



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC APPEAL NO. 9 NO. 2019

(FORMERLY HCCA NO. 180 OF 2010)

SAMWEL OGEMBO ONDERI.....APPELLANT

VERSUS

WILLIAM OBARA OIGARA.....RESPONDENT

(Being an appeal against the judgment of Hon. L.M Nafula - Principal Magistrate

in Ogembo SPM CC No. 70 of 2007 delivered on 29th July 2010)

JUDGMENT

INTRODUCTION

1. This appeal arises from the judgment of L.M Nafula - Principal Magistrate in Ogembo SPM CC No. 70 of 2007. In the said suit the Respondent who is the registered owner of L.R No. SOUTH MUGIRANGO/BOGETENAGA/1654 filed suit against the Appellant alleging that the Appellant had without any justifiable cause trespassed onto the Respondent's said parcel of land (hereinafter referred to as suit property) and committed various acts of wastage, damage and/or alienation thereby adversely affecting his proprietary rights and depriving the Respondent of the peaceful possession, use and enjoyment of his land. Consequently, the Respondent sought orders of injunction, eviction as well as general damages and mesne profits.

2. The Appellant filed a Defence and Counterclaim denying the Respondent's claim. The suit was subsequently set down for hearing after which judgment was delivered in favour of the Respondent. Being dissatisfied with the said judgment, the Appellant filed the instant appeal citing a number of grounds mainly touching on the issue of the court's jurisdiction. In particular, the Appellant contended that the learned trial magistrate erred in failing to appreciate the provisions of section 159 of the Registered Land Act Cap 300 (now repealed).

3. The appeal was canvassed by way of written submissions and both parties filed their submissions.

APPELLANT'S SUBMISSIONS

4. Learned counsel for the Appellant submitted that the Defendant had at paragraph 8 of his Defence stated that the court did not have jurisdiction. He contended that during the hearing of the suit the Respondent stated that the suit property was valued at approximately Kshs. 3,000,000. The court at the request of the Respondent then issued an order directing the District Valuation Officer to visit the suit property and prepare a valuation report. The District Valuation Officer visited the suit property and prepared a report in which he stated the value of the suit property as Kshs. 1,200,000. The said report was subsequently produced in court as Plaintiff's exhibit 3. It is counsel's submission that the trial court chose not to be guided by the evidence on record which demonstrated that it had no pecuniary jurisdiction and went ahead to hear and determine the suit on merit thus occasioning a miscarriage of justice.

5. Counsel relied on section 5 of the pre- 2015 Magistrate's Court Act Cap 10 which provides that a Resident Magistrate's court has jurisdiction in civil matters where the value of the subject matter in dispute does not exceed one hundred thousand shillings or three hundred thousand shillings where the court is held by a Principal Magistrate or Senior Resident Magistrate and five hundred thousand where the court is held by a Chief Magistrate. It was his contention that the jurisdiction of the Senior Resident Magistrate who conducted the hearing was Kshs. 300,000 and even if her jurisdiction was enhanced by the Chief Magistrate, the same would not have exceeded Kshs. 800,000.

6. Counsel further relied on Section 159 of the Registered Land Act Cap 300 which set the pecuniary jurisdiction of the Resident Magistrate's court in land matters at twenty five thousand pounds. He relied on the case of **The Owners of Motor Vessel Lillian v Caltex**

Oil (Kenya) Ltd (1989 eKLR where the court held that:-

“Jurisdiction is everything, without it a court has no power to make one more step...where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”... where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing”.

7. It was counsel’s submission that the suit property was fraudulently registered in the Respondent’s name as he failed to produce any adjudication records after alleging that he was the first registered owner of the suit property. He therefore urged the court to declare that the said registration was irregular, null and void.

8. The last point on which counsel submitted was that the Appellant was entitled to the suit property by way of adverse possession as he had stayed on the land for a period of 34 years. He faulted the trial magistrate for failing to make a determination on this issue.

RESPONDENT’S SUBMISSIONS

9. On his part learned counsel for the Respondent submitted that it was not in dispute that the Respondent was the registered owner of the suit property and that the same was a first registration.

10. With regard to the court’s jurisdiction, he submitted that the Appellant had acquiesced in the court’s jurisdiction by filing a Counterclaim and participating in the hearing and that he is therefore barred from objecting to the court’s jurisdiction. He contended that the suit property was within the court’s territorial jurisdiction and that the Appellant had not demonstrated that the trial court lacked jurisdiction, whether pecuniary or otherwise.

11. It was his contention that under Order 42 Rule 26 this court has the power to set aside the judgment and order a retrial and at the very worst the court ought to order a re-trial and transfer the suit to a court with jurisdiction try it. However, it was counsel’s submission that the trial court arrived at the right decision and that the appeal ought to be dismissed with costs.

