



No. 251

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 57 OF 2012

ISAAC MOKAYA MUNDEAPPELLANT

VERSUS

KENNEDY OMOMANYI ONGERIRESPONDENT

JUDGMENT

**(Being an appeal from the Ruling of the Principal Magistrate’s Court at Nyamira, Hon. J. Wanjalain
PMCC No. 223 of 2009 dated 4th April 2012)**

1. On 17th November 2009 the respondent herein filed a suit against the appellant at the Principal Magistrate’s court at Nyamira namely, **Nyamira PMCC No. 223 of 2009, Kennedy Omomanyi Ongeri –vs- Isaac Mokaya Munde** (hereinafter referred to only as “**the lower court or the lower court case**”). In the lower court, the respondent claimed that he is the proprietor of all that parcel of land known as Plot No. 43C measuring 25feet by 100feet situated at Kebirigo market. The respondent claimed that on 7th April, 2008 the appellant trespassed on the said parcel of land namely, Plot No. 43C (hereinafter referred to as “**the suit property**”) and started operating a hotel business forcefully in a shop situated thereon for his own benefit. The respondent sought a permanent injunction restraining the appellant from trespassing onto the suit property, an order of eviction against the appellant from the suit property and mense profits. The appellant entered appearance and filed a statement of defence on 14th December 2009 denying the respondent’s claim in its entirety. With leave of the court, the appellant amended his statement of defence and introduced a counter-claim in which he added two (2) defendants namely, **Munde Omayo Maina** and **Town Council of Nyamira**. In his counter-claim dated 2nd June 2010, the appellant claimed as against the respondent and the said additional defendant’s, a declaration that he is the lawful owner of the suit property and that the transfer thereof by Munde Omayio Maina to the respondent is null and void and a permanent injunction to restrain the respondent and the said additional defendants to the counter-claim from in any way or manner whatsoever interfering with his quiet enjoyment use and occupation of the suit property.
2. The lower court case came up for hearing for the first time on 31st October 2010. On that day, the appellant objected to the matter proceeding on the ground that he wanted to make an application in the High Court to transfer the lower court case to Kisii for consolidation with another case filed earlier at the Kisii Chief Magistrate’s court over the suit property namely, Kisii CMCC No. 285 of 2008. The lower court case was adjourned to enable the appellant to make the said application in the high court. When the matter came up again for hearing on 2nd June 2010, the appellant was not ready once again to proceed. This time round, he had an application under certificate of urgency to amend the defence which application was allowed by consent and the matter

- adjourned. The lower court case was listed for hearing again on 16th February 2011. On this day again the appellant was not ready to proceed. The appellant raised the issue that the parties had not complied with the new Civil Procedure Rules and that there was a matter pending at the Chief Magistrate's court at Kisii over the same subject matter. It is worth noting that this is the same case the appellant had sought adjournment to have consolidated with the lower court case. After listening to lengthy submissions the lower court in an adjourned ruling delivered on 9th March 2011 ordered that the case do proceed and thereafter listed the lower court case for hearing on 6th April 2011. On 6th April 2011, the respondent gave his evidence in chief and the matter was adjourned to 29th June 2011 for cross examination of the respondent and further hearing.
3. On 29th June 2011 the lower court case was adjourned because the appellant's advocate did not turn up in court. The court re-listed the matter for further hearing on 10th August 2011. On 10th August 2011, the appellant's advocate informed the court that the 2nd defendant in the appellant's counter-claim had died and as such the appellant required time to substitute the deceased with his legal representative before the matter could proceed. Despite protests from the respondent, the court gave the appellant two (2) months to substitute the 2nd defendant in his counter-claim. The court fixed the matter for mention on 12th October 2011 to confirm the position. Instead of filing an application for substitution of the 2nd defendant in his counter-claim, the appellant filed an application on 6th October 2011 by way of chamber summons dated 5th October 2011 seeking an order that the lower court case be struck out on the ground that the lower court had no jurisdiction to hear and determine the same. The applicant's application which was stated to have been brought under sections 1A, 1B, 3A, 4, 5 and 12 (a) of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure rules and sections 159 of the Registered Land Act, Cap 300 Laws of Kenya ("RLA") (now repealed) was brought on the ground that the suit property was part of a larger parcel of land known as LR No. West Mugirango/Bonyamatuta /841 (hereinafter referred to as "**Plot No. 841**") owned by Nyamira County Council which land is registered under the RLA. The appellant contended that under section 159 of the RLA the subordinate court's jurisdiction to hear disputes over title or ownership of land registered under that Act is limited to land whose value does not exceed kshs. 500,000.00. The appellant contended that the suit property was valued at Kshs. 750,000.00 and as such the lower court had no jurisdiction to entertain the dispute over the same.
 4. The appellant annexed to his affidavit in support of the application, a copy of a valuation report dated 16th September 2011 prepared by Ms. Otundo & Associates over "**part of LR No. West Mugirango/Bonyamatuta /841**" – whose value the said valuers put at Kshs. 750,000.00. It is on this valuation report that the appellant's application was based. The respondent opposed the appellant's application on various grounds. The respondent maintained that the lower court had jurisdiction to hear and determine the lower court case. The respondent contended that he had purchased the suit property at Kshs. 350,000.00 and that the value of the same could not be Kshs. 750,000.00. The respondent contended that the appellant's valuer who came up with the figure of Kshs. 750,000.00 did not value the suit property but extended his valuation to the entire parcel of land comprised in Plot NO. 841. The 3rd defendant to the appellant's counter-claim in the lower court also opposed the appellant's application terming it as fatally defective, misconceived and an abuse of the process of the court.
 5. The lower court considered the appellant's application and the opposition thereto by the respondent and the 3rd defendant to the counter-claim and in a ruling that was delivered on 4th April 2012 dismissed the same with costs. In its ruling, the lower court held that there was no proper basis for the application. The court found the valuation report by Otundo & Associates wanting. The court found that the valuers carried out a valuation of part of LR No. West Mugirango/ Bonyamatuta/841 and not the suit property. The court held that the valuers did not indicate whether the part of Plot No. 841 which they valued was the same as the suit property. The appellant was aggrieved with the said decision of the lower court and has preferred an appeal to this court against the same. In his memorandum of appeal dated 23rd April 2012, the appellant has raised 10 grounds of appeal as follows:-

