



**Thinwa v Thinwa (Environment and Land Appeal 30 of 2014)
[2018] KEELC 4914 (KLR) (1 October 2018) (Judgment)**

Moses Wamugo Thinwa v Charles Gikunju Thinwa [2018] eKLR

Neutral citation: [2018] KEELC 4914 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 30 OF 2014**

L WAITHAKA, J

OCTOBER 1, 2018

BETWEEN

MOSES WAMUGO THINWA APPELLANT

AND

CHARLES GIKUNJU THINWA RESPONDENT

JUDGMENT

1. By a plaint dated 27th August, 2009 and amended on 13th August, 2010 the appellant herein, instituted a suit before the lower court to wit, Nyeri CMCC No. 476 of 2009 seeking judgment against the respondent for inter alia general damages for trespass and wrongful registration of an encumbrance in the form of a caution and maintaining the same in respect of the parcel of land known as Aguthi/Mungaria/576 (the suit property); a permanent injunction to restrain the respondent, his agents, servants, assigns or any other person acting on the respondent's behalf from entering, interfering or in any way trespassing into the suit property.
2. The appellant, who is the registered proprietor of the suit property, pleaded that sometime in 2009, he discovered that the respondent had registered a caution against the suit property claiming that he had a licensee interest in it. The appellant also claimed that the respondent and his family members, had on several occasions trespassed into the suit property and interfered with his quiet use and occupation therein. A number of alleged unlawful dealings with the suit property by the respondent and his family members were particularized. For instance, the appellant claimed that the respondent was interfering with his developments in the suit property (had demolished a house he had constructed thereon and prevented him from constructing another house therein), threatened to eject him from the suit property, interfered with the boundary between the suit property and the neighbouring parcel of land to wit Aguthi/Mungaria 577, prevented him from accessing the suit property and destroyed his coffee plants among other claims.



3. It was the appellant's case, that owing to the conduct of the respondent, he had suffered loss and damage, which entitled him to the orders sought.
4. The respondent had denied all the allegations levelled against him and contended that the registration of the suit property in favour of the appellant was effected fraudulently, that he registered the caution after discovering the fraud in the registration of the suit property in the name of the appellant, that he has been in occupation of the suit property for 40 years hence he was not a trespasser and that the dispute over the suit property had on several occasions been arbitrated in his favour. Further, that there were other suits pending in court concerning the suit property and that the court had no jurisdiction to hear and determine the suit. (Emphasis supplied).
5. Upon considering the case presented before her, the Trial Magistrate (TM) framed the issues for determination as follows:-
 - i. Whether the alleged fraud in the registration of the suit property in favour of the appellant was proved?
 - ii. Whether the amended plaint should be struck out for want of compliance with the provisions of the law?
 - iii. Whether the court had jurisdiction to handle the matter and
 - iv. Whether the orders sought should be granted as prayed.
6. On whether there was fraud in registration of the suit property in favour of the appellant, the learned TM held that the alleged fraud in the registration of the suit property in the name of the appellant was not proved.
7. On the legal propriety or otherwise of the amended plaint, the learned trial TM determined that the amended plaint was filed without leave of court as by law required but declined to strike it out as striking it on account of that defect would not serve justice to the parties to the suit.
8. As to whether the court had jurisdiction to hear and determine the suit, the learned TM observed:-

“The defendant (read the respondent) in his submissions has indicated that this court lacks jurisdiction by the fact that the Lands Disputes Tribunal Act ousted the jurisdiction of magistrate courts to entertain land disputes concerning trespass to land. First it is clearly noted that the defendant has not denied that he has indeed trespassed into the land that does not belong to him. Looking at prayer No. (a) and (b) of the amended plaint both indicate that the defendant has trespassed and therefore require a permanent solution which is an injunction. I have looked at the provision of the law that is section 3(1) of the Land Disputes Tribunal Act of 1990 the said provision is couched under mandatory terms such that 3(1) (c) indicates that matters relating to trespass to land shall be determined by the tribunal. The record indicates that earlier the jurisdiction of this court had been challenged but it was on the basis that the case was subjudice which the court made a finding that this case was not subjudice since the subject matter in this case and that of 112 /85 are different but in relation to the claim sought herein, it is clear from the provisions of the law the orders cannot be granted....the case ought to have been dealt with as per provisions of section 3(1) of the Land Disputes Tribunal Act of 1990 which is couched in mandatory terms hence this court has no jurisdiction to determine and grant the orders sought. The said suit is struck out and each party to cater for their own costs.”