ISSUES FOR DETERMINATION

12. Having considered the proceedings and judgment of the lower court, Grounds of Appeal and rival submissions, the main issues for determination are whether the trial court had jurisdiction to hear and determine the suit and whether the court erred in failing to grant the orders sought in the Counterclaim.

ANALYSIS AND DETERMINATION

13. The suit herein was determined before the 2010 Constitution which resulted in the amendment of several laws to bring them in conformity with the Constitution. Section 159 of the Registered Land Act Cap 300 (now repealed) provides as follows:

Section 159. **“Civil suits relating to the title to or possession of land or to the title to a lease or charge, registered under this Act, or to any interest in land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court where the value of the subject matter in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate’s court, or where the dispute comes within the provisions of section 3 of the Land Disputes Tribunals Act, in accordance with that Act”.**

14. The jurisdiction of the Magistrates courts was further elaborated in section 5 of the Magistrates Court Act Cap 10 as follows:

S. 5. **“Subject to any other written law, the Resident Magistrate’s Court shall have and exercise jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter in dispute does not exceed one hundred thousand shilling or three hundred thousand shillings where the court is held by a principal or Senior Resident Magistrate and five hundred thousand shillings where the court is held by a Chief magistrate or Senior Principal Magistrate;**

Provided that the Chief Justice may by notice in the Gazette, increase the limit of jurisdiction of
a) a Chief Magistrate to a sum not exceeding three million shillings

b) a Senior Principal Magistrate to a sum not exceeding two million shillings;

c) A Principal Magistrate to a sum not exceeding one million shillings;

d) a Senior Resident Magistrate to a sum not exceeding eight hundred shillings; or

e) a Resident Magistrate to a sum not exceeding five hundred thousand shillings

(2) The Resident Magistrate’s Court shall have and exercise the same jurisdiction and powers in proceedings concerning claims under customary law as is conferred on District Magistrates under section 9(a).

15. From the foregoing provisions of the Magistrates’ Court Act, it is clear that the trial Magistrate who heard the case while she was a

Senior Resident Magistrate and wrote the judgment after she was promoted to the position of Principal Magistrate did not have the pecuniary jurisdiction to deal with the suit as the value of the subject matter exceeds Kshs.1,000,000. Furthermore, the Registered Land Act (now repealed) which was applicable at the time the case in the lower court was heard clearly provides that only the High Court has the jurisdiction to deal with land matters relating to possession or title to land where the value of the subject matter exceeds 25,000 pounds (approximately Kshs.500,000).

16. In the matter of **Interim Independent Electoral Commission [2011] eKLR** the Supreme Court stated as follows:

Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step."

[30] The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution".

17. I note that even after the trial magistrate ordered that the suit property be valued by the District Valuation Officer and the Plaintiff produced the valuation report of the said officer indicating that the suit property together with the developments thereon was valued at Kshs. 1,200,000, she still proceeded to hear and determine the matter. In her judgment, the trial Magistrate observed that since the prayers in the plaint were for an injunction, eviction and mesne profits and not orders relating to ownership or the boundaries of the suit property, she had the jurisdiction to grant the same. With respect, I do not agree with the opinion of the trial court as the court's pecuniary jurisdiction is pegged to the value of the subject matter and not the prayers sought by the Plaintiff. The trial Magistrate therefore fell into error by holding that she had jurisdiction to hear and determine the case. On this ground alone, the appeal succeeds.

18. The Respondent's submission that the court should order a retrial and have the suit transferred to the court that has jurisdiction in accordance with section 18 of the Civil Procedure Act is belated and untenable as such an application ought to have been made in the High Court before the trial in the lower court commenced.

19. With regard to the second issue touching on adverse possession, counsel for the Appellant submitted that the Appellant had at paragraph 11 and 12 of his Defence and Counterclaim raised a claim of adverse possession and that the court ought to have made a determination on the same. The proceedings of 22.10.2009 however, clearly indicate that counsel for the Appellant sought to withdraw the Counterclaim introduced by the Amended Defence dated 26th May 2008 and the court duly marked the said Counterclaim as withdrawn. The court could therefore not make a finding on the claim of adverse possession which had been withdrawn.

20. As stated earlier in this judgment, this appeal mainly turns on whether or not the lower court had jurisdiction to hear and determine the suit. Having arrived at the conclusion that the court had no jurisdiction, it is my finding that the appeal has merit and I allow it. Consequently, the judgment of the lower court is hereby set aside and substituted with an order dismissing the plaintiff's suit. The Respondent shall bear the costs of the suit in the lower court as well as this appeal.

DATED, SIGNED AND DELIVERED AT KISII THIS 1ST DAY OF FEBRUARY, 2022.

J.M ONYANGO

JUDGE