



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 27 OF 2016

NASSIM ATHMANI ALL.....APPELLANT

-VERSUS-

SWALEH MOHAMED FAMAU.....RESPONDENT

(An Appeal from the judgment of Hon. N. Njagi Senior Principal Magistrate,

delivered on 10th February, 2016 in Mombasa Resident Magistrate's Court

Civil Case No. 1503 of 2015).

RULING

1. The suit in the lower court was that the appellant is the registered proprietor of all that parcel of land known as Plot No. Msa/Mkomani/62 and that the respondent built a store that encroached on the said parcel of land. That by a Notice dated 17th April, 2013 served upon the respondent's Advocates, the appellant demanded payment of Kshs. 41,400.00 being arrears of ground rent from August, 2007 to April, 2013 at Kshs. 600/= per month from the respondent, which he refused to pay. The appellant's claim against the respondent was for payment of the sum of Kshs. 55,800.00 being rent arrears for the period from August, 2007 to March, 2015 at Kshs. 600/= per month and vacant possession of the plot No. Msa/Mkomani/62.

2. The respondent filed his statement of defence dated 31st August, 2015, where he averred that the house which forms the subject of the suit belonged to his late wife, Salima Said Ali (deceased), and as such, the appellant was non-suited against the respondent as he had not joined the estate of the deceased. He further averred that at the time of registration of squatters, the deceased was registered as the owner of the house and the land it stands on, but no letter of allotment was ever issued since the squatters' settlement committee asserted that the said house stood on a road reserve.

3. The respondent averred in his statement of defence that the lower court lacked jurisdiction to entertain and hear the matter by virtue of Article 162(2)(b) as read with Article 40(6) of the Constitution of Kenya, 2010. It was the respondent's case that he built the house referred to by the appellant in 1964 and sold the same to his wife in 1978. That she re-developed it on Mombasa/Mkomani/62 (part of original No. 67/319 of section 1 Mainland North), which was initially government land. He also averred that the house bordered that of the appellant on the said government land hence it was not tenable for the appellant to obtain a title deed for the entire piece of land or for the plot where his deceased wife's house stands.

4. The respondent claimed that the appellant purchased a structure neighboring that of Salima Said Ali (deceased) in 1981 or 1983 wrongfully and through misrepresentations to the Squatters' Settlement Committee obtained title to the entire land where her house and that of the deceased stood thereby extinguishing the title which could otherwise have gone to the deceased. On 30th September, 2015, the respondent filed a Preliminary Objection dated 29th September, 2015 challenging the jurisdiction of the lower court.

5. In a ruling delivered on 10th February, 2016, the lower court held that the suit had been filed in a Court that had no jurisdiction, consequently the respondent's Preliminary Objection was upheld and the appellant's suit was dismissed with costs to the respondent.

6. The appellant was dissatisfied by the decision of the Trial Magistrate and on 15th March, 2016, he filed a memorandum of appeal raising the following grounds of appeal;

i. That the learned Magistrate erred in law in finding that the proper forum to entertain the matter was the Environment and Land Court;

ii. That the learned Magistrate erred in law by failing to consider the practice directions on proceedings relating to the environment and use and occupation of and title to land dated 9th November, 2012; and

iii. That the learned Magistrate erred in law by failing to consider the provisions of Section 7 and Section 9(a) of the Magistrates' Courts Act 2015.

7. The appellant's prayer is for this Court to allow the appeal, with costs and set aside the ruling of the Senior Principal Magistrate's Court in RMCC No. 1503 of 2015.

8. On 5th July, 2018, the appellant's submissions were filed by the law firm of Khatib & Company Advocates. The respondent's submissions were filed on 26th January, 2021 by the law firm of S.M. Kimani Advocates.

