



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT VOI**

**CIVIL APPEAL NO 12 OF 2015**

**GEORGE MWACHALA NGURE.....APPELLANT**

**VERSUS**

**HAMISI NDEGWA.....1<sup>ST</sup> RESPONDENT**

**KUZIKA HAMISI.....2<sup>ND</sup> RESPONDENT**

**SIMON MUTIA.....3<sup>RD</sup> RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Respondents' Notice of Motion dated 27<sup>th</sup> June 2016 and filed on 28<sup>th</sup> June 2016 was brought pursuant to the provisions of Order 42 Rule 35 of the Civil Procedure Rules and Section (sic) 1A and 3A of the Civil Procedure Act and all enabling provisions of the law. It sought the following orders:-

- 1. THAT the memorandum of appeal be struck out and the appeal dismissed for want of prosecution.**
- 2. THAT in the alternative, the appeal herein be dismissed for being frivolous, vexatious and an abuse of the Court process.**
- 3. THAT the Honourable Court be pleased to grant such and/or further orders as it deems fit in the interests of justice.**

**1. THAT the appellant to bear the cost of this application and of the appeal.**

2. On 26<sup>th</sup> July 2016, this court directed the parties herein to file their respective Written Submissions. However, when the matter came up in court on 3<sup>rd</sup> October 2016, none of the parties had complied. This court allowed them additional time to file their said Written Submissions. The Respondents complied and filed their Written Submissions on 27<sup>th</sup> October 2016. As at the time of reserving the Ruling herein on 14<sup>th</sup> November 2016, the Appellant had not filed any Written Submissions.

3. However, on 8<sup>th</sup> September 2016, he swore a Replying Affidavit in response to the present application. The same was filed on 9<sup>th</sup> September 2016. He stated that he had not filed his Record of Appeal because he had not yet been supplied with certified copies of the proceedings despite having applied for the same. He added that the Trial Court file could not be traced.

**LEGAL ANALYSIS**

4. It is important to point out that the Appellant did not annex proof to support his assertions regarding the certified copies of the proceedings and the whereabouts of the Trial Court file. This court could not therefore verify the veracity of his averments.

5. Having said so, this court carefully perused his Memorandum of Appeal that was dated 18<sup>th</sup> May 2015 and filed on 2015 and noted that it was apparent that the question that had been placed before the Trial Court related to land.

6. Notably, the grounds of the Memorandum of Appeal were as follows:-

**1. THAT the Learned Trial Magistrate erred in law and in fact in ruling that his court had no jurisdiction to deal with the matter when it had previously entertained a setting aside application by the Respondent (sic).**

**2. THAT the Learned Trial Magistrate erred in law and in fact in holding that by submitting themselves to the Land Committee (sic) parties had waived their right to seek court's intervention.**

**3. THAT the Learned Trial Magistrate erred in law and in fact in failing to hold that the appellant had duly obtained the requisite consent from the Land Adjudication Officer Taita Taveta to continue with the civil suit.**

**4. THAT the Learned Trial Magistrate erred in law and in fact in disregarding the viva voce evidence of the Land Adjudication Officer Voi.**

7. Although none of the parties raised the issue of jurisdiction of this court in hearing the Appeal herein, it was a question it asked itself as it had at the back of its mind, the provisions of Article 165(5)(b) of the Constitution of Kenya, 2010 that specifically state as follows:-

**“The High Court shall not have jurisdiction in respect of matters... falling within the jurisdiction of the courts contemplated in Article 162(2).”**

8. Article 162(2) (b) of the Constitution of Kenya provides as follows:-

**“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to...the environment and the use and occupation of, and title to land.”**

9. Pursuant to the provisions of Article 162(3) of the Constitution of Kenya that provides that Parliament shall determine and contemplate the jurisdiction and functions of the said courts, the Environment and Land Court Act Cap 12A (Laws of Kenya) was enacted.

10. Section 13 of the said Environment and Land Court Act stipulates 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 law applicable in Kenya 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—**

**(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. It was therefore evident that this court did not have jurisdiction to hear and determine the appeal herein. The lack of jurisdiction by the High Court to hear appeals emanating from magistrates' courts in land matters was a position that had been articulated by Angote J in the case of **Kibwana Ali Karisa & Another vs Said Hamisi Mohammed & Others [2015] eKLR** where he agreed with the pronouncement of Lenaola J in **NRB Petition No 72 of 2013 Edward Mwaniki Gatura & Another vs The AG & 2 Others** where he had stated as follows:-

**“...It therefore follows, that the Magistrate's courts have jurisdiction to determine matters falling within the Jurisdiction of the Environment and Land Court Act and their decision will be subject to appeals preferred to the Land and Environment Court...”**

12. Any determination of the Appeal herein on merit would thus be *ultra vires* the Constitution of Kenya for the reason that the dispute will be a matter relating to environment and land which is well within the province of the Environment and Land Court.

13. Appreciably, while what is present before this court is an application for dismissal of an appeal for want of prosecution, which this court can determine as it was filed pursuant to the provisions of the Civil Procedure Rules, it would be best to leave the court with jurisdiction of land matters deal with it and proceed to hear and determine the Appeal herein as it relates to land. It would not make sense for one court to hear a part of the matter and leave another part to another court.

14. Going further, whereas in his Memorandum of Appeal the Appellant had sought that his appeal herein be allowed and that the case **Voi SPMCC No 151 of 2006 George Machala (sic) Ngure vs Hamisi Ndegwa & Others** be heard by the said trial court, it was the considered opinion of this court that unless the decision that was delivered by Emukule, Chitembwe and Thande JJJ in **Malindi Constitution Petition No 3 of 2016 Malindi Law Society of Kenya vs Hon Attorney General & 5 Others** on 11<sup>th</sup> November 2016 is overturned by the Court of Appeal, he might not have his case heard by the magistrate's court due jurisdictional challenges.

15. Notably, in the said decision, the learned judges held that magistrate's courts have no jurisdiction to deal with environment and land matters and that conferring jurisdiction on those courts to hear and determine matters that were exclusively left for courts under Article 162(2)(b) of the Constitution of Kenya was *ultra vires* the Constitution. In view of the foregoing, the Appellant may very well wish to re-consider whether it will be realistic to proceed with his Appeal as drawn.

16. The above notwithstanding, as there were issues that the Appellant wished to have determined on appeal which this court lacks jurisdiction to deal with, it has no option but to down its tools and transfer the Appeal herein to the Environment and Land Court at Mombasa for hearing and determination.

## **DISPOSITION**

17. For the foregoing reasons, this court hereby directs:-

**a. THAT for the reason that there is no Environment and Land Court in Voi, the Appeal file and the lower court record be and are hereby transferred to the Environment and Land Court Mombasa for hearing and determination.**

**b. THAT the Appeal file herein be placed before the judge in the Environment and Land Court Mombasa on 8<sup>th</sup> December 2016 for further orders and/or directions in respect of the Respondents'**

**Notice of Motion application dated 27<sup>th</sup> June 2016 and filed on 28<sup>th</sup> June 2016.**

**c. THAT there shall be no order as to costs.**

18. It is so ordered.

**DATED and DELIVERED at VOI this 29<sup>TH</sup> day of NOVEMBER 2016**

**J. KAMAU**

**JUDGE**