No.142/2013

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 109 OF 1994

1. **GEDION WATHE MUTISYA..... 1ST APPELLANT**
2. **URBAN COUNCIL OF MWINGI …..... 2ND APPELLANT**

VERSUS

1. **MUTHUI MBULU …..... 1ST RESPONDENT**
2. **LENAH KANO …..... 2ND RESPONDENT**

(BEING AN APPEAL FROM THE ORIGINAL CONVICTION AND SENTENCE IN MWINGI SENIOR RESIDENT MAGISTRATE'S COURT CIVIL CASE NO. 26 OF 1994 BY HON. C.S. KARERE DM I ON 20/5/2011)

J U D G M E N T

1. The Respondents herein filed a suit in the lower court seeking relief as follows:

i. A declaration that the disputed plot situated between plot No. 59, Mwingi market and Thika – Garissa Road sold to the 2nd Respondent by the 1st Respondent was the property of the 2nd Respondent.
ii. An order of injunction restraining the 1st appellant, his agents and servants from interfering in any way with the disputed plot.
iii. General damages.
iv. Costs of the suit.

2. Judgment was entered in favour of the Respondents. The Appellants being aggrieved by the Judgment appealed on grounds as follows:-
    1. The Learned District Magistrate erred and misdirected himself when he proceeded to hear a case whereby the plaint did not disclose a cause of action and whereby he had no jurisdiction to entertain the same and consequently the proceedings before him were a nullity.
    2. The Learned District Magistrate erred and misdirected himself when he failed to consider that the 1st Respondent had no Locus standi in the case for he had already disposed his interest.
    3. The Learned District Magistrate erred and misdirected himself when he failed to consider that though the area was adjudicated the Respondents could not identify the land they were claiming.
    4. The Learned District Magistrate erred when he abdicated his role as a judge in the case and acted as the Respondents key witness by imputing his own knowledge concerning the extent of Mwingi Market and how plots at Mwingi should be acquired which imputations

were erroneous and were not to be tested in cross-examination.

5. The Learned District Magistrate erred and misdirected himself when he relied on the evidence of **Francis Kimangau Muvinga** who was not even a councilor when the plot in question plot No.159 was allotted to the 1st Respondent in 1972, and he further erred when he rejected documentary evidence in favour of verbal evidence.
6. The facts the magistrate alleged to have taken judicial notice of were of his personal nature and were not of common knowledge to all people or notorious in any way and above all they were erroneous.
7. The Learned District Magistrate had no legal powers to quash the Decision of the Kitui County Council allotting plot No.159 to the 1st Respondent as the decision by the council to allot the plot to 1st Respondent was not before him and also the same could not be quashed by the High Court under Judicial Review but not the Subordinate court.
8. The Judgment of the District Magistrate did not tally with the weight of evidence.

3. This being a first appellate court, it is my duty to subject the evidence tendered in the lower court to fresh and exhaustive evaluation to reach my own conclusion bearing in mind the fact that I didn't see or hear witnesses. ***(See Peter Versus Sunday***

   Post (1958) EA 424 at page 429).

4. It has been stated that no cause of action was disclosed in the plaint and the court had no jurisdiction to hear the case. Looking at the plaint filed in court on the 7th February, 1994, the claim was for a plot adjacent/adjoining plot No.59 and Thika-Garissa Road, (hereinafter "the disputed plot"). The 1st appellant was said to be the owner of the plot No.59 which is within the jurisdiction of the 2nd Appellant. The 1st Respondent on the other hand was said to have purchased that portion of land from one **Munanu Kusuania**, the original owner.

   Thereafter he sold the land to the 2nd Respondent, a sale stated to be within the knowledge of both appellants.

5. It was stated that the 1st appellant encroached on the parcel of land in dispute following an allegation that he had been allocated the same by the 2nd appellant. Per the evidence adduced the land in dispute is within the Mwingi adjudication area/Section. An adjudication Section is established by an Adjudication officer **(vide Section 5 of the Land Adjudication Act, Cap 284, Laws of Kenya)**. An Adjudication Officer then retains records of the Adjudication record. In this case the adjudication Officer was expected to have kept the record of all parcels of land within the Mwingi adjudication area the disputed portion inclusive.
6. A letter dated 17th February 1994 was written by the Land Adjudication Officer, Mwingi Adjudication area. According to the officer the disputed plot was part of parcel No.3281. That parcel of land was awarded to the 1st appellant. Consequently the office did not have any records of plots that were eventually allocated to individuals. In the circumstances the 2nd Appellant would be expected to have had custody of all records of allotees and respective plot numbers.
7. According to the Land Adjudication Act, a person can only institute civil proceedings in respect of an interest in land if the Adjudication Officer has given him/her consent in writing (**See Section 30(1) of the Land Adjudication Act)**. The proceedings may however be continued if the Adjudication Officer directs otherwise.
8. In the matter although there were no records indicating that the disputed land was part of the Adjudication Section, by a letter