9. Aggrieved by the above decision, the appellant appealed to this court on nine (9) grounds which can be summarized as follows, the TM erred by:-
- i. Framing and determining the issue as to whether the court had jurisdiction to hear and determine the dispute preferred before it in view of the provisions of Section 3(1) of the Land Disputes Tribunals *Act No. 9 of 1990* (LDTA) when the same did not form part of the pleadings or proceedings before court thus denying him an opportunity to respond to it;
 - ii. Revisiting the issue of jurisdiction when she had considered and determined it in an earlier decision;
 - iii. Failing to appreciate that as at the time the judgment was delivered, the Land Disputes Tribunals had been repealed by the *Environment and Land Court Act* and directions issued by the Chief Justice on how disputes that were pending before the magistrate courts were to be dealt with;
 - iv. Failing to appreciate that under Section 159 of the Registered *Land Act* Cap 300 Laws of Kenya (now repealed), the Land Disputes Tribunals had no jurisdiction to hear and determine civil suits and proceedings relating to title to land as such jurisdiction was vested in the High Court and the Resident Magistrate's Courts.
 - v. Failing to appreciate the nature of the orders sought and to find that the Tribunals established under the LDTA did not have power to grant those orders; and
 - vi. Failing to assess the damages payable to the appellant if he had succeeded in his case against the respondent.
10. For the foregoing reasons, the appellant urges this court to:-
- i. Set aside the judgment of the lower court in its entirety and substitute it with an order allowing all the prayers sought in the amended plaint since apart from the issue of jurisdiction, the learned TM had found that he had proved his case against the respondent;
 - ii. To assess the general damages sought as tabulated in his submissions;
 - iii. Costs of the appeal and the proceedings before the lower court;
 - iv. Any other order this court may deem fit to grant.
11. The appeal was disposed off by way of written submissions.
12. Despite having been accorded an opportunity to file his submissions, the respondent did not file his submissions within the time given by the court and at all.

Appellant's submissions

13. In the submissions filed on behalf of the appellant, the following are framed as the issues for the court's determination.
1. Whether the magistrate's courts had jurisdiction to hear and determine the subject matter of this appeal?
 2. What are the rights of a registered proprietor of land?
 3. Whether the learned TM was justified in framing and introducing new issues not raised and ignoring others raised by the plaintiff?



4. Whether the Land Disputes Tribunal had jurisdiction to hear the subject matter of this appeal?
 5. Whether the learned TM was justified in revisiting in her judgment a question determined in a preliminary objection? and
 6. Whether the learned TM was justified in basing her judgment on a repealed Act.
14. Before I begin considering the appellant's submissions on the above issues framed for the court's determination, I begin by pointing out that by dint of the provisions of Order 2 Rule 6(1) as read with Order 42 Rule 4 of the Civil Procedure Rules, the appellant is precluded from urging his appeal on grounds other than the grounds contained in the memorandum of appeal. In that regard see the said provisions of the law which provide as follows:-
- “Order 2 Rule 6(1)
- “No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.”
- Order 42 Rule 4
- “The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule:
- Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.”
15. On whether Magistrate Courts had jurisdiction to hear the subject matter of this appeal, reference is made to Sections 3, 133(1), 134(4), 135 and 159 of the Registered *Land Act*, Cap 300 Laws of Kenya (RLA) repealed and submitted that it is the Magistrate courts that had jurisdiction to hear and determine the subject matter of this appeal as opposed to the Land Disputes Tribunals established under the Land Disputes Tribunals *Act No.18 of 1990* (LDTA) as determined by the learned TM.
 16. Concerning rights of a proprietor of land, it is pointed out that the learned TM determined that the suit property belonged to the appellant and based on the provisions of Sections 27(a) of RLA (repealed), submitted that the finding by the trial court that the appellant was the owner of the suit property entitled him to all rights and privileges belonging to and appurtenant to the suit property.
 17. On whether the learned TM was justified in framing and introducing new issues not raised and ignoring others raised by the parties, Reference is made to Order 21 Rule 5 of the Civil Procedure Rules which requires the court, in a case where issues have been framed, to state its finding or decision, with reason thereof upon each separate issue and submitted that the learned TM misdirected herself by framing new issues which had not been pleaded. The learned TM is said to have treated the whole case as if the appellant had pleaded trespass yet the plaintiff had claimed general damages for trespass and wrongful registration of an encumbrance by way of a caution.
 18. The learned TM is faulted for having failed to make any determination on damages for trespass and wrongful maintenance of a caution. Because the learned TM did not consider the appellant's claim for damages for wrongful maintenance of caution, she is said to have been biased against the appellant.



