



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CIVIL APPEAL NO. 62 OF 2019**

**(An appeal arising from the judgment and decree of the Hon. CC Kipkorir, Senior Resident Magistrate (SRM), in Mumias SPMCCC No. 164 of 2017 of 8<sup>th</sup> May 2019)**

**PETER MUKHUNYA MALOBA.....APPELLANT**

**VERSUS**

**DENNIS KUSINYO.....RESPONDENT**

**JUDGMENT**

1. The suit at the trial court revolved around the sale of a property known as South Wanga/Lureko/427, between the parties hereto. It was alleged that the respondent had failed to allocate to the appellant the 1 acre that he had bought, failed to transfer the demised property to him and trespass to the demised property. The appellant sought specific performance of the sale agreement, and, in the alternative, refund of the consideration, general damages and costs. The trial court found for a fact that there was a sale agreement entered into by the parties, but that the prayer for specific performance did not lie as the agreement had been varied, and the appellant had failed to honour the terms of the variation. The court found that the purchaser was entitled to a refund of the purchaser price, but dismissed the claim for compensation for damage to his development, to wit trees planted on the subject parcel.

2. The appellant was aggrieved by the outcome, and brought the instant appeal, vide a memorandum of appeal, dated 7<sup>th</sup> June 2019. He averred that the evidence was not properly assessed, and that the court erred in disallowing the claim for compensation for trespass for the damaged trees, despite overwhelming evidence.

3. The dispute before the trial court turned on sale, transfer and trespass to land. The trial court was called upon to determine whether or not the sale transaction was valid, entitling the appellant to an order of specific performance and for compensation for trespass. The subject of the dispute is regulated by the Land Registration Act, No. 3 of 2012 and the Land Act, No. 6 of 2012. The Land Registration Act provides for both disposal of interests in land and for transfers. These provisions are in Part III of the Act. Sections 36 covers sale of interests in a charge, lease and any other. Sections 37, 40 and 42 provide for transfers of such interests. The Land Act also covers the same matters. South Wanga/Lureko/427 is private property, and, therefore, Part V of the Land Act applies, which provides for management of private land. Section 38 covers validity of contracts in sale of land, while section 39 provides for the right of the vendor to take possession of demised land, section 40 provides for damages for breach of a contract of sale of land, section 41 provides the procedures for possession and section 42 provides the reliefs against rescission of contract. Sections 43 to 48 of the Land Act deal with transfer of interests in land, being of land (read title), lease or charge.

4. A determination of the question as to whether there was a valid sale of the registered land, and, therefore, entitling the buyer to a right to have the interests sold transferred to him, in accordance with the relevant land legislation, is an issue that is well outside the jurisdiction of the High Court. Both the Land Registration Act and the Land Act carry provisions which state the jurisdiction of the court with regard to the application and interpretation of the two statutes. These provisions are to be found in sections 2 and 101 of the Land Registration Act and sections 2 and 150 of the Land Act.

5. The provisions in the Land Registration Act state as follows:

“Interpretation.

2. In this Act, unless the context otherwise requires—

“Court” means the Environment and Land Court established under the Environment and Land Court Act, 2011, No. 19 of 2011: ...

Jurisdiction of court.

101. The Environment and Land Court established by the Environment and Land Court Act, 2011 No. 19 of 2011 has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

6. The Land Act carries similar provisions; which state as follows:

“2. Interpretation

In this Act, unless the context otherwise requires—

“Court” means the Environment and Land Court established under the Environment and Land Court Act, 2011 (No. 19 of 2011); ...

150. Jurisdiction of the Environment and Land Court

The Environment and Land Court established in the Environment and Land Court Act and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

7. My understanding of these provisions, in the context of the matter that was before the trial court, is that any disputes or questions or issues that require court intervention which revolve around sale, registration and transfer of land, and rescission of the land sale agreement, possession and breach of contract fall within the jurisdiction of the Environment and Land Court. The Land Registration Act and the Land Act, therefore, confer jurisdiction in the Environment and Land Court with regard to all the processes that are subject to the two statutes, and, therefore, any reference in the two statutes to court is meant to refer to the Environment and Land Court, and any subordinate court that has been conferred with jurisdiction over the processes the subject of the two statutes.

8. The High Court has no jurisdiction over matters that the Environment and Land Court has jurisdiction over, by virtue of Articles 162(2) as read together with Article 165(5) of the Constitution, which state as follows:

“162. (1) ...