   dated 17th February, 1994, the Land Adjudication Officer acted pursuant to Section 30 of the Land Adjudication Act and granted consent to the continuation of the suit in Civil Case Number 26 of 1994. The consent was given after the case was filed on the 7th February, 1994. The action taken by the Adjudication Officer was evidence that he recognized the fact that the disputed land though allocated to the 2nd Appellant was within the adjudication section. Having given consent, the court had jurisdiction per the Land Adjudication Act to continue hearing the case.

9. However, there is the limb of contention that the magistrate did not have pecuniary jurisdiction to hear the case. The jurisdiction of a District Magistrate I emanated from statute.

The Magistrate's Courts Act Chapter 10 of the Laws of Kenya, Section 9 provides:

"***A district magistrate's court shall have and exercise jurisdiction and powers in proceedings of civil nature where either;***

a. ***the proceedings concern a claim under customary law; or***

b) the value of the subject matter in dispute does not exceed five thousand shillings or ten thousand shillings where the court is constituted by a district magistrate having power to hold a magistrate's court of the first class."

10. The pleadings are silent on the value of the disputed plot. It was argued by counsel for the Respondents that there was no claim for value of the plot. Their claim was a declaration of ownership of the plot and an injunctive relief to restrain the Appellants from interfering with the plot. This argument was misconceived because competence of a court to hear a matter is determined by pecuniary jurisdiction. It is fundamental because a remedy can only be avoidable if the court is competent to hear a case. If not, it becomes a nullity.
11. Although the value of the disputed plot was not disclosed, the 1st Respondent stated as follows:

"Before I sold the land to Lenah, I had bought it from Munanu Kusuania. I bought it for a total sum of Kshs. 8,500/=."

The 2nd Respondent did state as follows:

"The plot that he sold to me is 40 feet wide and 70 feet long. I bought it for Kshs.63,000/=."

12. Having purchased the disputed portion at Kshs.63,000/= without evidence to the contrary, it is presumed that the market price then was beyond 10,000/=. This being the case, a District Magistrate 1 was not competent to hear such a matter. He lacked jurisdiction derived from Section 9 of the Magistrate's Court Act, Chapter 10, Laws of Kenya. Therefore, whether the contentious issue that had to be determined was ownership of land or trespass thereon, the subject matter having been above 10,000/=, the District magistrate I had no jurisdiction to hear it.
13. As aforestated, a court presiding over a matter while lacking jurisdiction to adjudicate on the same makes the whole trial a nullity. This position was well enunciated in the case of The Owners of Motor-Vessel "**Lilian S" versus Caltex Kenya Ltd. (1989) KLR** where Nyarangi J.A. had this to say:

"jurisdiction is everything. Without it, a court has no power to make one move step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds that it is without jurisdiction."

14. I am alive to the fact that in this matter the issue of jurisdiction was raised at the outset. In its ruling the trial court made a finding that the matter was properly and legally before the court. Had the learned trial magistrate considered what is stipulated by statute, he would have appreciated the fact that jurisdiction in the instant case had been taken away from him by statute. Therefore he had no authority whatsoever of adjudicating over the matter. This position was properly put in the case of ***Muhia versus Mutura Ealr (1999) I EA 202*** where the court of Appeal held thus:

"A question of jurisdiction was a matter which the court can and should take cognisance whether or not the matter is raised in argument".

15. On the issue of lack of locus standi on the part of the 1st Respondent having disposed of his

interest in land. It is in evidence that the 1st Respondent sold the disputed plot to the 2nd Respondent for a consideration of Ksh. 63,000/=. In his evidence he stated thus:

"Out of the entire plot I bought from Munanu I sold 40 feet long and by 70 feet long to Lenah. Her plot now is on the front side while mine is 40 by 30 is on the rear side so my rooms are on my piece of land but not on Lena's plot."

On cross-examination he said:

"I have fully transferred the plot to Lenah because the plot has not yet demarcated by the Physical Planning Officer."

