



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 70 OF 2016

HUSSEIN FERAJI ALI.....APPELLANT

VERSUS

JOHN ODERA OYUCHO.....RESPONDENT

(Being an Appeal from the Ruling of Hon.W.K.Onkunya (S R.M) in KisumuCMCC No.50 of 2016 delivered on 7th September, 2016)

JUDGMENT

1. By a plaint filed on 18th February, 2016 in KisumuCMCC No.50 of 2016, HUSSEIN FERAJI ALI (*hereinafter referred to as appellant*) sued JOHN ODERA OYUCHO (*hereinafter referred to as respondent*) for orders for:

- a. Kshs. 1,400,000/- being refund for purchase price of land parcel Kisumu/Nyalenda B/ 592 with interest at 20% per annum from 5th November, 2013 till payment in full**
- b. Costs of the suit**
- c. Interest on a) and b)**
- d. Any other relief**

2. In a defence filed on 14th April, 2015, the respondent denied the plaintiff's claim and averred that ELC No. 99 of 2013 relating to land parcel **Kisumu/Nyalenda B/ 592, where the parties herein are parties is pending and that the trial court had no jurisdiction to deal with the matter.**

3. On 16th August 2016; the Preliminary Objection was argued and in a ruling delivered on 7th September, 2016, the trial magistrate ruled that the court had no jurisdiction because the plaint referred to parcel no. **Kisumu/Nyalenda B/ 592 and that this was therefore a land matter.**

The Appeal

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal and filed the Memorandum of Appeal dated 15th September, 2016 which set out 5 grounds which I have summarized into four grounds that:-

- 1. The Learned trial Magistrate erred in law and in fact by holding that the court had no jurisdiction to hear and determine the case**

2. The Learned trial Magistrate erred in law by finding that the suit before the court was a claim for land

3. The Learned trial Magistrate erred in law by arriving at a decision which was contrary to the pleadings and submissions

4. The Learned trial Magistrate erred in law in considering extraneous matters and hence arriving at a wrong decision

SUBMISSIONS BY THE PARTIES

Appellant's submissions

5. Mr. Onyango, advocate for the appellant submitted that the appellant's claim was for refund of money and not a claim on land.

Respondent's submissions

6. Mr. Nyamweya, advocate for the respondent submitted that the basis of plaintiff's claim was sale of land parcel no. **Kisumu/Nyalenda B/ 592**

Analysis and Determination

7. I have considered the appeal in the light of the record of appeal and submission for both parties. The Environment and Land Court Act, 2011 an Act of Parliament 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.

8. As clearly stated hereinabove, the plaintiff's claim is for Kshs. 1,400,000/- being refund for purchase price of land parcel **Kisumu/Nyalenda B/592** which allegedly fell through. It is evidently not a claim relating to the environment and the use and occupation of, and title to land **Kisumu/Nyalenda B/592**. The fact that there exists **ELC No. 99 of 2013** that relate to claim for ownership of the suit land does not in any way affect the plaintiff's claim. There is no evidence that the matter in **ELC No. 99 of 2013** also relates to a refund. The two matters are therefore not substantially dealing with the same issue and they cannot be tried together as proposed by the respondent.

9. In the result and for the reasons given hereinabove, I find that the learned trial magistrate fell into error by holding that this was a land matter and that the court had no jurisdiction to hear and determine it.

ORDERS

10. In the result, the court makes the following orders:

a. The appeal is allowed to the extent that the trial court's ruling delivered on 7th September, 2016 is set aside and in its place an order overruling the preliminary objection is granted

b. This file shall revert to Kisumu Chief Magistrate's Court for hearing and disposal by a magistrate other than Hon. W.K. Onkunya (S R.M)

c. Costs of this appeal shall be borne by the respondent

DATED AND DELIVERED THIS 26th DAY OF January 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Clerk - Felix and Carol

Appellant - N/A

Respondent - Mr Nyamweya