19. Based on the provisions of Section 133(1) and 134(4) of the RLA (repealed), it is submitted that the claim for damages for wrongful maintenance of a caution can only be entertained by the courts and not the Tribunals established under the LDTA.
20. On whether the Land Disputes Tribunals had jurisdiction to hear and determine the subject matter of this appeal, based on the decisions in the cases of Joseph Malakwen Lelei & Another v. Rift Valley Land Disputes Appeals Committee & 2 Others, Civil Appeal No. 82 of 2006; [*Isaac Waweru Mwangi v. Ndungu Mwangi & Others, Civil Appeal No. 557 of 1999*](#); Sarah Chelagat Samoei v. Musa Kipkering Kosgei & Another, E & L Misc Application No.10 of 2013; George Maina v. Wanderi Kabugi & Another, Civil Appeal No.100 of 2000 and the provisions of Section 159 of the LRA it is submitted that since the suit property was registered under the RLA (repealed), and there having been no evidence adduced capable of showing that the pecuniary value of the suit property was higher or lower than prescribed by Section 159 of the RLA (repealed), the learned TM erred by conferring jurisdiction on the Land Disputes Tribunal when the provisions of Section 159 of the LRA (repealed), does not confer jurisdiction on the Land Disputes Tribunal to determine issues concerning title or ownership of registered land.
21. The common thread in the cases cited in paragraph 12 above, is that the Tribunals established under the LDTA lacked jurisdiction to hear and determine disputes concerning title to land or ownership of land registered under RLA (repealed).
22. Maintaining that the learned TM failed to appreciate the nature of orders sought and arguing that the Land Disputes Tribunal had no powers to grant the orders he had prayed for, based on the case of [*Esther Kavaya v. Wilso Musungu Civil Appeal No.15 of 2003*](#), where it was held that the jurisdiction of the Land Disputes Tribunal does not include determination of claims for award of damages, it is submitted that the learned TM erred by holding that the Tribunal had jurisdiction to hear and determine the appellants' claim which was for damages for trespass to his land and wrongful maintenance of a caution.
23. On whether the learned TM was justified in making a finding in her judgment on a question she had already determined in a preliminary objection, it is pointed out that the issue of the court's jurisdiction to determine the dispute preferred before her was raised in a preliminary objection and a decision made to the effect that the court had jurisdiction to hear and determine the suit and submitted that the learned TM erred by revisiting that issue in her final judgment. Based on the case of [*National Bank of Kenya Limited v. Leonard Gitthoi Kamweti case No.1965 of 2014*](#) where it was held that when a point of law is raised through a preliminary objection and is determined, then the same is res judicata, because the case of Esther Karanja v. Wilson Musungu supra was cited by the appellant in the preliminary objection the court's jurisdiction, because the TM overruled the objection, it meant that the court had jurisdiction to hear and determine the dispute preferred before it.
24. As to whether the learned TM was justified in basing her judgment on a repealed Act to wit the LDTA, reference is made to Section 30 of the [*Environment and Land Court Act, 2011*](#) and Section 12A of the [*Land Act, 2012*](#) and submitted that the learned TM erred by basing her judgment on a repealed Act.
25. The learned TM is said to have failed to appreciate that there were practice directions issued by the Chief Justice vide Gazette Notice No. 1617 dated 9th February, 2012 to the effect that all matters pending in any subordinate court subsequent to the commencement of the Act were to continue to be heard and determined by the same courts. The practice directions are said to have lent credence to the appellants' contention that the Resident Magistrate had jurisdiction to hear, determine and grant the orders sought by the appellant.



26. According to the appellant, the respondent was claiming ownership of the suit property and was interfering with his rights to use and occupy his land as he wished as provided by the RLA (repealed). Because the issues raised in the respondent's statement of defense had the possibility of resulting in cancellation of the title he held over the suit property, the appellant maintains that the Land Disputes Tribunal lacked jurisdiction to hear and determine the dispute he preferred before the lower court.