9. Mr. Khatib, the appellant's Counsel relied on Section 7(1)(e) of the Magistrates' Courts Act and submitted that the appellant's claim was for a sum of Kshs. 55,800.00 and that the Trial Court being a Resident Magistrate had pecuniary jurisdiction to handle the matter. Learned Counsel also relied on Section 9 of the Magistrates' Courts Act and Section 26(3) of the Environment and Land Act. He submitted that the respondent's Counsel in the lower court did not establish that the learned Magistrate was not one of the Magistrates appointed to hear Environment and Land matters and that at no point did the said Magistrate state that he was not one of the Magistrates who had been appointed to hear cases falling in the said jurisdiction. The appellant's Counsel relied on the case of **Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 Others** [2017] eKLR, where the Court declared Section 2 of the Statute Law (Miscellaneous Amendments) Act 2015, Sections 7(3), 8(d) and 26(3) and (4) of the Environment and Land Act, Section 9(a) and (b) of the Magistrates' Courts Act, 2015 as unconstitutional, null and void.

10. He also cited Gazette Notice No. 16268 rule 7 which states that Magistrates' Courts shall continue to hear and determine all cases relating to environment, the use and occupation of and title to land (whether pending or new) in the Courts that have the requisite pecuniary jurisdiction. He urged this Court to allow the appeal with costs.

11. Mr. S. M. Kimani, Counsel for the respondent relied on Section 75 of the Civil Procedure Act as read with Order 43 of the Civil Procedure Rules, 2010 and submitted that the appellant ought to have sought leave of the Court to appeal before lodging the appeal herein but leave was not sought. He submitted that the order or decree that ensued from the ruling delivered on 10th February, 2016 did not entitle the appellant to an appeal as of right, without leave of Court. Reliance was placed on the case of **William James Baker v Joseph P. Rush** [1964] EA 602, where Sir Clement De Lestang JA defined a decree in the sense that there must be an adjudication, the adjudication must have been given in a suit, it must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit and such determination must be conclusive.

12. He stated that in the matter before the lower court, the ruling of 10th February, 2016 did not determine the rights of the parties as the court declined jurisdiction to entertain the plaint and the issues pleaded therein and that the said court referred the parties to the Environment and Land Court. It was also stated that the said ruling was not a conclusive determination of any of the issues arising from the settled pleadings in the suit,

13. He further submitted that the Hon. Magistrate before whom the preliminary point of law was argued had not been appointed and gazetted as having jurisdiction to hear matters falling under the Environment and Land Court and that if he had been so appointed, he was not sitting as a Subordinate Court for the purposes of Section 162 of the Constitution. As the 1st appellate court, this court was invited to strictly interpret the provisions of Article 169 of the Constitution of Kenya.

14. Mr. Kimani contended that from the material placed before the Trial Court, there was no basis for determining the pecuniary jurisdiction of the said Court. He made the proposition that since Section 65 of the Civil Procedure Act appears before Section 75 of the said Act, the latter Section must prevail in the event of an interpretational conflict.

15. He submitted that the ruling in issue which gave rise to the decree although made under Order 11 of the Civil Procedure Rules, was not appealable without leave of the court as provided in Section 65(1)(b) as read with Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules.

16. He pointed out that under Article 165(5)(b) of the Constitution, the High Court is barred from entertaining an Environment and Land matter, thus the proper Court with jurisdiction to entertain the appeal herein is the Environment and Land Court. Counsel urged this Court to strike out the appeal with costs to the respondent.

ANALYSIS AND DETERMINATION.

17. This Court is alive of its duty as the first appellate court, as restated in the case of **Joseph Munga'thia v County Council of Meru and another**, Civil Appeal No. 146 of 2002 (Nyeri) (unreported), where the court stated that-

“In law, this matter coming as a first appeal, we have a duty to consider both matters of fact and of the law. On facts, we are duty bound on first appeal to analyse the evidence afresh, evaluate it, and arrive at our own independent conclusion, but always bearing in mind that the trial court had the advantage of seeing the witnesses and seeing their demeanor and making allowance for the same.”

18. See also **Selle and Another vs Associated Motor Boat Company Ltd & others** (1968) E A 123 -126 (CA-2) and **Peters vs Sunday Post Ltd.** (1958) EA 424, 429), on the duty of the 1st appellate Court.

19. I have carefully considered the grounds of appeal raised by the appellant, the submissions filed by the Advocates for both parties, the pleadings before the Trial Court and the ruling that forms the subject of the present appeal. In paragraphs 1 to 4 of this ruling, the court has captured the details of the dispute between the parties herein.

