



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 106 OF 2011

JACK MIDIMOAPPELLANT

-V E R S U S-

RAMA JUMA HAMISI 1ST RESPONDENT

JOSEPH NYAGA NJIRU 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the Chief Magistrate Court at Mombasa delivered by Hon. Rosemelle Mutoka (CM) on 13th June, 2011)

JUDGMENT

1. This Appeal is directed to the judgment in **Mombasa CMCC No. 1987 of 2008**. Before the Chief Magistrate Appellant sought a declaration that Plot No. 94 site 31/118/111MS (**the property**) belongs to him; and for permanent injunction restraining the two Respondents from trespassing or in any way dealing with the property.
2. The Respondents in a joint Defence denied Appellants claim of ownership of the property and pleaded in that Defence that the property was owned by the 1st Respondent who was in occupation of it.
3. The trial Court after receiving parties evidence delivered a judgment whereby it dismissed Appellant's suit with costs. It is that judgment which is the subject of this appeal.
4. Appellant has filed numerous grounds of appeal touching on the evidence adduced before the Trial Court and seeking a finding in this appeal that the Learned Trial Magistrate erred both in law and fact in dismissing the suit. However, in view of the ground upon which the trial Court dismissed the suit I shall not consider the Grounds of Appeal touching on the evidence adduced and touching on the ownership of the property.
5. The reason why I believe that those grounds on the merit of the suit are misplaced in this appeal is because the Learned Trial Magistrate dismissed the suit on the ground that her Court did not have jurisdiction to entertain the dispute. This is what the Learned Trial Magistrate stated in her judgment-

“Before dwelling into the discussion of the various claims on the file, I had to satisfy myself that I have jurisdiction to determine the suit. Jurisdiction is a statutory issue or it arises from the facts of the case and without it a Court downs its tools and makes no further step. This

was the famous statement made by the Court of Appeal in the famous case of MV LILIAN. The claim in the suit is that of ownership and trespass. The Honourable Court is being asked to declare the Plaintiff as owner and the Defendants as trespassers.

When the Magistrates jurisdiction was amended on the stroke of the introduction of Act No. 18 of 1990 claims of ownership, trespass and boundaries were transferred to the Land Disputes Tribunal established by the Act referred. By virtue of Section 3 of that Act, [No. 18 of 1990], disputes of ownership, trespass and boundary ought to be placed before the Tribunal established under Section 4 of that Act. The other aspect which touch on jurisdiction is the plea for a declaration. A Magistrate's Court does not have such jurisdiction to make declarations. For the above reasons, this Honourable Court has no jurisdiction to decide this case and the Plaintiffs suit is dismissed with costs to the Defendants."

6. Looking at that judgment it is clear that the only two issues to determine in this appeal are; (i) Whether the Magistrate's Court had jurisdiction over the Appellant's claim or whether that jurisdiction lay with The Land Dispute Tribunal under Act 18 of 1990 (now repealed); (ii) Whether the Magistrate's Court had jurisdiction to make orders of declaration. Bearing those two issues in mind the only Grounds of Appeal that I shall consider are Grounds No. 1 and 3.
7. On consideration of the first issue it will be of assistance to reproduce Section 3 of The Land Dispute Tribunal Act (now repealed) which set out the jurisdiction of the Tribunal as follows-

"3. (1) Subject to this Act, all cases of a civil nature involving a dispute as to-

- a. **the division of, or the determination of boundaries to, land, including land held in common;**
 - b. **a claim to occupy or work land; or**
 - c. **trespass to land, shall be heard and determined by a Tribunal established under Section 4."**
8. It will be seen from the above provisions that the jurisdiction of the Tribunal was restricted to boundaries disputes, claims of right to occupy land and claims of trespass. Appellants claim as seen by his Plaint is for declaration that he is the owner of the property and for injunction to restrain the Respondents from entering or using the property. In other words Appellant sought to be declared the owner of the land and if the Court did so declare to proceed to grant the injunction. It follows that Appellants claim did not fall under the categories set in Section 3 reproduced above. Indeed Section 3 did not permit the Tribunal to determine ownership of land at all.
 9. The Tribunal's jurisdiction was the subject of many previous Court decisions but to refer to just one is where Justice S. M. Kibunja in the case **REPUBLIC -Vs- CHAIRMAN LAND DISPUTE TRIBUNAL AMUKURA DIVISION & 2 OTHERS EX-PARTE JARED MWIMALI MUKUMA & ANOTHER [2014]eKLR** discussed the Tribunal's jurisdiction as follows-

"Patrick Echesa -Vs- Mumias Land Dispute Tribunal & Anor Kakamega Misc. App. No. 22 of 2009, where the Court referred to the powers of the tribunal under the Land Disputes Tribunal Act and held;

"This power does not include determination of title to the land. The Tribunal clearly had no jurisdiction to hear the claim by the Interested Party. Much less to make the decision it made. It is my finding that the decision of the Tribunal was ultra vires its powers under Section 3(1) of Act 18 of 1990."

