



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC APPEAL CASE NO. 14 OF 2020

CHARLES ONYANGO MENYA..... APPELLANT

VERSUS

KENYA FOREST SERVICERESPONDENT

(Being an appeal from the Judgment and Decree of Hon. M. Obiero (PM now SPM) delivered and dated 14th day of July 2020 in the original Migori CM's Court Environment & Land Case No. 2 of 2018)

JUDGMENT

A. INTRODUCTION

1. The instant appeal is from the Judgment and decree of the trial court (Honourable M. Obiero PM now SPM) rendered on 14th July 2020 and issued on 28th July 2020 respectively in the original Migori Chief Magistrate's Court Land and Environment case No. 2 of 2018 where the trial court determined the suit thus :-

- a) That the plaintiff suit is hereby struck out for want of jurisdiction.*
- b) The defendant's counter claim be and is hereby dismissed for lack of merits.*
- c) Each party to bear the costs of this suit.*

2. The appellant, Charles Onyango Menya who was the plaintiff before the trial court was dissatisfied with the trial court's decision. Therefore, as provided for under section 26 (4) of the Environment and Land Court (ELC) Act, 2015 (2011), he filed the present appeal.

3. The appellant Charles Onyango Menya is represented by M/s Oguttu Mboya, Ochwal and partners Advocates formerly M/s Oguttu ,Ochwangi, Ochwal and company Advocates.

4. The respondent Kenya Forest Service was the defendant before the trial court and is represented by M/s Omulele and Tollo Advocates.

5. Initially, the suit was lodged before this court. On 24th January 2018, the suit was transferred to the trial court for hearing and determination bearing in mind the provisions of the law including **section 26 (3) and (4) of the Environment and Land Court Act, 2015 (2011)-The ELC Act.** and sections 11 and 18 of the Civil Procedure Act Chapter 21 Laws of Kenya.

B. THE GIST OF THE APPELLANT'S CASE BEFORE THE TRIAL COURT

6. By a plaint dated 2nd December 2015 and duly filed in court on even date, the appellant sued the respondent for the orders infra:-

- a) Declaration that LR NO. SUNA EAST/KAKRAO/842 measuring approximately 1.54 hectares in area (The suit land herein) lawfully belongs to the plaintiff.
- b) Declaration that the disputed portion which has been encroached upon and currently under the possession of the defendant and measuring approximately 3 acres, forms part and parcel of the suit land, registered in and belonging to the plaintiff
- c) Permanent injunction restraining the defendant either by herself, agent's servants and/or anyone claiming under the defendant from re-entering, trespassing onto planting trees, interfering with and/or in any other manner dealing with the disputed portion of the suit land.

d) General damages for trespass and /or mesne profits

e) Such further and/or other relief as the honourable court may deem fit and expedient so to grant.

7. It was the appellant's complaint that he is the registered proprietor of the suit land after he obtained a grant of letters of administration intestate and a certificate of confirmation the grant in respect of the estate of Marcus Peter Midiwo Menya (deceased) in Kisii High Court Succession Cause No. 98 of 1992 (PEXhibits 1 and 2 respectively). That in or about the month of June, 2008, the respondent who is the registered proprietor of LR NO. SUNA EAST/KAKRAO/841 measuring approximately 27.29 hectares in area (The other parcel of land) sharing a common boundary with the suit land, trespassed into and excised a substantial portion of the suit land measuring approximately three (3) acres in area alleging that the same forms part of the other parcel of land. As a result, it precipitated the suit.

8. On 26th March 2019, the appellant testified before the trial court as per his statement which was adopted as part of his evidence. He made reference to PEXhibits 1,2 and other documents, among them, a mutation dated 14th November 1973 (PEXhibit 3) a copy of proceedings between the appellant and the respondent in Migori District Land Disputes Tribunal (Suba East Division) case No. Suna East/Kakarao /542 (PEXhibit 5) and Migori County Land Registrar's letter dated 2nd September 2014 (PEXhibit 7). He called the Land Registrar, Philip Makini (PW2) in support of his claim. His reply to defence and defence to counterclaim dated 12th September 2017 are noted accordingly.

