



NO. 259/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 142 OF 2010

SOPHIA MOHAMED SARAH APPELLANT

VERSUS

HUSSEIN ALI DIMA1ST RESPONDENT

BALKHISA QAADIR2ND RESPONDENT

(Being an appeal from the original Ruling in Kajiado Senior Resident Magistrate's Court Civil Case No. 361 of 2009 by

Hon. D.M. Itaya R.M. on 14/9/2010)

J U D G M E N T

1. The appeal emanates from a ruling delivered on the 14th September 2010 in Kajiado Senior Resident Magistrate's Civil case No. 361 of 2009. By a plaint dated 20th November 2009, the Respondents sued the appellant claiming that she had trespassed into plot No. 664 Residential/Olekasasi Trading Centre and commenced construction of houses therein without justification. They sought issuance of a declaration order that they use legal owners of the said plot. The appellant filed an application seeking an order striking out the suit for want of jurisdiction. It was contended that the trial magistrate had no pecuniary jurisdiction to hear the matter.
2. In its ruling the court declared that it had jurisdiction to handle the case hence dismissed the application with costs. Being aggrieved by the ruling, the appellant filed an appeal on grounds that:
 1. The Learned Trial Magistrate erred in law and in fact in finding that he had jurisdiction to hear the suit.
 2. The Learned Trial Magistrate erred in law and in fact in finding that the appellant had failed to furnish him with the valuation report when the respondents failed to rebut the appellant's evidence by way of affidavit or otherwise.
 3. The Learned Trial Magistrate erred in law and in fact in finding that the property in issue was within his jurisdiction.
 4. The Learned Trial Magistrate erred in law in dismissing the application and failed to consider the submissions and evidence which was before court.
 5. The Learned Trial Magistrate erred in law and in fact in conferring jurisdiction unto himself contrary to law.

3. The appellant therefore prays that the appeal be allowed and the order dismissing the application dated 2nd August 2010 be set aside and/or vacated and/or replaced with an order allowing the appellant's application with costs or any just order that the court would deem fit.
4. The **Hon. D.M. Itaya** was of the rank of Resident Magistrate. When the suit was filed on 23rd November 2009, the pecuniary jurisdiction of a Resident Magistrate was 500,000. (*See the Magistrates Courts Act*).

According to the Registered Land Act, Cap 300 Laws of Kenya (*Though now repealed*), at the time of filing the suit and when the ruling was delivered a Resident Magistrate could hear such a matter if the subject matter did not exceed twenty-five thousand pounds. (an equivalent of Kshs.500,000/=) (*vide Section 159 of the said Act*).

5. The Respondents did not plead the value of the plot in dispute. The appellant in her defence however stated that she bought plot No. 88/Business-Ole Kasasi Trading Centre at Ksh.800,000/=. Thereafter she constructed thereon a house at a cost of Ksh.2,500,000/=. Affidavit evidence was adduced by the Respondents that in the year 2004 the plot did cost Ksh.134,000/=. The value must have appreciated as at 2009 when the suit was filed. It would have been prudent on the part of the court to give directions that would have culminated into the valuation of the land prior to assuming jurisdiction over the matter. Section 5 of the Civil Procedure Act provides that:

“Any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature of which its cognizance is either expressly or impliedly barred.”

The land in dispute, though given different titles by the parties is the same one in dispute. An averment having been made in the defence of the value, the trial magistrate should have established whether or not he indeed had pecuniary jurisdiction to try the case or not prior to dismissing the application. Failure by the respondent to stipulate the value of the suit premises was not a good reason to accord him the authority to hear the matter. This was stated in the case of *Rafiki Enterprises Limited versus Kingsway Tyres and Automart Limited Nairobi Civil Application No.375 of 1996(UR)* where the Court of Appeal held inter alia that:

“Every court has a duty to determine whether or not it has jurisdiction in a particular matter.”

Needless to add that in the case of the owners of the *Motor Vessel M.V. Lillians verses Caltex Oil (Kenya) Limited 1989 KLR1*). At page 14 line 29 – 43 Nyarangi JA (as he then was) had this to say:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter or commission under which the court is constituted and may be extended or restricted by the like mean. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the action and matters of which the particular court has cognizance of or as to the area over which the jurisdiction shall extend; or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal including an arbitrator depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction but except where the court or tribunal has been given power to determine conclusively whether the fact exists where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision a merit to nothing. Jurisdiction must be acquired before judgment. It is for that reason that a question of jurisdiction once

raised by a party or by a court on its own motion must be decided forthwith on evidence before the court. It is immaterial whether the evidence is scanty or limited. Facts constitute the evidence before the court...The moment a court determines that it has no jurisdiction it has to down its tools and proceed no further.”

6. The question of jurisdiction is vital to a case, once raised by a party must be decided based on the evidence before court. It is immaterial whether the evidence is scanty or limited for that matter. The learned trial magistrate should have acted in accordance with the law.
7. With regard to the property being outside the jurisdiction of the court, it is pleaded in the plaint that the cause of action arose in Naivasha within the jurisdiction of the court. The issue was not raised in the defence. What was stated was lack of pecuniary jurisdiction. That being the case the learned trial magistrate did not address the issue. According to Section 12 of the Civil Procedure Act, a suit should be instituted where the subject matter is situate. Subject to the pecuniary or other limitations prescribed by the law. The cause of action having arisen in Naivasha, the suit should have been instituted in Naivasha court.
8. According to the practice directions per **Gazette Notice No. 16268, Legal notice No. 19 of 2011**, Magistrates Courts continue to have jurisdiction in land matters (whether pending or new) in which they have pecuniary jurisdiction. Following the Miscellaneous Amendment Act No. 12 of 2012, the Magistrates Courts Act was amended. Magistrates have jurisdiction to hear civil cases in which the subject matter in dispute does not exceed seven million. Subject to the valuation of the property in issue and an amendment of the plaint, then a Magistrate’s Court in Naivasha should be seized of jurisdiction to hear the matter.
9. From the foregoing the appeal which is merited is allowed. The case is hereby transferred to Naivasha Chief Magistrate’s Court for hearing and determination. The Respondents shall pay costs of the appeal in any event and also costs of the application at the trial court.
10. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 3RD day of APRIL, 2014.

L.N. MUTENDE

JUDGE