



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 59 OF 2019

(An appeal from the Ruling and Order of the Hon. Gesora

(C.M.) dated 31<sup>st</sup> January 2019 in CMCC No. 4445 of 2017)

(CORAM: F. GIKONYO J.)

GINA DIN KARIUKI.....APPELLANT

Versus

JOSEPH NYAGAH.....1<sup>ST</sup> RESPONDENT

JOSEPH KAHOGO T/A UPSTATE AUCTIONEERS.....2<sup>ND</sup> RESPONDENT

**RULING**

1. The Appellant was the Defendant in the trial Court whereas the 1<sup>st</sup> Respondent was Plaintiff. The 2<sup>nd</sup> Respondent was the 2<sup>nd</sup> Defendant.
2. The 1<sup>st</sup> Respondent filed a plaint dated 21<sup>st</sup> June 2017 praying for a permanent injunction to restrain the defendant and/or their agents from trespassing and/or auctioning the suit premises. She also prayed for a proclamation that House Number 2 Elshadai Villa, Kaputei Gardens situate on L.R. Number 209/10557/2 legally belongs to the Plaintiff, general damages, interest and cost of the suit.
3. On 13<sup>th</sup> July 2017 the Defendant raised a Preliminary Objection on the following grounds:-
  - a. That the court lacks jurisdiction to hear and determine the suit and should therefore be dismissed with costs to the 1<sup>st</sup> Defendant.
  - b. That the plaintiff suit is hopelessly incompetent thus the same should be struck out *in limine* and be dismissed with costs.
4. The trial court considered the preliminary objection and on 27<sup>th</sup> September 2017 held that the cause of action falls within the pecuniary jurisdiction of the court; and without the filing of a valuation report the Preliminary Objection was premature and cannot stand. The trial Magistrate dismissed the objection.
5. Thereafter, the Appellant on 30<sup>th</sup> July 2018 filed an application seeking the following Orders;
  - a. That the Honourable Court be pleased to review its Order made on 27<sup>th</sup> September 2017 herein;
  - b. That the Honourable Court be pleased to allow the Notice of Preliminary Objection dated 13<sup>th</sup> July 2017 and struck out the suit herein with costs.
6. The application was supported by the sworn affidavit of **Gina Din – Kariuki** and on the grounds that the subject order was made when a valuation report in respect of the suit property was not available. That the 1<sup>st</sup> defendant has since obtained a valuation report which indicates that the suit property is worth way over Kshs. 20,000,000/=. The Appellant attached a valuation report from Fortune Realtors Limited that placed the market value of the suit premises at Kshs. Eighty Four Million (Kshs.84,000,000/=), Forced sale value at Kshs. Sixty Three Million (Kshs. 63,000,000/=) and Insurance value at Kshs. thirty one Million (Kshs. 31,200,000/=). On that basis, she asked the trial court to review its orders.

7. The Respondent opposed the Application vide Replying Affidavit dated 26<sup>th</sup> September 2018 sworn by **Joseph Nyaga** where he opined that the Court had already pronounced itself and therefore the defendant cannot approach the court for review. He also opined that the cause of action in the suit was whether or not the defendant is entitled to rent over the suit premises and that at the time the court pronounced itself all the information was available to the Honourable court.

8. The trial court considered the application and arguments made by both parties and held that the application was filed ten (10) months after the earlier decision was rendered and the delay has not been explained. That in the Ruling dated 21<sup>st</sup> September 2017 the trial court did observe that the 1<sup>st</sup> defendant conceded that no valuation report had been filed and proceeded to pronounce itself on the value of the property hence making the issue res judicata and cannot be entertained. According to the trial court, the only recourse the 1<sup>st</sup> defendant has is to lodge an appeal on the decision.

9. Aggrieved by the aforesaid decision the Appellant has lodged this appeal enumerating the following four grounds of appeal;

**a. The learned Magistrate erred in law by holding that the Chief Magistrate's Court has pecuniary jurisdiction to hear and determine the suit.**

**b. The learned magistrate erred in law in ignoring the evidence placed before him.**

**c. The learned Magistrate erred in law by holding that the court had pronounced itself on jurisdiction.**

**d. The learned magistrate erred in Law by Holding that there was unreasonable delay in bringing the application for review.**

#### **Submissions**

10. On 19<sup>th</sup> July 2019 the Court directed parties to canvass the Appeal through written submissions. Both parties have filed their respective submissions.

