



REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 202 of 2008

NO.612

JOSEPH OCHWERI OBEGI.....1ST APPELLANT
HUDSON OCHWERI OBEGI.....2ND APPELLANT
YUNES MOGOTU GICHANA.....3RD APPELLANT
STEPHEN MARANGA OBEGI4TH APPELLANT
SEFANIA ONDORO OBEGI.....5TH APPELLANT
ANDREW OMBASA SAUL.....6TH APPELLANT

AND

GESARE OKIOMARESPONDENT

JUDGMENT

1. This appeal arises out of the ruling and/or decision of **Hon. S. Wewa (R.M.)** dated 7th November, 2008 in the original KISII CMCC.NO.798 of 2006 in which she dismissed the appellants' Notice of Preliminary Objection dated 9th day of July, 2008.
2. The said Notice of preliminary objection challenged the jurisdiction of the subordinate court on the ground that the dispute herein was a matter which ought to be handled by the Land Disputes Tribunal and secondly that the application for injunction was lodged in vacuo since no prayer for injunction had been pleaded in the plaint and the court was therefore devoid of jurisdiction to entertain an application founded on nothing.
3. The Preliminary objection was argued before the learned trial magistrate who dismissed it triggering the present appeal.
4. It was argued in the Preliminary objection that the trial court had no jurisdiction to entertain such a dispute and further that the said court should not grant orders that had not been prayed for in the pleadings. It was counsel's argument that since the claim touched on encroachment of right of way, the jurisdiction was ousted by **Section 159 of Registered Land Act (the RLA)** now repealed, and that the matter was within the purview of the Land Disputes Tribunal.

5. The appellant being aggrieved by the dismissal order, lodged an appeal herein on the following grounds:-

1. *The learned Trial Magistrate erred in Law and in fact by sustaining and/or upholding illegal orders; thereby occasioning miscarriage of justice.*
2. *The learned trial magistrate erred in law and in fact by failing to address all the real issues raised by the Appellants counsel and particularly, by failing to sustain the objection that the Honourable court had no jurisdiction to entertain the entire suit and/or issue the order dated 25th June, 2008.*
3. *The learned trial magistrate erred in law and in fact by venturing into the arena of speculation by holding that the Respondent could not be made to suffer whereas there was no evidence placed before her to confirm that the Respondent was suffering as alleged or at all.*
4. *The learned trial magistrate erred in law by misapprehending the principles applicable in respect of the pleadings lodged by parties to a suit vis a vis the parameters of the court orders capable of issuing in a suit.*
5. *The learned trial magistrate erred both in law and in fact by failing to exercise her jurisdiction judiciously.*
6. *That the learned trial magistrate grossly erred in law and in fact by taking into consideration extraneous matters thereby arriving at erroneous decision to the prejudice of the Appellants.*

6. The above grounds can broadly be reduced into two main grounds:-

i) *Whether the trial magistrate had jurisdiction to entertain and/or issue any orders for injunction, whereas there was no prayer for any injunctive orders in the plaint.*

ii) *Whether the jurisdiction of the court extended to matters ousted by **Section 159** of the **Registered Lands Act** read together with **Sections 3** of the **Land Disputes Tribunals Act No.18 of 1990***

7. The appellant therefore prays for the following orders:-

- (a) *The ruling and/or decision of the Learned Trial Magistrate dated 7th November 2008 be set aside and the same be substituted by an order sustaining the Preliminary Objection raised against the entire suit and the application dated 24th June 2008 by striking out the entire suit together with the application dated 24th June 2008 by striking out the entire suit together with the application dated 24th June 2008.*
- (b) *Costs of the appeal and those incurred in the subordinate court be borne by the respondent.*

8. The background of this case is that the Respondent herein filed suit in the subordinate court against the appellants vide the plaint dated 7th

November 2006 seeking the following reliefs:-

- (a) *An order that the Land Registrar Kisii Central District with the District Surveyor do open the public access road as for the maps.*
- (b) *Costs of this suit.*
- (c) *Any other further other relief this Honourable Court shall deem just to grant.*

9. It was alleged that after the suit was filed the appellants were never served with the pleadings and

summons to enter appearance and the case proceeded ex-parte during which the District Land Registrar and the Respondent testified after which the court delivered its judgment on 25th April 2007. The judgment by the trial court was in terms of the prayers sought in the plaint dated 7th November 2006.

10. Consequently, the Respondent extracted a Decree and proceeded to implement the same on 15th June 2007 with the help of the District Land Registrar and District Surveyor. From the record, the District Land Registrar and his team were not able to successfully open the purported road of access which passes through land parcel No. Masaba/Bokimotwe/386 (**the suit land**). The reason for the inability to re-open the road by the District Land Registrar was the alleged hostility on the ground by those who had blocked the road in the first place.

