



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**APPELLATE SIDE**

**CIVIL APPEAL NO. 96 OF 1999**

From Original Civil Case 717 of 1999 of the Senior Resident  
Magistrate's Court at Kangundo: C. D. Nyamweya Esq. on  
8.7.1999)

**FRANCIS DAVID KIMALI :::::::::::::::::::: APPELLANT**

**VERSUS**

**SIMON NZOKA )**

**MICHAEL MUTUKU MUINDI ) :::::::::::::::::::: RESPONDENT**

**J U D G E M E N T**

Josephine Ndinda David the appellant herein has filed an appeal against the ruling of Senior Resident Magistrate Kangundo dated 8.7.1999 in SRMCC 717/1999. The appeal is dated 13.7.1999. The appellant is the legal representative of Francis David Kimali who was the initial appellant. An order for substitution was made by this court on 6.6.2000.

The appellant had filed a suit in the lower court seeking a perpetual injunction to issue against the respondents restraining them from burying the remains of Beatrice Mbula Mule in land parcel No. KANGUNDO/MUISUNI/2042.

Brief background of plaintiffs claim in the plaint was that the plaintiff had entered into a contract of sale of land with the deceased and that the deceased did not pay the full purchase price and hence the transaction between them became null and void because the consent of Land Control Board was not obtained.

After Counsel for Respondent appeared he raised a preliminary objection to the effect that the lower court had no jurisdiction to hear and determine the matter. This is the ruling against which an appeal is preferred. The court heard the submissions of counsel for appellant on the grounds in the memorandum of appeal. The respondents Counsel did not attend court. The court considered reasons why counsel was not present in court and the court came to the conclusion that counsel was not keen to proceed with the appeal having intimated to court that he wished to withdraw from acting two times earlier but never did so. On the hearing date he had first sent somebody to hold brief and tell court that counsel was indisposed and wanted to withdraw from acting. Mr. Kimeu had gone to look for him and found him but instead he set a pupil with the file. The court ordered the appeal to proceed ex parte.

It is argued that the trial magistrate erred by abdicating his duty to hear the matter. The prayer in the plaint are clear – a prayer for injunction. However the trial magistrate said that he had no jurisdiction to determine a matter which involved a portion of land but the High Court. I do find that the magistrate

disqualified himself from hearing the matter prematurely. He should have known the value of the land in question before he could have decided whether it was the High Court with jurisdiction or not. Section 159 Registered Land Act provides as follows

“Civil Suits and proceedings relating to the title to or the possession of land or to the title to a lease or charge registered under this Act, or to any interest in the land, lease or charge being an interest which is registered or registerable under this Act, or which is expressed by that Act not to require registration shall be tried by the High Court and where the value of the subject matter in dispute does not exceed twenty five thousand pound, by the Resident Magistrates courts or where the dispute comes within the provisions of Section 3 (1) of the Land Disputes Tribunals Act in accordance with that Act.”

My understanding of this provision of law and which was quoted in the case of JOHN ONYALIGO VS. SAMSON LUMWAJI CA 93/85, is that the magistrate had jurisdiction in the matter provided that the value of the subject land did not exceed 25,000 pounds which translates into Kshs. 500,000/-. The magistrate never enquired to find out what the subject matter was valued at. The plaintiff was really to blame for the failure to state the consideration allegedly agreed at for the suit land.

The plaint at paragraphs 5, 6 and 7 allude to a contract of sale of land between the appellant and the deceased whom the respondents sought to bury on the land in issue. The prayer sought was one of injunction. Before such prayer could be granted the court would consider whether the plaintiff was the rightful owner of the suit land and whether he had made a prima facie case before grant of said injunction. Since there is an allegation of sale of land, the court would have to consider whether the sale agreement was proper and whether complied with the law. I do find that the underlying issue as the magistrate rightly pointed out was ownership of the said land. The magistrate however misdirected himself by finding that the issue of ownership of land falls under the jurisdiction of Land Disputes Tribunal Act. Ownership of land issues should squarely fall under the High Court and Resident Magistrates Courts as per provisions of Section 159 Registered Land Act depending on the value of the land.

It is only after the court was seized with jurisdiction that it would go ahead to consider whether or not the appellant had sold land to the deceased or not and whether the consent of Land Control Board had been sought and if not whether the said contract for sale of land was void.

It is the appellant who failed to state value of suit property in the plaint. Though the magistrate disqualified for wrong decision, the court can not say with certainty as of now whether or not the lower court had jurisdiction or not. The only court with inherent jurisdiction would have been the High Court. In the circumstances the court will allow the appeal in part – set aside the lower court’s ruling of 8.7.1999 and order the appellant to file the matter in the court with jurisdiction after the pleadings are amended as pointed out in the judgement on pecuniary jurisdiction.

Prayer C of the appeal cannot be granted at this stage till the issues in the plaint that is ownership and sale are determined at a hearing.

The appellant is partially to blame for the confusion regarding issue of jurisdiction and appellant will bear costs of the appeal.

Dated, read and delivered at Machakos this ..... day of ..... 2004.

**R. V. WENDOH**

**JUDGE**