REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL CASE NO. 40 OF 2019

JOSEPH M'IMPWI M'MAUTA.....APPELLANT

VERSUS

RUTH NKIROTE GITONGA .....1ST RESPONDENT

NAOMI KABOBOKI GITONGA.....2ND RESPONDENT

JUDGMENT

(Being an appeal from the Judgement and Decree of Hon. G.N. WAKAHIU Chief Magistrate Maua in CMCC No. 149 of 2013 delivered on 27th December 2018)

Summary of Facts

By a Plaint dated 06th October 2013, the Respondents herein (then Plaintiffs) sued the Appellant (then Defendant) for unlawful entry and damage to the crops growing on Land Parcel No. 9351 Upper Athiru Gaiti 'C' Adjudication Section, in which the Respondents are recognized as owners in common. The Plaintiffs thus sought an award of special damages amounting to the sum of One Hundred and Twenty Kenya Shillings (Ksh. 120,000), being the value of the crops damaged by the Appellant. The Appellant filed his defence on 04th November 2013 and denied the Respondents allegations in toto.

The matter was heard and determined in the Chief Magistrate's court at Maua in Civil case no. 149 of 2013. In the judgement issued on 27th December 2018, the trial court found in favour of the Respondents and granted an award of the special damages sought, amounting to One Hundred and Twenty Kenya Shillings (Ksh. 120,000)

Issues for Determination

Aggrieved by the judgement of the trial court, the Appellant herein mounted the present appeal, lodging his memorandum of appeal on 07th February 2019. The Appellant set out five grounds of appeal as follows:

1. That the learned Magistrate erred in law in holding that the Respondents had proved their case on a balance of probabilities;

2. That the learned Magistrate erred in law and fact in failing to consider the Appellant's evidence before arriving at his decision;

3. That the learned Magistrate erred in law and fact in awarding the Respondents special damages of Ksh. 120,000 which had not been proved to the required standard;

4.That the learned Magistrate erred in law and fact in holding that the Respondents had proved their case in view of glaring conclusion in the evidence of the Respondents;

5. That the Judgement is against the weight of the evidence before the trial Magistrate.

Submissions of counsels for the Appellant and Respondent

The Appellant filed his submissions on 3rd March 2020, while the Respondents filed theirs on 11th September 2020.

The Appellant's submissions reiterated the issues raised in the memorandum of appeal. He however added a new matter, that of the fact that the trial court lacked jurisdiction to hear and determine the matter by operation of ***Section 30(1) of the Land Adjudication Act***, which provides as follows:

> **Section 30 (1) -** Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.

The Respondents submitted that the Appellant could not be allowed to bring up a new matter not contained in the pleadings, referring to the ground of lack of jurisdiction raised by the Appellant. They further contended that the cited provision, while requiring consent from the adjudication officer, could not override the provisions of ***Article 159 of the Constitution*** requiring for justice to be administered without undue regard to procedural technicalities.

Legal analysis and opinion

Before getting into the substance of the appeal, it is instructive to call to remembrance the duty to be borne by a court invited to consider a first appeal. The following authorities are instructive:

In ***Selle Vs Associated Motor Boat Co. [1968] EA 123***, the legal parameters and considerations for guiding a court of first appeal were set out as follows:

> "The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

Further guidance was given by the Court of Appeal decision in ***Ephantus Mwangi and Another Vs Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278 :***

> "A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.

From the foregoing, the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the trial court, to analyze them and to arrive upon its independent conclusion, but always bearing in mind that the trial court had the advantage of seeing and hearing the parties.

Now, to the substance of the appeal. The Appellant has set five grounds of appeal. To my mind, there are two issues requiring determination by the court:First, whether the Appellant's ground, raised in his submissions but lacking in the memorandum of appeal can be entertained. Secondly, whether the Respondents were able to prove their case on a balance of probabilities.

It is trite law that parties are bound by their pleadings. This allows for certainty on the matters to which the opposing party ought to address its mind and eventually helps in laying out the framework of matters requiring determination by the court. See - ***Gichinga Kibutha Vs Caroline Nduku [2018] e KLR,*** where the Court held as follows:

> **"**It goes without saying that a party is bound by their own pleadings and the evidence they adduce in court. The purpose of pleadings is to ascertain with clarity the matters on which parties disagree and points of agreement so as to ascertain matters for determination."

See also the Court of Appeal's decision in ***Mohamed Fugicha Vs Methodist Church in Kenya, CA No. 22 of 2015*** where the court described the purpose of pleadings as follows*:*

> "We apprehend that the primary purpose of pleadings is to communicate with an appreciable degree of certainty and clarity the complaints that a pleader brings before the court and to serve as sufficient notice to the party impleaded to enable him to know what case to answer."

That said, there are very limited instances in which an appellate court is granted discretion to allow for the introduction of new matters at the appellate stage. One such instance is where a question of jurisdiction is raised. The authority for this position is traced to the following Court of Appeal decisions:

Kenya Ports Authority Vs Modern Holdings [E.A] Limited [2017] e KLR, where the court rendered itself thus:

> "We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised: at any time, in any manner, even for the

first time on appeal, or even viva voce and indeed, even by the Court itself-provided only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard."

Adero & Another Vs Ulinzi Sacco Society Limited ***[2002] 1 KLR 577,*** quite sufficiently summarized the law on jurisdiction as follows;

"1……..

2. The jurisdiction either exists or does not ab initio and the non-constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction.

3. Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.

4. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.

5. Where a cause is filed in court without jurisdiction, there is no power on that court to transfer it to a court of competent jurisdiction.

6. ……..

7. ……..."