(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.”

163 ...

164 ...

165. (1) ...

(2) ...

(3) ...

(4) ...

(5) The High Court shall not have jurisdiction in respect of matters—

(a) ...

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).”

9. In compliance with Article 162(3) of the Constitution Parliament passed the Environment and Land Court Act, No. 19 of 2011, to establish the court envisaged in Article 162(2)(b) and to lineate the jurisdiction of the said court. The preamble to the Act states the objective of the Act to be: -

“... to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land; and to make provision for its jurisdiction functions and powers and for connected purposes.”

10. The scope and jurisdiction of the said court is set out in section 13 of the Act, which states as follows:

“13. Jurisdiction of the Court

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 law applicable in Kenya relating to the 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 –

a. relating to environmental planning and protection, 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.”

11. The plain effect of these provisions is that the High Court has no jurisdiction to address itself to matters that fall under the jurisdiction of the Environment and Land Court. The dispute that was before the trial court related to sale of land, which is regulated by the Land Registration Act and the Land Act. Contracts relating to sale of land are about title, for the agreement concerns conveyance of the title in the land from the vendor to the purchaser. After sale, transfer should follow. All these processes are regulated and governed by the Land Act and the Land Registration Act, and any dispute arising from the same ought to be a matter for resolution by the Environment and Land Court, as envisaged by the Land Act and the Land Registration Act. Similarly, trespass to land is about occupation of land. The appellant claimed that he took possession of the land sold, and planted trees on it, which were destroyed or damaged by the respondent, hence the claim for compensation. These issues turn around occupation and use of the land, as to who, between the appellant and the respondent, was entitled to occupy and use the land in question, South Wanga/Lureko/427. There are also issues relating to rescission of the sale agreement and damages for breach of contract. All these are covered under the the Land Registration Act and the Land Act, and, going by what I have stated above, the High Court has no jurisdiction over disputes that arise with respect to matters provided for under both statutes.

12. Under the Environment and Land Court Act, the Environment and Land Court has appellate jurisdiction with respect to environment and land matters handled by subordinate courts that have been conferred with jurisdiction. Section 150 of the Land Act envisages subordinate courts being conferred with jurisdiction over disputes arising from the application of the Act. Any appeals arising from determinations by the subordinate courts should be placed before the Environment and Land Court, going by the appellate jurisdiction conferred by the Environment and Land Court Act. Since the suit before the trial court turned squarely on matters that related to title to land and the use and occupation of land, any appeal arising from the determination of the dispute ought to have been filed at the Environment and Land Court. Since the High Court is bereft of jurisdiction to determine the instant appeal, I cannot proceed to determine it on its merits. The only issue for me to address now is what I should do with the appeal. Should I order its transfer to the court with jurisdiction, or should I dismiss or strike it out?

13. The Court of Appeal in *Equity Bank Limited vs. Bruce Mutie Mutuku t/a Diani Tour & Travel* (2016) eKLR, said as follows:

“In numerous decided cases, courts, including this Court, have held that it would be illegal for the High Court in exercise of its powers under section 18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled law that parties cannot, even by their consent, confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the “O2” principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the same. In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer”

14. In a more recent decision, *Phoenix of EA Assurance Company Limited vs. SM Thiga t/a Newspaper Service* (2019) eKLR, the Court of Appeal said:

“... Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If the suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction upon itself ...”

15. Jurisdiction is at the core of exercise of power by a court. Where there is no jurisdiction the court cannot exercise power without violating the principles of rule of law and legality. It was in that context that the Court of Appeal in *Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd* [1989] eKLR, stated:

“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 a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

16. Jurisdiction is conferred by law, in particular the Constitution and statute. With regard to land, the Constitution, the Land Registration Act, the Land Act and the Environment and Land Court Act have conferred jurisdiction on the Environment and Land Court. The High Court has no jurisdiction over those matters on which the Environment and Land Court has been conferred with jurisdiction by the said statutes. The High Court cannot confer jurisdiction upon itself over such matters. The appeal before me is, therefore, incompetent to the extent that it was filed at the High Court, which has no jurisdiction over the subject matter. Consequently, I hereby strike out the same. The respondent shall have the costs.

**DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26<sup>th</sup> DAY OF June, 2020**

**W. MUSYOKA**

**JUDGE**