20. The preliminary issue for determination is if this court is clothed with the requisite jurisdiction to hear an appeal touching on the issue of use, occupation and ownership of land.

21. In the case of the **Owners of the Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd (1989) KLR 1**, Nyarangi, JA expressed himself thus-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized by the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds that it is without jurisdiction”

22. In the case of **Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 others** [2012] eKLR, the Supreme Court of Kenya stated as follows on the issue of jurisdiction-

“A Court’s jurisdiction flows from either the constitution, or legislation or both. Thus a Court of law can only exercise jurisdiction as conferred on it by law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... where the constitution exhaustively provides for the jurisdiction of a Court of law, it must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation....”

23. The Environment and Land Court derives its jurisdiction from both the Constitution and the Environment and Land Court Act. Article 162(2)(b) of the Constitution of Kenya provides as follows -

“(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to: -

a...

b. The environment and the use and occupation of, and title to, land.”

24. Section 13 of the Environment and Land Court Act provides as follows:

“(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other written law relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the court shall have power to hear and determine disputes relating to environment and land, including disputes-

a) Relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

b) relating to compulsory acquisition of land;

c) relating to land administration and management;

d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

e) any other dispute relating to environment and land.”

25. The Supreme Court in the case of **Republic v Karisa Chengo & others**, [2017] eKLR, dealt with the issue of exclusivity of the jurisdiction of the Employment and Labour Relations Court, Environment and Land Court and the High Court where it held as follows;

“From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of courts, with sui generis jurisdiction, is provided for. We therefore entirely concur with the court of Appeal’s decision that such parity of hierarchical stature does not imply that either Environment and Land Court or Employment and Labour Relations Court is the High court or vice versa. The three are different and autonomous courts and exercise different and distinct jurisdictions. As Article 165 (5) precludes the High court from entertaining matters reserved to the Environment and Land Court and Employment and Labour Relations Court, it should, by the same token, be informed that the Environment and Land Court and Employment and Labour Relations Court too cannot hear matters reserved to the jurisdiction of the High court.”

26. The appellant’s claim in the lower court deals with the issue of land and more particularly, the issue of trespass. It is apparent that the Constitution and the Environment and Land Court Act No.19 of 2011 stipulate that an appeal such as the present one should have been filed

before the Environment and Land Court. At the time the appeal herein was filed on 15th March, 2016, the Court of Appeal sitting in Malindi had on **8th day of May 2015** rendered its decision in **Karisa Chengo & 2 others v Republic** [2015] eKLR, where the issue of the jurisdiction of the 3 courts of equal status was addressed at length. The appeal herein should therefore have been filed in the court with the jurisdiction to hear it. For reasons that were not explained by the appellant's Counsel, that was not done. This court notes that if it strikes out the appeal which was filed in the year 2016, it will not be assisting the parties to have the dispute determined expeditiously. This court therefore must consider if there is any other recourse available to the parties.

27. In the case of **Henry Kigen & 6 others v Baringo County Governor & 2 others** [2020] eKLR, the Court addressed a similar situation as the current one and held as follows-

“I would agree that the proper course having regard to the overriding objective of the civil process and to Article 159 principle of substantial justice is to transfer a matter to the more appropriate or correct court, as the case may be, so as to avoid expensive delays in the substantive determination of disputes.”

28. The Court of Appeal in **Daniel N Mugendi v Kenyatta University & 3 others** [2013] eKLR held that-

“And in order to do justice, in the event where the High Court, the Industrial Court or the Environment & Land Court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim.” (emphasis added).

29. The upshot is that this court lacks jurisdiction to hear and determine the appeal herein. In the interest of justice, this appeal is transferred to the Environment and Land Court, Mombasa, for hearing and determination. Costs shall be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 21ST DAY OF MAY, 2021. Ruling delivered through Microsoft Teams online platform due to the outbreak of the covid-19 pandemic.

NJOKI MWANGI

JUDGE

In the presence of-

Mr. Khatib for the appellant

Ms Kimani holding brief for Mr. S.M. Kimani for the respondent

Mr. Oliver Musundi – Court Assistant.