11. The Appellant submits that the pertinent ground for review herein was the discovery of new and important matter or evidence which after the exercise of due diligence could not have been produced at the time the Order was made. That the trial magistrate did not address the merits of the valuation report which placed the suit premises above its pecuniary value. She relied on the cited authorities of **Owners Motor vessel "Lilian S" v Caltex Oil Civil Appeal No. 50 of 1989** and **Samuel Kamau Macharia & Anor vs. Kenta Commercial Bank Limited & 2 Others** where the court held that the court cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.

12. The respondent on his part submits that there is no new evidence that has been brought before the Court that had not been specifically pleaded by the Appellant. There is no apparent error on the face of the record to warrant a review to be issued by the Honourable Court. That the Respondent made it clear that the issue in question is whether the Appellant herein had the right to instruct the 2<sup>nd</sup> Defendant to levy distress upon the Respondent herein for a sum of Kshs. 8,250,000/= which is well within the jurisdiction of the Chief Magistrate Court. He relied on the following cited authority; **Civil Appeal No. 275 of 2010 Pancras T Swai v Kenya Breweries Limited**.

#### **ANALYSIS AND DETERMINATION**

13. As the first appellate Court, the court will re-evaluate the evidence on record and reach its own conclusion in the matter. **(See the case of Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123).**

14. At the heart of this appeal is the power of the trial court to review its decision under **Order 45 of the Civil Procedure Rules**.

15. For the sake of jurisprudence only, discovery of new evidence and important matter relates to evidence or matter which, after the exercise of due diligence was not within the knowledge of the Appellant, or could not be produced by the appellant at the time of the order to be reviewed. See the Court of Appeal in **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR** that:

**"In Francis Origo & another v. Jacob Kumali Mungala (C.A. Civil Appeal No.149 of 2001 (unreported), the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review. This court stated:-**

**"our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant's application for review. We have therefore no option but to dismiss this appeal with costs to the respondent."**

**We do not find it necessary to comment on the exercise of Court's discretion on which counsel submitted because it was not an issue and in any case the appellant had not made out a case in that regard.**

16. Whether the appeal meets the test is a matter to be determined by the competent court to which, by order, this appeal shall be transmitted.

17. Again, on jurisprudence's sake only, a preliminary objection based on pecuniary jurisdiction must be based on some substantiated or

pleaded valuation of the property. Absent such impleading, the objection lacks a foot on which to stand and will be rejected. Nonetheless, whether or not the trial court has jurisdiction to try the primary suit herein will also be determined by the competent court to which this appeal shall be transmitted.

18. The foregoing notwithstanding, I note that one of the prayers that the Respondent seeks in the plaint is a proclamation that the House Number 2 Elshadai Villa, Kaputei Gardens situate on L.R. Number 209/10557/2 legally belongs to the him. The trial magistrate must have exercised jurisdiction conferred by Section 7 of the Magistrates Courts Act and Environment and Land Act.

19. Undoubtedly, this appeal relates to disputes relating to use, title and interest in land which is a preserve of the Environment and Land Court and subordinate courts duly gazetted for that purpose. See article 162(2) of the Constitution and the Environment and Land Act. Accordingly, I order that this appeal be transmitted to the relevant Environment and Land Court for hearing and determination. I make this order in the wider sense of justice authorized by the Constitution and which insist on transmission of such file to the correct superior court as opposed to the old and quite unjust practice where a superior court would decline jurisdiction on the basis that it can only transfer a suit to or from a subordinate court. Such approach is not only narrow but an egregious mistake and a source of great injustice to the parties. It is so ordered.

**Dated and signed at Nairobi this 14<sup>th</sup> day of October 2019**

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**F. GIKONYO**

**JUDGE**

**Dated, signed and delivered in open court at Nairobi this 24<sup>th</sup> day of October, 2019**

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**L. NJUGUNA**

**JUDGE**