C. THE GIST OF THE RESPONDENT'S CASE BEFORE THE TRIAL COURT

9. The respondent denied the appellant's claim by way of a statement of defence and counterclaim dated 21st August 2017 and filed in court on 24th August 2017. The respondent stated that the disputed portion which borders the other parcel of land had been handed over to the then Forest Department by the then South Nyanza County Council in the year 1983 and was subsequently gazetted vide legal notice number 219 of 1992 as Magina Forest.

10. The respondent further stated that the disputed portion does not belong to the appellant since it was allocated to the respondent for the sole purpose of conservation and forest management being the respondent's mandate. That after the award as per PEXhibit 5, it was discovered that the green card from the Land Registrar indicates that the suit land was not registered.

11. On that account, the respondent sought that the appellant's suit be dismissed with costs to the respondent and that Judgment be entered against the appellant for :-

a) Declaration that the other parcel of land reference number Suna East /Kakrao/841 measuring 27.29 hectares is inclusive of the 3 acres being the suit land and that it is lawfully owned by the defendant as Miguna Forest;

b) A permanent injunction restraining the defendant either by himself, his agents, servants and/or employees and anyone claiming under the defendant from re-entering, trespassing onto, interfering with in any manner with the disputed portion of the other parcel of land;

c) A declaration that the title of the suit land of issued to the plaintiff was irregularly and illegally obtained;

d) The subsequent cancellation of the plaintiff's title parcel No. Suna East/Kakrao/842 giving ownership rights to him of a portion of land that is rightfully and lawfully owned by the defendant under title of the other parcel of land ; and

e) That the plaintiff's suit be dismissed with costs.

12. DW1, Frank Juma Enock, a land surveyor with the respondent testified and relied on his statement dated 22nd January 2020 which was adopted as part of this evidence. He told the court, inter alia, that the other parcel of land was allocated by the Central Government to the respondent since the year 1974. He produced a list of documents (DEXhibits 1 to 9), a supplementary list of documents dated 13th March 2007 (DEXhibit 10) and Land Disputes Tribunal Proceedings (DEXhibit 11), to fortify the respondent's case.

D. THE TRIAL COURT'S FINDINGS IN BRIEF

13. In his Judgment, the learned trial Magistrate held that the court had no jurisdiction to hear and determine the suit in terms of the provision of **section 18 (2) of the Land Registration Act, 2016 (2012)-The LRA herein**. That the boundaries were not fixed by the Land Registrar and surveyor, hence the appellant should have implemented the decision of the Land Disputes Tribunal (LDT) before filing the suit at the trial court.

14. The learned trial magistrate further held that the matter is res judicata by dint of the court's ruling on a preliminary objection on 14th August 2018. That the subdivision and transfer of the disputed portion of land in favour of the appellant was procedural and legal hence the court arrived at a finding as noted in paragraph 1 hereinabove.

E. THE INSTANT APPEAL

15. This appellant commenced this appeal by way of a memorandum of appeal dated 22nd May 2020 beaoned on grounds 1 to 9 stated on it's face. The grounds include; that boundaries had been confirmed and that the court had jurisdiction over the matter.

16. So, the appellant proposed thus;-

- i. The Judgment and Decree of the learned trial magistrate dated 14th day of May 2020, be set aside and/or quashed as far for as the striking of the appellant's case is concerned.
- ii. The Honourable court be pleased to substitute in lieu of the judgment dated 14th May 2020, an order allowing the appellant's claims in terms of the plaint dated 2nd December 2015 vide Migori ELC case No. 2 of 2018.
- iii. The respondent herein be condemned to bear costs incurred in the subordinate court.
- iv. Cost of the Appeal be borne by the respondent
- v. Such further and /or other orders be granted as this honourable court may deem fit and expedient.