11. This matter is now before me as a first appeal. In this regard, this court is under a duty to reconsider and evaluate the evidence afresh with a view to determining whether or not the findings of the trial court should be supported. This court however does not have the advantage of seeing and hearing the witnesses who testified during the trial. See generally **Peters –vs- Sunday Post Ltd [1958] EA 424** and **Selle & another –vs- Associated Motor Boat Co. Ltd. & others [1968] EA 123**.

12. By consent of the parties herein, this appeal proceeded by way of written submissions. The appellants' submissions were filed on 19th March 2012 through the firm of M/s O.M. Otieno & Company Advocates. Counsel also filed relevant authorities alongside the submissions. Although the court was informed by Mr. Ochwangi advocate who held brief for Mr. Minda advocate for the respondent that the respondent had filed submissions, there were no such submissions on record and none have been filed to date. The court has therefore, in crafting this judgment been guided by the appellants' submissions.

13. In their submissions counsel for the appellant argued the two issues separately as follows:- that it is now settled law that parties to proceedings are bound by the pleadings they have lodged in the suit. He cited the case of **Abdul Shakoor Sheikh –vs- Abdul Majeid Sheikh & another** being Court of Appeal Civil Appeal No. 161 of 1991 at NAIROBI where the court held as follows:-

“.....Order 7 Rule 6 of the Civil Procedure Rules states that every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative and it shall not be necessary to ask for costs, interests or general relief which may always be given as the court thinks just. As a general rule therefore a plaintiff is not entitled to reliefs which he has not specified in his statement of claim. Pleadings play a very pivotal role in litigation”. Counsel has also quoted from BULLEN AND LEAKE (12th EDITION) at page 3 under the rubric nature of pleadings”.

14. It is counsel's submissions that the above case law underscores the significance of pleadings and how to deal with claims not pleaded. Counsel has also cited the case of **Ngorika Farmers Co-operative Society Ltd –vs- John Kiarie and 2 other [2006] e KLR** where Justice Musinga held that **where there was no prayer for any injunction whatsoever in the plaint orders sought by the plaintiff in an application for injunction could not issue in the circumstances.**

15. Counsel has further submitted that the respondent had sought mandatory injunction vide an application dated 24th day of June, 2008 which application was never anchored on any prayer for injunction in the plaint. The appellant raised a preliminary objection when the subject application came up for hearing contending that the court was acting in vacuo and without jurisdiction since no such prayers were contained in the plaint but the trial court stated **“...though the prayer has not been prayed for in the pleadings a court should not cause anyone to suffer who is within its reach to do what is contrary to its notion of equity merely because the issue has not been pleaded”.**

16. When the preliminary objection was argued court did not find merit in the appellants' objection and held that the court had wide powers to grant a claim whether pleaded or not. Counsel submitted that the court erred and misdirected itself notwithstanding that it was informed that it was acting contrary to law to entertain an application for mandatory injunction which was drastic in nature and had the effect of finality in respect of the claim before it when there was no corresponding prayer for the same in the

plaint.

17. On the second issue counsel for the appellant submits that the matter herein could only be dealt with by the land Disputes Tribunal in accordance with **section 3** of the **Land Disputes Tribunals Act** as read together with **Section 159** of the **RLA**. Counsel submitted that encroaching on a parcel of land use Rule of land are those claims which fall within the jurisdiction of the Land Disputes Tribunal in so far as the encroachment is deemed to be a trespass onto the Land alleged to be a public road.

18. Counsel relied on **Section 3(g)** of the **Land Disputes Tribunal Act** which provides that “Notwithstanding any other written Law no magistrate’s court shall have or exercise jurisdiction or powers in cases involving any issues set out in paragraph (a) to (c) of subsection 1”. He therefore concludes that the trial magistrate’s court was therefore devoid of any jurisdiction to deal with the matter before it. It is the appellants prayer that the appeal be allowed.

19. Having considered the submissions made I take the following view of the matter. On the issue as to whether the subordinate court had jurisdiction to hear and determine the case herein I will answer in the affirmative. I am guided by the recent gazette Notice by the Chief Justice being gazette notice No. 13573 dated 20th September, 2012 and will add that the District Land Disputes Tribunal is now defunct.

20. On the 2nd issue I will find in favour of the appellant, namely that no party is entitled to reliefs which he/she has not sought in his pleadings. The appeal therefore succeeds only in part. I therefore set aside the trial magistrate’s order of 7th November 2008 and substitute the same with an order sustaining the preliminary objection raised against the application dated 24th June 2008 by striking out the said application. Having found that the trial court had jurisdiction to entertain the suit, I direct that this suit be remitted to the CM’s court at Kisii for hearing of the main suit.

21. The appellants shall have the costs of the application in the lower court. They shall also have half the costs of this appeal.

22. It is so ordered.

Dated and delivered in open court at Kisii this 22nd day of November, 2012

RUTH NEKOYE SITATI,

JUDGE

In the presence of:-

Miss Kusa (present) for Appellants

Mr. Kaburi for Minda (present) for Respondent

Mr. Bibu - Court Clerk.

RUTH NEKOYE SITATI,

JUDGE.