Analysis and determination

27. From the grounds of appeal and the submissions filed by the appellant, this court finds the issues for determination to be:-
- i. Whether the TM erred by revisiting the issue of the court's jurisdiction to hear and determine the dispute preferred before her?
 - ii. What was the nature of the appellant's claim?
 - iii. Did the TM err by finding that the court had no jurisdiction to hear and determine the suit?
 - v. Did the TM err by failing to assess damages payable to the appellant in case he had succeeded in his claim.
 - vi. What orders should the court make?
28. On whether the TM erred in revisiting the issue of jurisdiction when the same had been dealt with, I find that she did not. This is because the jurisdictional issue raised after the conclusion of the case was different from that raised in the preliminary objection. Though it was prudent for the parties to have addressed all issues concerning the court's jurisdiction to hear and determine the case preferred before her, the parties having chosen to urge the question as to when the court had jurisdiction to hear and determine the suit on account of the nature of the subject matter of the suit, (trespass) which matter formed part of the grounds upon which the respondent's suit was premised, the court was justified in revisiting the issue of the subject matter jurisdiction because that issue had not been taken up in the preliminary objection.
29. Concerning the nature of the appellant's claim, whilst the orders sought turned on the determination as to whether or not the respondent had trespassed into the appellant's land, I agree with the appellant that the Tribunals had no jurisdiction to grant the orders sought. In essence, the TM erred in finding that she had no jurisdiction to hear and determine the dispute preferred her. In this regard see the persuasive authority of Joseph Chepkong'a Rotich v. Michael Cherono (2005) e KLR where it was stated:-

“....The suit land in this case was a portion of land registered under the Registered *Land Act*. Being Registered Land, it could not therefore be referred to the Land Disputes Tribunal as provided by the Land Disputes Tribunals Act. The determinant factor on whether the trial magistrate had jurisdiction or not was the value of the suit land. If the suit land exceeded the value of Kshs.500,000/=, then the Resident Magistrate would lack jurisdiction to hear the matter...”

30. Similar sentiments were expressed in the case of Jesse Kamau Kinuthia v. Teresia Wanjiku Kamande (2008) e KLR where it was held:-

“A dispute as to title to land can only be ventilated either in the High Court or Resident Magistrate Courts depending on the pecuniary value of the land. This provision of the



law (referring to section 159 of the Registered *Land Act*) clearly and expressly therefore ousts completely the jurisdiction of the Land Disputes Tribunals in hearing and entertaining claims pertaining to title to land.”

31. The learned TM also failed to take into account that the Land Disputes Tribunal had no jurisdiction to grant the reliefs sought namely general damages for trespass to land and maintaining wrongful caution. In this regard see the persuasive authority of *Esther Kavaya v. Wilson Musungu* (2006) e KLR where it was observed:-

“...the trial magistrate failed to appreciate that the jurisdiction of the Land Disputes Tribunal does not include determination of claims for award of damages. The claim for special and general damages in suit No. 141 of 2000 clearly fell outside the purview of the Jurisdiction of the Land Disputes Tribunal...”

32. I need not say more to demonstrate that the learned TM erred by holding that based on the subject of the suit, (trespass to land), she had no jurisdiction to hear the dispute preferred before her. Though the decision of the court determined whether or not the respondent had trespassed into the appellant’s land, this was not per se a claim for trespass as it related to rights of a registered proprietor of land under the Registered *Land Act* (repealed) which could only be determined in accordance with the provisions of that law.
33. Having reviewed the evidence adduced before the lower court as I am obligated to do, I agree with the finding by the TM that the respondent did not make up a case for interfering with the respondent’s title. His conduct and activities in respect of the appellant’s title were therefore a violation of the appellant’s right to the suit property.
34. Even though the appellant did not prove the extent of damage he suffered on account of the respondent’s unlawful interference with his rights to the suit property, trespass to land being actionable per se, I find and hold that the appellant has made up a case for assessment of the damages in his favour, which I hereby assess at Kshs. 100,000/=.
35. The upshot of the foregoing is that the appeal herein has merit and is allowed in terms of prayers (a), (b) and (c) of the memorandum of appeal hereto.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 1ST DAY OF OCTOBER, 2018.

L N WAITHAKA

JUDGE

Coram:

N/A for the appellant

Charles Gikunju Thinwa – respondent

Court assistant - Esther