1. **The learned trial magistrate erred in law and in fact in ignoring the extremely clear**

- provisions of section 159 of Registered Land Act, Cap 300 Laws of Kenya.
2. **The learned trial magistrate erred in law and in fact in disbelieving the valuation report.**
 3. **The learned trial magistrate was wrong in law in not finding that the plaintiff did not state the facts in his plaint to show that actually the lower court had jurisdiction to hear and determine the suit instead of merely asserting that the court had jurisdiction.**
 4. **The learned trial magistrate was wrong in holding that the valuation report was in respect of the entire land parcel title number west Mugirango/Bonyamatuta/841.**
 5. **The learned trial magistrate was wrong in holding that the issue of jurisdiction had been dealt with earlier by the same court and a ruling made which had not been appealed against/from.**
 6. **The learned trial magistrate was fundamentally wrong in not appreciating the provisions of law which clearly states that the lower court has no jurisdiction to entertain a suit involving land unless it is indicated that the value of the land is within its jurisdiction. Thus whether the issue of jurisdiction is raised or not it is the court's mandate to ensure that it has jurisdiction to deal with the matter before it.**
 7. **The learned trial magistrate was extremely wrong in clothing herself with jurisdiction to deal with the matter when a statute has directly removed the jurisdiction from her. Thus the learned trial magistrate closed her eyes on the fact that the extent of jurisdiction is that which is conferred or limited by the constitution or any other law.**
 8. **The learned trial magistrate was wrong in law and in fact in making findings on the issues not raised before it.**
 9. **The learned trial magistrate was wrong in not appreciating the law which provides that the issue of jurisdiction is a matter of which the court can and should take cognizance of whether or not the matter is raised in argument.**
 10. **The ruling of the learned trial magistrate was against the law.**
6. When the appeal came up for directions on 14th March 2013, the parties agreed to argue the same by way of written submissions. The respondent filed his written submissions on 10th June 2013 while the appellant filed his submissions on 19th August 2013. I have considered the ruling of the lower court, the appellant's memorandum of appeal, the appellant's written submissions and the respondent's submissions in reply. I am of the opinion that this appeal has no merit. Although the appellant has preferred a total of 10 grounds of appeal against the lower court's decision, the lower court determined the appellant's application only on one point namely, that the appellant had failed to show that the lower court had no pecuniary jurisdiction to hear the lower court case. The lower court was not satisfied that the valuation report by Otundo & Associates could be relied upon as a basis for ascertaining the value of the suit property. I am unable to fault the lower court on this conclusion. As I have stated at the beginning of this judgment, the respondent's claim against the appellant is over the suit property namely, Plot No. 43C Kebirigo Market. This was the property in dispute in the lower court at least as far as the respondent was concerned. It is the value of this property that was to determine the pecuniary jurisdiction of the lower court under section 159 of the Registered Land Act, Cap. 300, Laws of Kenya (RLA)(now repealed).
7. As I have stated above and as was found by the lower court, the appellant in challenging the jurisdiction of the lower court relied on a valuation report over "Part of LR No. West Mugirango/Bonyamatuta/ 841". The suit property is not mentioned at all in the said valuation report. Whereas the respondent had stated in the plaint that the suit property measured 25feet by 100feet, the valuer has not indicated at all in his valuation report the measurement of the portion of Plot No. 841 which was the subject of his valuation. The lower court could not assume therefore that part of Plot No. 841 that was valued by Otundo & Associates was the same as the suit property. I therefore uphold the decision of the lower court that the appellant did not lay a proper basis on which the lower court could allow his application. The dismissal of the appellant's application was therefore proper. In view of the numerous applications for adjournment that the appellant had made in the lower court, the respondents and the 3rd defendant's in the appellant's counter-claim's submission in the lower court that the appellant's application was an abuse of the process of the court was not far-fetched. From the appellant's conduct in the lower, I have got the impression that the appellant was bent on frustrating the lower court proceedings.

8. The upshot of the foregoing is that the appeal herein lacks in merit. The same is dismissed with costs to the respondent.

Delivered, dated and signed at Kisii this 23rd day of May 2014.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the Appellant

Mr. Bigogo for the Respondent

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE