



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELCA NO. 13 OF 2019**

**CHARLES NDUNGU KAHANDO.....APPELLANT**

**VERSUS**

**CLEMENTINE NYAWIRA KURIA.....1<sup>ST</sup> RESPONDENT**

**GEOFFREY KABUI KURIA.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**A. INTRODUCTION AND BACKGROUND**

1. This is an appeal against the ruling and order of **Hon. O. Momanyi (SRM)** dated 12<sup>th</sup> September 2019 in **Nyahururu MC L & E Case No. 264 of 2018 - Charles Ndungu Kahando v Clementine Nyawira Kuria & Another**. By the said ruling and order, the trial court upheld the Respondent's preliminary objection on jurisdiction and directed the Appellant to make an application for transfer of the suit to a court with territorial jurisdiction.

2. The record shows that by a plaint dated and filed on 9<sup>th</sup> April, 2018, the Appellant sought the following reliefs against the Respondents:-

*(a) A declaration that the Plaintiff is the registered absolute proprietor of ALL THAT piece of land known and described as Land Title Nos. **Laikipia/Ngobit Supuko Block II/832 (Wiumiririe)**, measuring 1.470 hectares or thereabouts, and the Defendants have no right or interest therein whatsoever.*

*(b) A declaration that the Defendants have encroached on and unlawfully occupied the Plaintiff's land Parcel No **Laikipia/Ngobit Supuko Block II/832 (Wiumiririe)**.*

*(c) An order for eviction and ejection of the Defendants together with members of their families, their proxies, servants and agents or anyone else claiming under the Defendants from the Plaintiff's Land Parcel No **Laikipia/Ngobit Supuko Block II/832 (Wiumiririe)**.*

*(d) A permanent injunction restraining the Defendants by themselves, members of their families, their proxies, employees, servants and agents from entering, remaining on, cultivating, using or in any other manner interfering with the Plaintiff's quiet possession and peaceful enjoyment of Land parcel No. **Laikipia/Ngobit Supuko Block II/ 832 (Wiumiririe)**.*

*(e) General damages and or mesne profits.*

*(f) Costs of the suit and interest thereon.*

*(g) Any other or further relief that this Honourable Court may deem fit and just to grant to the Plaintiff.*

3. The Appellant pleaded that he was the registered proprietor of Title No. **Laikipia/Ngobit Supuko Block II/832 (Wiumiririe) (parcel 832)** located within Laikipia County, whereas the Respondents were registered proprietors of Title Nos. **Laikipia/Ngobit Supuko Block II /861(Wiumiririe) (parcel 861)**. It was further pleaded that the said parcels were separated by a public road which served as a boundary between them.

4. The Appellant further pleaded that the Respondents had without just cause or excuse trespassed upon and occupied a portion of parcel 832, fenced it off and cultivated some crops thereon. It was contended that despite issuance of demand and notice of intention to sue the Respondents had failed to make amends hence the suit.

5. By a joint statement of defence dated 15<sup>th</sup> May, 2018 the Respondents denied the Appellant's claim in its entirety. They denied that the Appellant was the registered proprietor of parcel 832 and that they had trespassed thereon. They further denied being the registered proprietors of parcel 861 and put the Appellant to strict proof thereof.

6. The Respondents further pleaded that no valid cause of action could be maintained against them and that they shall raise a preliminary objection on the validity and competence of the suit. They pleaded that the suit was statute barred and that the court had no jurisdiction to entertain the suit since the suit properties fell within the jurisdiction of Magistrates' court at Nanyuki. The Respondents further contended that the dispute among the parties had been determined before **Lamuria Land Disputes Tribunal** whose award was adopted as a judgment in **Nanyuki Award Case No. 9 of 1999** hence the matter could not be reopened.