17. The appeal was admitted on 21st September 2020.

18. On 5th February 2021, this court ordered and directed that the appeal be heard by way of written submissions.

19. Accordingly, Learned Counsel for the appellant filed submissions dated 30th April 2021 on 7th May 2021. Counsel submitted on grounds 1 to 9 of this appeal and cited authorities namely **Samuel Kamau Macharia & Anor –vs- Kenya Commercial Bank Ltd. & 2 others, 2012 eKLR, Provincial Insurance Co. Ltd. –vs- Modercai Mwanga Nandwa, Kisumu CA CA No. 179 of 1995, James Muniu Mucheru-vs- National Bank of Kenya Ltd., 2019 eKLR and Republic –vs- Capital Markets Authority & 2 others ex-parte Fredrick Tshofa Mueni, 2017 eKLR** in support of the submissions. In conclusion, counsel urged the court to allow the appeal with costs to the appellant.

20. Learned Counsel for the Respondent did not file submissions herein.

F. POINTS FOR DETERMINATION

21. Having considered the above, I do not lose sight of the six (6) issues identified at page seven (7) of the trial court's judgment shown in page 43 of the record of appeal. The issues include; whether the trial court had the jurisdiction to hear and determine the matter and whether the parties were entitled to the orders sought in their respective pleadings. I further, consider the trial court's findings on the issues in the negative, at pages 10 to 14 of the judgment as disclosed at pages 46 to 50 of the record of appeal.

22. In the foregone, I am of the considered view that the issues for discussion in this appeal are compressed to-

- a) Grounds 1, 2,3, 4, and 5 as set out on the face of the memorandum of appeal,
- b) Grounds 6, 7, 8 and 9 as stated on the face of the said memorandum.
- c) Are the orders proposed in the same memorandum as pointed out in paragraph 16 hereinabove tenable?

G . DISCUSSION AND DETERMINATION

23. I am guided by the case of Peterson –vs-Sunday Post (1958) EA 424 at 429 where Sir Kenneth O'Connor remarked-

“The appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution...”

24. In the case of **Selle-vs-Associated Motor Boat Co. Ltd (1968) EA 123**, it was held that the appellate court is not bound to follow the trial court's findings of fact if it appears either; the court failed to take account particular circumstances or probabilities or if the impression of the demeanour of witnesses is inconsistent with the evidence on record.

25. On the issue of jurisdiction, The **Halsbury's Laws of England 4th Edition Volume 9 at page 350** defines the term as-

“...the authority which the court has to decide matters that are litigated before it or take cognizance of matters prosecuted in a formal way for decision...” (The same was reiterated by **John Beecroft Saunders in his treatise words and phrases Legally Defined Volume 3 at page 113**)

26. In the Supreme Court of the Republic of Kenya decision in the case of **Samwel Kamau Macharia and another-vs-Kenya Commercial Bank Ltd and others (2012) eKLR**, it was held that-

“A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law....”

27. This Court's jurisdiction is anchored in **Article 162 (2) (b) of the Constitution of Kenya 2010**; see also the Supreme Court of the Republic of Kenya decision in **Republic-vs-Karisa Chengo and 2-others (2017) eKLR**.

28. Section 26 (4) of the ELC Act, provides that subject to the above Article, the Magistrate appointed under subsection (3) of the ELC Act has the jurisdiction and power to handle environment and land cases stated thereunder. Under section 9 (a) of the Magistrates' Courts Act No. 26 of 2015, the magistrate is also empowered to hear and determine environment and land cases.

29. **Section 18 of the LRA** provides for boundaries and **subsection (2) thereof** reads-

“The court should not entertain any action or other proceedings relating to dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section”

30. The appellant asserted that boundaries of the suit land and the other parcel of land were determined. That thus, the court has jurisdiction over this dispute. The respondent contended otherwise.

31. The trial court's findings were that that by award No. 5 of the Migori District Land Disputes Tribunal as appearing at pages 45 and 125 of the record of appeal, the parties were to appear before the District Land Registrar and the District surveyor Migori for assistance in case of any boundary problem. That the Land Registrar issued several summons to the parties but was unable to resolve the dispute.