The answer then is that the question of jurisdiction raised by the Appellant is so fundamentally so that, despite being a newly raised point, demands to be heard and determined.

The Appellant's view is that ***Section 30(1) of the Land Adjudication Act (Cap 284***) robbed the lower court jurisdiction to hear and determine the plaint as filed. The Section is reproduced below for consideration:

Section 30 (1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.

Now, there is no question that the land in question in the case is one that is under adjudication and whose adjudication process is yet to be finalized. There is a long line of judicial authority to the effect that *Section 30(1) of the Land Adjudication Act (Cap 284)* sets out a mandatory requirement which must be observed by litigants. See the decisions in:

Reuben Mwongera M'Itelekwa Vs Paul Kigea Nabea (2014) e KLR, where the court held as follows:

"There is no argument regarding the fact that the adjudication register for the adjudication section where the suit land is situated had not become final in all aspects under section 29 (3) of the land adjudication act at the time when the suit was filed. An examination of the court records reveals that a consent from the land adjudication officer was not annexed to the suit documents when his suit was filed. The plaintiff has annexed to his further supporting affidavit a consent from the District land adjudication officer dated 27th June 2011. The said consent concerns parcel No's 44/9, 6/27, 4946 and 6323. Parcel No. 372 is not mentioned. The requirement for consent to be granted by the land adjudication officer before a suit can be filed is a statutory requirement. It cannot be considered a procedural technicality. It is not a mere technicality. It is a legal issue. In accordance with section 30 of the Land Adjudication Act this court and any other court should not entertain any suit filed except with the consent of the adjudication officer until the register for that adjudication section has become final. Section 8(1) of the land consolidation act directs that no recognizance should be taken of any suit appertaining to an adjudication area unless there was prior consent in writing of the adjudication officer. Section 8(2) requires officers of all courts to be satisfied that the appropriate consent has been granted by the land adjudication officer before issuing any plaint or other legal process for the institution or continuance of proceedings prohibited by section 8 (1)".

Justus Ntuiti Vs Mwirichia Kaumbuthu (2004) e KLR, where **Onyancha J.** considered the application of ***Sections 29 and 30 of the land Adjudication Act*** and observed as follows:-

"The way I understand (section 30) is that no person shall institute a Civil Case in court and no court shall entertain a case with an interest in a place of land in a section which has been declared an adjudication section under section 5 of the Act Except with the consent of the adjudication officer or until the adjudication record has been declared finalized."

Kilusi Julius Sile & 60 others versus Chairperson, Oloirien ***Adjudication section "B" Committee & 3 Others (2016) e K.L.R*** *where* **Mutungi J** *held that:-*

"**……** it is patently clear that the courts have held they have no jurisdiction to deal with a dispute where the process of adjudication is ongoing unless the adjudication officer has under section 30(1) of the Act given his consent for the party to institute court proceedings. No such consent was granted by the Adjudication Officer to the petitioners to enable these proceedings to be brought. In the present matter there is no doubt that the process of adjudication is ongoing and that the Adjudication register has not been closed and/or published. The court in the premises cannot properly get seized of this matter. It lacks jurisdiction to deal with

the matter."

The question now, is whether, the present case involves an interest in land. ***Section 2 of the Land Adjudication Act (Cap 284)*** defines an interest in land as follows:

> "In relation to land, includes absolute ownership of the land and any right or interest in or over the land which is capable of being registered under the Registered Land Act (Cap. 300)."

The Respondent's claim and resultant award granted was for the damages incurred by the Appellant's destruction of crops belonging to the Respondents. Clearly, this was not a claim belonging to the category barred by *Section 30 of the Land Adjudication Act (Cap 284).*

See the decision in ***Reuben Mwongela M'itelekwa (Suing as the Legal Representative of the Estate of M'itelekwa M'mucheke Naituri alias M'itelekwa Mucheke) Vs Paul Kigea Nabea & 2 others [2019] e KLR:***

> "Thus as long as a claimant desires that there be a determination regarding a right and interest in land, **YET** a consent would certainly be required even in the filing of petitions, but in other disputes, the consent is not required."

On the first issue, the court holds that a consent was not required as the nature of the dispute was not one relating to a registrable interest over land, but a destruction of the Respondent's crops on the land.

On the second issue, the Respondents were required to support their assertion that the Appellant indeed is the one who occasioned a damage to their crops and were further required to specifically prove the damages prayed.

The Respondents called PW3 Kepher Mutethia Gitonga who was present on the property and witnessed the Appellant running over the Respondents' crops and uprooting them. The 1st Respondent says she spoke to the Appellant over the phone at the time when he was manning the tractor and destroying the crops and pleaded with him to stop. Nothing in the defence nor in the Appellant's witness statements controverted this evidence. In fact, save for the blanket denial in the defence, the issue of the destroyed crops does not feature anywhere else in the Appellant's submissions.

The Court is guided by the decision in ***Edward Muriga Through Stanley Muriga Vs Nathaniel D. Schulter Civil Appeal No. 23 of 1997*** where it was observed that:

> "In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations…Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence".

The Respondents did indeed prove that the damage on their crops was visited on them by the Appellant and also filed the Ward's Agricultural Officer's report on the computation of the damage in aid of the claimed damages of One Hundred and Twenty Kenya Shillings (Ksh. 120,000).

In the end, it is my finding that there is nothing in the Appeal to cause the present court to disturb the judgement and decree given by the trial court and that therefore the appeal must fail. Costs are awarded to the Respondents.

DATED, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 28TH DAY OF JULY, 2021

…….…….

E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Nyamongeri for the Respondent

2. Appellant/Advocate- Absent

3. Fardowsa –Court Assistant