7. The material on record further reveals that during the pendency of the suit the Respondents filed a notice of preliminary objection to the Appellant's suit dated 11<sup>th</sup> March, 2019 and filed on 13<sup>th</sup> March, 2019 raising the following grounds:-

*(a) That this Honourable lacks territorial jurisdiction to hear and determine the Plaintiff's suit and the same should be struck out with costs to the Defendants.*

*(b) That the Plaintiff's suit is statutorily time barred and the same ought to be dismissed with costs to the Defendants.*

*(c) That the Plaintiff has sued the Defendants who have no capacity to be sued in this matter.*

*(d) That the suit is res judicata and should be dismissed with costs to the Defendants.*

*(e) That the Plaintiff's suit is incompetent, bad in law, fatally defective, totally misconceived and an abuse of the court process and the same should be struck out with costs to the Defendants.*

8. The said preliminary objection was canvassed through written submissions and by a ruling dated and delivered on 12<sup>th</sup> September, 2019, the trial court upheld the preliminary objection on jurisdiction. The trial court agreed with the Respondents that the proper court with jurisdiction for properties falling within Laikipia County was the Magistrates' Court at Nanyuki under the provisions of **Section 5 and 12 of the Civil Procedure Act (Cap. 21)**. The court did not, however, strike out the Appellant's suit but directed him to apply for transfer of the suit to the appropriate court for trial and disposal.

## **B. THE GROUNDS OF APPEAL**

9. Being aggrieved by the said ruling and order, the Appellant filed the instant appeal raising the following 8 grounds in his memorandum of appeal dated 24<sup>th</sup> September, 2019:-

*(a) That the learned trial Magistrate erred in law and in fact in failing to appreciate or take cognizance of the fact that the suit property being Title Number **Laikipia/Ngobit Supuko Block II/832 (Wiumiririe)**, is located in Laikipia County and consequently both Nyahururu Chief Magistrate's court and Nanyuki Chief Magistrate's court have territorial proximity to the suit property.*

*(b) That the learned trial Magistrate erred in law and in fact in failing to find and hold that the Appellant was at liberty to file his suit in respect to the suit property either in Nyahururu Chief Magistrate's Court or Nanyuki Chief Magistrate's Court, both of which have territorial jurisdiction over the suit property.*

*(c) That the learned trial Magistrate erred in law and in fact in failing to apply and invoke the decision of the Environment and Land Court in the case of **David Karobia Kiiru v Charles Nderitu Gitoi and Another (Nakuru HC Civil Appeal No. 27 of 2016)**, on territorial jurisdiction of the Magistrate's Court in respect to land that is situate in Laikipia County, which decision was binding on the learned trial Magistrate.*

*(d) That the learned trial Magistrate erred in law and in fact in basing his findings and decisions in respect to the preliminary objection raised by the Respondents on irrelevant matter or consideration and hence arrived at a wrong decision.*

*(e) That the learned trial Magistrate erred in law and in fact in finding and or holding that the suit property, being Title Number **Laikipia/Ngobit Supuko Block II/832 (Wiumiririe)** is situate outside the territorial jurisdiction of Nyahururu Chief Magistrate's Court.*

*(f) That the learned trial Magistrate erred both in law and in fact in finding and or holding that Nyahururu Chief Magistrate's court lacks jurisdiction to hear the Appellant's suit, being Nyahururu CMC ELC No 264 of 2018.*

*(g) That the learned trial Magistrate erred in both in law and in fact in finding and holding that the Appellant's suit, aforesaid, offends the provisions of **Section 5 and 12 of the Civil Procedure Act**.*

*(h) That the learned trial Magistrate erred in law and in fact by failing to properly apply the law in determining and upholding the Respondent's preliminary objection.*

10. As a result, the Appellant sought the following reliefs:

(a) That the appeal be allowed.

(b) That the ruling and orders of the trial court dated 12<sup>th</sup> September, 2019 in Nyahururu M.C.L& E No 264 of 2018 be set aside.

(c) That the Respondents' preliminary objection dated 11<sup>th</sup> March, 2019 be dismissed with costs.

(d) That the Appellant be awarded costs of the appeal.

### **C. DIRECTIONS ON SUBMISSIONS**

11. When the appeal was listed for directions on 4<sup>th</sup> February, 2021 it was directed that the appeal shall be canvassed through written submissions. The Appellant was granted 21 days to file and serve his submissions whereas the Respondents were granted a similar period to file theirs upon the lapse of the Appellant's period. The record shows that the Appellant filed his submissions on 6<sup>th</sup> April, 2021 whereas the Respondents filed theirs on 26<sup>th</sup> April, 2021.