Patrick Makokha Sakwa -Vs- Chairman, Matungu Land Disputes Tribunal & Anor. Kakamega H.C. Misc. Appl. No. 118 of 2003 where the Court held;

“The Matungu Land Disputes Tribunal; in its decision dated 22.4.2003 usurped the power of the Court in purporting to determine the rights of the parties to the contract of sale of land. The jurisdiction conferred on the Tribunal by Section 3(1) of Act 18 of 1990 [Land Disputes Tribunal Act] does not include determination of contractual rights in matters of sale of land. The tribunal acted in excess of its jurisdiction.”

10. In respect of the first issue therefore this Court finds in favour of the Appellant. The Tribunal did not have jurisdiction to declare Appellant owner of the land, rather that jurisdiction lay with the Trial Court.

11. In respect of the second issue it will be recalled from the reproduced judgment above that the Learned Trial Magistrate made a finding, without assigning a reason, that she had no power to make a declaration. Appellant had sought a declaration that he is the owner of the property. The Court of Appeal and even the High Court have found that the Magistrate’s Court had jurisdiction to deal with Civil dispute relating to title of registered land under the Registered Land Act Cap 300 (**now repealed**) subject the value of the land not being in excess of the Magistrate’s pecuniary jurisdiction. I am not sure whether this land was registered, there is some statement of the witnesses who adduced evidence at trial to the effect that the land was not registered. I was unable to confirm that because the record of appeal did not contain the exhibits and because the lower Court file was a reconstructed one, the original having been misplaced. Whichever is the case however I do find that the Magistrate’s Court had jurisdiction as sought by the Appellant and even had jurisdiction to declare existence of trust. This was the holding in the case **MUTHUITA –Vs- WANOE [1982]KLR 166** as discussed in **REPUBLIC –Vs- CHIEF MAGISTRATE, THIKA LAW COURTS & ANOTHER EX-PARTE JOSEPH NJUGUNA KABUGUA [2011]eKLR** where Justice D. Musinga (as he then was) stated-

“In MUTHUITA Vs WANOE [1982]KLR 166, the Court of Appeal held that The Resident Magistrate’s Court has jurisdiction to declare the existence of a trust. Such jurisdiction is derived from Section 159 of the Registered Land Act and the jurisdiction is as wide as that of the High Court where the value of the land in dispute falls within the pecuniary jurisdiction established under Section 159 thereof. The authority of JOB MURIITHI WAWERU Vs PATRICK MBATIA (supra) cannot assist the applicant. Makhandia, J. held that the Subordinate Court had pecuniary jurisdiction because the purchase price of the land in dispute was Kshs. 495,000/-. The fact that the learned Magistrate made orders in respect of a parcel of land whose title did not exist at the time does not necessarily mean that the decision was made irrationally and in abuse of power or discretion. Although it was submitted by the applicant that the orders made by the trial Court had the effect of canceling his title, it had been demonstrated that the Court had jurisdiction to make such an order.”

12. On the second issue this Court does also find in favour of Appellant.

The Trial Court, contrary to its holding, had jurisdiction to entertain a claim for declaration.

13. On both issues the Court finds that the Learned Trial Magistrate erred. Even the Respondents in this appeal appreciated that there was error in the lower Court’s decision since they submitted as follows-

“After hearing the matter to its logical conclusion, the Learned Magistrate curiously and surprisingly ruled that she had no jurisdiction particularly regarding declarations. She however made the right decision in dismissing the Appellant’s case with costs to the Respondents. The reason given by the Honourable Magistrate for the decision was wrong but the conclusion was spot-on.”

14. The Appellant’s appeal does succeed and the judgment of 13th June 2011 in **Mombasa CMCC No. 1987 of 2008** is hereby set aside. The Mombasa **CMCC No. 1987 of 2008** shall be retried before any other Magistrate other than Hon. Rosemelle Mutoka and until the conclusion of such

retrial status quo shall be maintained on **Plot No. 94 site 31/118/111 MS Likoni, Mombasa**. The Appellant is awarded costs of this appeal.

DATED and DELIVERED at MOMBASA this 18TH day of SEPTEMBER, 2014.

MARY KASANGO

JUDGE