16. Having been paid full consideration for the disputed plot and having relinquished his rights and control over the disputed plot the 1st Respondent had no cause of action against the appellants. The Civil Procedure Rules provide for persons who may be joined as plaintiffs. Order I Rule I of the Civil Procedure Rules stipulates as follows:

"All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise."

The 1st Respondent would therefore not be entitled to any relief in as far as this matter is concerned.

It has been argued by counsel for the appellants that having had no reason to complain his claim should have been dismissed with costs.

Order I Rule (9) of the Civil Procedure Rules provides thus:

"No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

Joining of the 1st Respondent in the suit was a misjoinder, but the court had the ultimate authority of making a finding regarding interest of each party in accordance with the law. Failure to do so was a misdirection on the part of the learned trial magistrate. Indeed the 1st Respondent had no locus standi in the matter.

17. The learned trial magistrate was faulted for failure to consider that though the area in dispute was adjudicated the Respondents could not identify the disputed plot. In his evidence the 1st Respondent said that the disputed plot that he sold to the 2nd Respondent was situated between plot No. 59 owned by the 1st appellant and the Nairobi-Garissa road. The 2nd Respondent said the plot she purchased from the 1st Respondent measured 40 feet by 70 feet. **Francis Kimangao** a witness called by the Respondents who claimed to know the disputed plot very well having been a councillor for Mwingi between 1974 and 1988 did not allude to any number**. Munanu Kusuania** who sold land to the 1st Respondent said the land she sold to **Muthui** was situated between the 1st appellant's land and the Nairobi-Garissa road. When the Nairobi-Garissa road was constructed according to her the parcel of land was divided into two (2).
18. According to **E.N. Kithumbu**, the Land Adjudication Officer the disputed plot was part of parcel No.3281 which was awarded to Mwingi Urban Council. The Mwingi Urban Council ought to have had records of the said plot. No evidence was called of the number of the disputed plot. The court visited the disputed plot with parties and their advocates. There was no representation from the Land Adjudication office or the Mwingi Urban Council. The court however did note that the disputed plot measured 29 feet by 100 feet. Part of it had a construction that stopped following a court order. It adjoined a plot fully developed by the 1st Appellant. Within the disputed plot was a big hole (pit) caused by brick making. Although the Respondents physically identified the

disputed plot, there were no records to establish which plot it was.

19. The learned trial magistrate took judicial notice of same facts. In his judgment he sated thus:

"Plot No.59 according to the allotment letters is situated within Mwingi market. According to the evidence before court, Mwingi sits on agricultural land. In fact the area of market place was formerly owned by individual farmers from Kitui County. Council ought to have acquired in order to establish the plots to individual persons who include farmers. This is a fat that the court takes judicial notice. In fact this court house is situated within the environs of Mwingi market. The ground that the market stand has never been trust land".

20. According to the law the court takes judicial notice of all written laws, and all laws, rules and principles, written or unwritten, having force in law, whether in force or having such force as aforesaid before, at or after the commencement of the Evidence Act; and all matters of general or local notoriety. **(Vide Section 60(1)(a) of the Evidence Act).**

What the learned trial magistrate stated were facts within his personal knowledge. Evidence of land being owned by individual could not be said to be within the knowledge of all people. Such evidence could not be of general or local notoriety. In fact what the learned magistrate did was to introduce in his verdict extraneous matters. This was a misdirection on his part.

21. The learned trial magistrate relied on the evidence of Francis **Kimangau Muvinga** who stated that he was a councillor when the plot No. 59 was allotted to the 1st Respondent in 1972. Having been a councillor there was no evidence that he was employed by the land adjudication office or at the land section at the Urban Council. He was not in a position to be an authority in land matters within the council. His evidence could therefore not override the documentary evidence adduced.
22. In his findings the learned trial magistrate stated thus:

"I also find the Kitui County Council has never owned the disputed land. It had compensated the owner. So whether the allotment letters were genuine or not (no copies of the quoted minutes were produced in court). I find the allotment to Gideon Wathe of the dispute by Kitui County Council was null and void of no consequences."

What the learned trial magistrate did was indeed to quash the decision of Kitui County Council. The order made was not within his jurisdiction as the District Magistrate I. This was also misdirection on his part.

23. From the foregoing it is apparent that the trial magistrate acted without jurisdiction in the matter.
24. In the premises the trial is declared a nullity – Parties may institute another suit in the Environment and Land Court. The court being the author of the error either party shall bear their own costs.
25. It is so ordered.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **17th** day of **DECEMBER, 2013.**

L.N. MUTENDE

JUDGE