



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Civil Appeal 53 of 2004

PAULINA WANGARE NJOROGE

(Suing as the Personal Representative and

Administrator of the Estate of

JOSEPH NJOROGE GICHUHI (DECEASED).....APPELLANT

VERSUS

JOSEPH WAINAINA GITURO 1ST RESPONDENT

JAMES WATHIKA GITURO 2ND RESPONDENT

PETER KEMEI 3RD RESPONDENT

(Being an Appeal from the Ruling of Solomon Wamwayi, Esq.,

**Chief Magistrate in Eldoret Chief Magistrate' s Court Civil Case No.1698 of 2003
delivered on 3rd March 2004)**

JUDGEMENT

This is an appeal from the ruling by the Chief Magistrate, Solomon Wamwayi, Esq., in Eldoret CMCC. No.1698 of 2003. The Ruling was delivered on 3rd March 2004. The appellant has appealed to this court on 8 grounds as follows:

1. THE Learned Magistrate erred in law and in fact in making a Ruling that was wrong both in law and in principle.
2. THE Learned Magistrate erred in law and in fact in arriving at a decision that was self-contradictory and unfair.
3. THE Learned Magistrate erred in law and in fact by making a ruling that was irregular, improper and a nullity.
4. THE Learned Magistrate erred in law and in fact in making an Order pursuant to a prayer that was not properly if at all before it and accordingly had no jurisdiction to make the said order.
5. THE Learned Magistrate erred in law and in fact in making a ruling pursuant to which two

(2) potentially contradictory decrees may ensue in the same cause of action thus precipitating confusion, abuse of the court process and ultimately anarchy.

6. THE Learned Magistrate erred in law and in fact in failing to disallow the preliminary objection raised by counsel for the respondent for want of merits.

7. THE Learned Magistrate erred in law and in fact in failing to adhere and /or be guided by the superior court precedents supplied by the counsel for the appellant and submission thereof to the effect that the Tribunal does not have the legal jurisdiction to deliberate and /or entertain the dispute before him.

8. THE Learned Magistrate erred in law and in fact in Ordering for stay of the suit suo moto and without any or any sound basis in law.

The appellant herein filed a plaint dated 10th December 2003, in the Chief Magistrate's Court Eldoret. He sought for orders of temporary and permanent injunctions; eviction; mesne profits; removal of caution; costs and interest; and any other relief the court might deem fit and just to grant in the circumstances. The first and second defendants/respondents, Joseph Wainaina Gituro and James Wathika Gituro filed a defence on 18th December 2003. Paragraph 10 of the said joint defence stated that the court was devoid of jurisdiction in the matter.

On 25th April, 2004, Mr. Ngigi Mbugual for the 1st and 2nd Defendants/Respondents raised a preliminary objection to the suit and stated that the claim was basically a claim to occupy agricultural land and therefore it fell within the ambit of the Land Disputes Tribunal Act No. 18 of 1990, Section 3(1) (b) and (c) thereof. He asked the court to dismiss the suit as it lacked jurisdiction. He also stated that under section 159(1) of the Registered Land Act (cap 300) and section 12 of the Land Disputes Tribunal Act No. 18 of 1990, the court's jurisdiction should be ousted. He asked that the suit and the application be struck out.

Counsel for the plaintiff/appellant Mr. Njuguna, opposed the preliminary objection. He submitted that there were 8 issues in dispute. There was an issue as to whether the plaintiff was the administrator of the estate; the issue as to the name in which the title deed to the land was; whether there was a purchaser's interest which was a contract; the issue of profits and the issue of eviction. In his view, the matter was not an issue of occupation of land. He referred to several case authorities.

The learned magistrate considered the submissions of both counsel and found that all the other prayers flowed from the issue of the alleged trespass on the land which was agricultural land and therefore that issue should have gone to the Land Disputes Tribunal first. The learned magistrate then referred the issue of trespass to the Land Disputes Tribunal Uasin Gishu and ordered a stay of proceedings to await the outcome of the Land Disputes Tribunal decision on the issue of trespass.

The decision of the learned magistrate is what has necessitated this appeal. Basically the grounds of appeal can be summarized as follows – Firstly, that the learned magistrate erred in making a decision that was not sought for by any of the parties, which could result in contradictory rulings. That the learned magistrate erred in referring the matter to the Land Disputes Tribunal which had no legal jurisdiction to deliberate and entertain the same. Thirdly, that the learned magistrate erred in fact and law in ordering for the stay of the suit without any sound basis.

Both counsel made submissions before me on the issues raised. I have considered the submissions and perused the record. The counsel for the respondents had raised a preliminary objection before the learned trial magistrate. The magistrate decided that the other reliefs sought in the plaint arose from a claim to occupy land. I have to decide this as a preliminary point.

In my view, that was an error. It is quite clear from the plaint that there were several claims to be addressed by the learned magistrate, none of which was said to arise from the other. In fact, if anything, according to the plaint, the occupation of the land by the plaintiff arose from a purported claim for sale. It

did not arise from customary occupation of land. In that event, it cannot be said that it is only the Land Disputes Tribunal that has jurisdiction to entertain the matter. The jurisdiction of the Land Disputes Tribunal in any event requires that the matter be commenced at the Tribunal. If by error, the parties came to court, then the only request to the court would be to dismiss the case.

I now turn to the issue whether the learned Magistrate erred in making a decision that was not asked for by any of the parties. I find that the learned magistrate erred in ordering part of the issues before him to be referred to the Tribunal and also ordering a stay of the proceedings on its own without any of the parties seeking for those orders. Firstly, the respondents, in their objection did not seek for stay of the suit, neither did they seek for transfer of any issue to the Land Tribunal for determination.

They only sought for orders that the court did not have jurisdiction. The court should have therefore restricted itself to that prayer. It is not for a court of law to grant prayers which have not been sought by any of the parties. The second issue is whether the magistrate erred in referring the matter to the Land Disputes Tribunal. In my view, he erred. He did not have powers to do so; even if a party had sought these orders. Though section 13(1) of the Land Disputes Tribunal Act No. 18 of 1990 removes jurisdiction from the magistrates court, on matters relating to division of or determination of boundaries to land; as well as a claim to occupy or work land and trespass to land, it does not confer on a magistrate power to refer such a case filed before the magistrate to the Land Disputes Tribunal.

The several cases cited before the learned magistrate did not relate to the legal issue of transfer. It was not surprising as none of the parties sought for that transfer. In my view, the learned magistrate should have dealt with the objections raised before him and determined them on the merits. With due respect, I am of the view that he erred in referring issues to the Land Disputes Tribunal, as the law did not allow him to do so. The third issue is whether the learned magistrate erred in staying the proceedings before him.

In my view he erred. No party asked him to stay the proceedings. Secondly the stay was based on an erroneous order referring to the Land Disputes Tribunal part of the claims before him, in a case where the law did not permit him to refer any matter to another Tribunal. The learned magistrate should not have stayed the proceedings before him on the ground that he had referred some issues to the Land Disputes Tribunal. For the above reasons, I allow the appeal, quash the decision of the learned magistrate and order that the suit and application, if any, before the learned magistrate be heard and determined by that court on their merits. Each party will bear its own costs of appeal.

Dated and delivered at Eldoret this 15th day of November, 2005.

George Dulu

Ag. Judge