### **D. THE ISSUES FOR DETERMINATION**

12. Although the Appellant raised 8 grounds of appeal in his memorandum of appeal, the court is of the opinion that the appeal may effectively be determined on the basis of the following issues:-

(a) **Whether the trial court erred in law in holding that it had no jurisdiction to entertain the suit.**

(b) **Who shall bear the costs of the appeal.**

### **E. ANALYSIS AND DETERMINATION**

(a) **Whether the trial court erred in law in holding that it had no jurisdiction to entertain the suit**

13. The court has considered the material and submissions on record on this issue. This is really the gist of the Appellant's grievances. Whereas the Appellant faulted the trial court for failing to properly apply the law relating to its territorial jurisdiction, the Respondents fully supported the decision of the trial court that it had no territorial jurisdiction over the matter. The Appellant relied upon the decision of the **Environment and Land Court in Nakuru ELC Appeal No. 27 of 2016 – David Karobia Kiiru v Charles Nderitu Gitoi & another** and the Court of Appeal decision in **Francis Ndichu Gathogo v Evans Kitazi Ondansa & Another [2007] eKLR** in support of his submissions that the trial court had jurisdiction to entertain the suit before it.

14. The ruling of the trial court indicates that it was of the opinion that it had no jurisdiction in the matter on account of **Sections 5 and 12 of the Civil Procedure Act (Cap. 21). Section 12** of the said Act stipulates that:-

“Subject to the pecuniary or other limitations prescribed by any law, suits —

(a) for the recovery of immovable property, with or without rent or profits.

(b) for the partition of immovable property.

(c) for the foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property.

(d) for the determination of any other right to or interest in immovable property.

(e) for compensation for wrong to immovable property.

(f) for the recovery of movable property actually under distraint or attachment.

where the property is situate in Kenya, shall be instituted in the Court within the local limits of whose jurisdiction the property is situate:

**Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the court within the local limits of whose jurisdiction the property is situate, or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides or carries on business, or personally works for gain”.**

15. On the other hand, **Section 5 of the Act** stipulates that:-

” Any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred”.

16. The trial court was of the opinion that since the suit property was situated at **Wiumuririe** within Laikipia County, then it had no territorial jurisdiction and that land disputes within Laikipia County fell within the local jurisdiction of the Magistrates' Court at Nanyuki. The trial court consequently advised the Appellant to apply for transfer of his suit to Nanyuki Law Courts for trial and disposal.

17. The court has noted that none of the parties placed any material in the form of a gazette notice, administrative circular or judiciary guidelines on the issue of territorial jurisdiction before the trial court. Equally, no such material was placed before this court by any of the parties. In the premises, the court will take judicial notice of the fact that both Nyahururu Law Courts and Nanyuki Law Courts are located within the boundaries of Laikipia County. There is no material on record to demonstrate that the High Court or the Environment and Land Court has issued any directions on the distribution of business between the two courts. The court is thus of the opinion that the two courts have concurrent jurisdiction and a party may elect to file suit in either of the two courts respecting property falling within Laikipia County.

18. The court is therefore of the opinion that the trial court erred in law in declining to entertain the Appellant's suit on account of lack of territorial jurisdiction. The court finds and holds that the Magistrates' Courts at Nyahururu do have jurisdiction to entertain the Appellant's suit hence it is not necessary to have the same transferred to Nanyuki Law Courts for trial and disposal. Even if there were previous proceedings before the Land Disputes Tribunal at Nanyuki, that could not affect the jurisdiction of the courts at Nyahururu from entertaining the suit **under Section 12 of the Civil Procedure Act (Cap. 21)**

**(b) Who shall bear the costs of the appeal**

19. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. However, the court is of the opinion that since the appeal was occasioned by the error on the part of the trial court in declining jurisdiction and the dispute between the parties is yet to be heard, each party should bear his own costs.

**G. CONCLUSION AND DISPOSAL**

20. The upshot of the foregoing is that the court finds merit in the Appellant's appeal. Accordingly, the court makes the following orders for disposal thereof:

**(a) The appeal be and is hereby allowed.**

**(b) The ruling and order of the trial court dated 12<sup>th</sup> September, 2019 declining jurisdiction in Nyahururu MC L & E No. 264 of 2018 be and is hereby set aside.**

**(c) The Respondents' notice of preliminary objection dated 11<sup>th</sup> March, 2019 be and is hereby dismissed with costs to the Appellant.**

**(d) Each party shall bear his own costs of the appeal.**

21. It is so ordered.

**RULING DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 10<sup>TH</sup> DAY OF JUNE 2021 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

Mr. Kinyua Njogu for the Appellant

Ms. Miriti holding brief for Mr. Nderi for the Respondents

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**Y. M. ANGIMA**

**JUDGE**