



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELCA 3 OF 2020

LUCY NJERI GIKONYO.....APPELLANT

VS

AGNES WANJIRU MWANGI.....RESPONDENT

(Being an Appeal from the ruling delivered on 28/1/2020 in CMCC No 48 of 2019 by Hon E M Nyaga PM)

JUDGEMENT

1. The Appellant filed suit in the lower Court against the Respondent seeking orders inter alia that the Respondent's husband held LOC11/GIKANDU/15 in trust for his younger brother and sought an order of dissolution of trust and to compel the Respondent to transfer 1.5 acres of land to the Appellant.
2. The Respondent in a swift rejoinder denied the claim of the Appellant in a statement of defense filed on the 5/3/2019.
3. In addition, the Respondent moved the Court on 30/10/2019 and raised a Preliminary Objection on the following grounds;
 - a. That the registered proprietor of the suit premises number LOC.11/GIKANDU/15 is deceased.
 - b. That there is already a Succession Case Number 22 of 2017 in the Chief Magistrate's Court Murang'a which is going on.
 - c. That until the Defendant is registered owner, then orders as prayed in the plaint even if they are granted will be unenforceable and therefore the hearing of this case will be in futility.
 - d. That even if the Defendant is declared owner of the suit land in the Succession case aforesaid it will be subject to trusts and all other liabilities attached to it when it was owned by the deceased.
 - e. The Succession case should be heard first
4. The Court heard and determined the objection and its ruling dated the 28/1/2020 as follows;
 - a. The Preliminary Objection be and is hereby dismissed.
 - b. The Court lacks jurisdiction to determine the issue of trust and the suit be and is hereby dismissed with orders as to costs.
5. The Appellant being aggrieved by the above ruling has proffered 3 grounds of Appeal as follows;
 - a. The Learned Judge erred in law and fact when purported to deal with an issue that was never raised by any of the parties.
 - b. The Learned Magistrate misdirected himself in law when he sought to interpret the High Court's Judgement without paying regards to the circumstances that informed the said judgment.
 - c. The Learned Magistrate gravely erred in law when he ruled that the Court lacked jurisdiction to entertain a case based on trust when the Law is very clear that the lower Court has jurisdiction subject to the value of the subject matter.
6. The Appellant seeks the following orders;

a. overturn the lower Court ruling and enter judgement as prayed for in the suit

b. Costs of the Appeal.

7. The Appeal was canvassed by way of written submission which I have read and considered.

8. The Appellant submitted that the only issue for determination is whether the Court has jurisdiction to hear and determine the issue of customary trust. The Appellant has relied on the case of **RE estate of Mbai Wainaina (deceased) Nairobi succession cause No 864 of 1996 (2015)** where the Court stated that matters of trust and ownership of land are preserve of the ELC Court and not the Probate Court.

9. The Appellant argue that the issue of trust was not raised in the Respondent objection. That the existence of a probate suit cannot be a bar to filing of a suit in the ELC seeking to determine an issue of trust in the asset of the deceased estate.

10. The Appellant concluded that the Magistrate Court has power to determine the suit based on section 26 of the ELC Act read together with Magistrates Act.

11. The Respondent opposed the Appeal and submitted that the suit land is subject to a succession cause No 22 of 2017 in the Chief Magistrate's Court Murang'a. That given that the owner of the suit land is deceased this suit will not succeed against the Respondent who is not yet the owner of the Suit land. That the Appellant should wait until the succession cause is determined by which time the suit land shall have been devolved in the name of the Respondent. She argued that the suit was filed prematurely and should await the conclusion of the succession cause.

12. The issue is whether the trial Magistrate's Court has power to determine a dispute involving customary claim in land.

13. The starting point is section 7 of the Magistrates Act which provides the jurisdiction of the Court with respect to civil suits as follows;

“A magistrate's Court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed —

- (a) twenty million shillings, where the Court is presided over by a Chief Magistrate;
- (b) fifteen million shillings, where the Court is presided over by a Senior Principal Magistrate;
- (c) ten million shillings, where the Court is presided over by a principal magistrate;
- (d) seven million shillings, where the Court is presided over by a Senior Resident Magistrate; or
- (e) five million shillings, where the Court is presided over by a Resident Magistrate.

14. section 7 (3) of the said Act states as follows;

“A magistrate's Court shall have jurisdiction in proceedings of a civil nature concerning any of the following matters under African Customary Law —

- (a) land held under customary tenure;
- (b)

15. Section 26 of the ELC Act provides as follows;

“Subject to Article 169(2) of the Constitution, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle —

- (a) disputes relating to offences defined in any Act of Parliament dealing with environment and land; and
- (b) matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Courts Act.

16. My reading of the above provisions is that the Magistrate's Court has power to determine issues of trust subject to pecuniary limitations set out in para 13 above and the Learned PM misdirected himself when he divested himself of jurisdiction. He fell in error in the regard.

17. For the reasons above the Appeal succeeds and I make the following orders;

a. The ruling of the Hon E M Nyagah SPM delivered in CMCC NO 48 of 2019 be and is hereby set aside with respect to the holding that the Court lacked jurisdiction in determining customary trust.

b. The order dismissing the Preliminary Objection remains undisturbed.

c. The suit is reinstated for hearing and determination by another Magistrate with jurisdiction other than Hon E M Nyagah, SPM.

d. The costs of the Appeal shall be in favour of the Appellant.

18. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 14TH DAY OF JANUARY 2021.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Appellant: Ben Mwangi (HB) for Mwaniki

Respondent: Kebuka Wachira (HB) Karuga Wandai

Kuiyaki: Court Assistant