32. Under Section 19 of the LRA, it is the Land Registrar who is mandated to establish and fix boundaries of registered land; see also the decision in **Andrew Marigwa-vs- Josephat Ondieki Kebati (2017) eKLR** and this court's decision in **Registered Trustees Legio Maria Africa Church Mission-vs- Simeon Nyamweya Obwocha (2018) eKLR**, among other authorities.

33. The Appellant (PW1) referred to the Land Registrar's report dated 2nd September 2014 (PEXhibit 7). During cross examination, he stated in part-

“The Tribunal asked the surveyor and the Land Registrar to mark boundary. The same has not been done.....The recommendation of the tribunal has not been implemented. We have sued the Defendants because they have placed boundary on land.....The Land Registrar and the surveyor went to the ground.....”

34. PW2, PHILIP MAKINI Land Registrar Migori testified that-

“There was a dispute about a boundary. The complainant was Charles Onyango Menya. There was a visit to the ground on 02/09/2014. The team leader was K.E.M Bosire who was the Land Registrar. I can see the reportExhibit 7....”

35. DW1, a surveyor with the Respondent made reference to Migori District Land Disputes Tribunal's proceedings dated 13th March 2007 (DEXhibit 11) in his testimony. He stated:

“...In survey, all the parties involved must be engaged. The boundaries must be correctly marked....”

36. Quite clearly, the Land Registrar's report (PEXhibit 7) as captured at page 131 of the record of appeal directed that;

“...the boundary dispute initially lodged before the Land Registrar should proceed as intended to resolve the matter once and for all”

37. On that score, the emerging puzzle is infra;

- a) Did the Land Registrar proceed and determine the boundary dispute as envisioned in PEXhibit 7, sections 18 and 19 of the LRA?
- b) If so, where is the determination?

38. In light of the foregoing, it is the finding of this court that the learned trial magistrate correctly applied the principles of fact and the law in arriving at the finding that he had no jurisdiction over the instant dispute. To that extent, there is no reason to fault his informed finding.

39. As regards grounds 6, 7, 8 and 9 of this appeal, I subscribe to the celebrated case of Owners of Motor Vessel Lillian “S”-VS- Caltex oil (Kenya) Ltd (1989) KLR 1 where the late Nyarangi JA held;

“...Jurisdiction is everything. Without jurisdiction....a court has no power to take one more step...”

40. Interestingly, the learned trial magistrate proceeded to determine the other issues identified in his judgment after arriving at an informed finding as pointed out at paragraph 38 hereinabove. Plainly, he had no power to take one more step. Therefore, I find him not faultless in the determination of issues (ii) to ((v) in the judgment as shown at pages 47 to 50 of the record appeal herein.

41. To that end, the instant appeal initiated by way of a memorandum of appeal dated 22nd May 2020 and duly filed herein on 28th May 2020 is partially merited. In the circumstances, I find it superfluous to examine the other grounds of appeal which do not capture the issue of the

trial court's jurisdiction as regards this matter.

42. A fortiori, I make the final orders as follows;

a) This appeal is partially allowed.

b) Pursuant to sections 1A, 1B, 3, 3A and 78 (1)(e) of the Civil Procedure Act Chapter 21 Laws of Kenya alongside section 19 (20) of the ELC Act and in view of the character of the dispute, it is hereby ordered and directed that there be a new trial of the suit before a different magistrate in Migori chief magistrate's court on priority basis and the Land Registrar's report as envisioned in paragraphs 35,36 and 37 herein above, be availed at the trial accordingly.

c) Parties to bear their own Costs of this appeal and the court below as I subscribe to the decision in **Samwel Kamau Macharia** case (supra) and by dint of the proviso to section 27 (1) of the Civil Procedure Act Chapter 21 Laws of Kenya.

DELIVERED, DATED AND SIGNED AT HOMA BAY VIA EMAIL PURSUANT TO ARTICLE 7 (3) (B) OF THE CONSTITUTION OF KENYA, 2010 AND THE PARTIES WERE DULY NOTIFIED, THIS 29TH DAY OF SEPTEMBER 2021

G.M.A. ONGONDO

JUDGE