



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC. APPEAL NO. 26 OF 2019

(Formerly Kajiado Civil Appeal No. 3 of 2019)

STEPHEN W. MAINA.....APPELLANT

VERSUS

FRANCIS OTISO ONCHOMBA.....1ST RESPONDENT

COUNTY COUNCIL OF OLKEJUADO.....2ND RESPONDENT

(Being an Appeal from the Ruling and Order of Principal Magistrate at Kajiado

Hon. P M Okuche in Kajiado CMCC No. 347 of 2009, delivered

by Hon. Margaret Kasera, Senior Principal Magistrate

on 21st December, 2018)

JUDGEMENT

Introduction

By a Memorandum of Appeal dated the 16th January, 2019, the Appellant appeals against the whole of the Ruling delivered by Hon Margaret Kasera on behalf of Hon. P M Okuche at Kajiado Chief Magistrate's Court on the 21st December, 2018. The genesis of this appeal is the Ruling of the Principal Magistrate Hon. P M Okuche in Kajiado CMCC No. 347 of 2009, where the trial court proceeded to strike out the Appellant's (Plaintiff's) suit with costs to the 1st Respondent (Defendant) citing lack of jurisdiction.

The Appellant being dissatisfied by the whole Ruling filed an appeal at the Kajiado High Court which matter was later transferred to the ELC Kajiado on 11th November, 2009.

The Memorandum of Appeal contained the following grounds;

- i. The learned trial Magistrate erred in law and fact in holding that the Honourable Court has no jurisdiction in this matter.
- ii. The learned trial Magistrate erred in law and in fact in holding that the matter is a boundary dispute under Section 18 of the Land Registration Act No. 3 of 2012.
- iii. The Learned trial Magistrate erred in law and in fact by upholding the Preliminary Objection that did not raise a pure point of law but mixed point of law and fact.
- iv. The learned trial Magistrate erred in law by upholding a Preliminary Objection that raised points of law and fact and not pure point of law.

REASONS WHEREFORE the Appellant prays that: -

- a. The Appeal be allowed.
- b. This Honourable Court be pleased to set aside the orders of the lower court striking out the suit and reinstate the suit for hearing.
- c. The Appellant be awarded the costs of this Appeal.
- d. Any other order in the interests of justice.

The Appeal was canvassed by way of written submissions.

Submissions

Appellant's Submissions

The Appellant in his submissions contended that the Preliminary Objection was not merited and the trial magistrate erred in upholding it. He contended that a Preliminary Objection must first, raise a pure point of law based on the ascertained facts in a matter and not on evidence. He reiterated that in the lower court suit, the 1st Respondent raised a Preliminary Objection that the said court did not have jurisdiction to hear the matter in view of **Section 18(2)** of the **Land Registration Act No. 3 of 2012**. Further, the provision of **Section 18(2)** of the **Land Registration Act No. 3 of 2012** serves to restrict the jurisdiction of the Court by committing boundary disputes to the Land Registrar for determination in the first instance. He insists the claim was not based on a boundary dispute but founded on the wrongful occupation of the suit property by the 1st Respondent. The trial magistrate erred by holding that the matter before court was a boundary dispute, which fact does not arise by clear implication out of the pleadings. He avers that the preliminary objection raised by the 1st Respondent was not only wrongly formulated but was also founded on the wrong interpretation of the law as the suit property herein is an **unregistered land** since the Appellant only holds for the time being a letter of allotment as proof of ownership of the suit property. Further, **Section 18(2)** of the **Land Registration Act No. 3 of 2012** vests the jurisdiction to determine boundary disputes relating to registered land on the Land Registrar. This fact alone ousts the jurisdiction of the Land Registrar to hear any matter related to the suit property as long as the same remains unregistered. He explained that a letter of allotment is proof that a party is in the process of having the property that he/she was allotted, registered and a certificate of title issued in respect of the land. He argued that the suit property although not yet registered belonged to the Appellant by dint of him holding the letter of allotment, which has never been revoked and/or cancelled to date. He stated that he had proved trespass to his land. He surmised that the Preliminary Objection was not competent as it was not only blurred and murred with factual issues but also founded on the wrong interpretation of the law. He was categorical that the Magistrates' Court had jurisdiction to hear and determine this dispute, sought for the Appeal to be allowed with costs.

To buttress his averments, he relied on the following decisions: **J.N. & 5 others v Board of Management St G. School Nairobi & another (2017) eKLR**; **Omondi vs. National Bank of Kenya Ltd & Others [2001] KLR 579; [2001] 1 EA 177**; **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**; **Oraro vs. Mbaja (2005) 1 KLR 141**, which was cited with approval in the case of **J.N. & 5 others v Board of Management St G. School Nairobi & another (2017) eKLR**; **Republic versus City Council of Nairobi & 3 Others (2014) eKLR**, which was cited with approval in the case of **Joseph Kagunya v Boniface K. Mulli & 3 others [2018] eKLR**; **Joseph N.K Arap Ngok vs Justice Moiwo ole Keiuwa & 4 Others CA Civil Appl. No. 60 of 1996**, which was cited with approval in the case of **David Wahome Gitonga (Suing as the legal Representative of the Estate of the Late Lucy Nyokabi Kiarie) v Mary Nyakio Kanini & 3 others [2020] eKLR**; **M'Mukanya v M'Mbijiwe (1984) KLR 761**, which was cited with approval in **Municipal Council of Eldoret v Titus Gatitu Njau [2020] eKLR**; **NRB Petition No. 72 of 2013, Edward Mwaniki Gatura & Another Vs The AG & two others**; **Kibwana Ali Karisa & another v Said Hamisi Mohamed & 3 others [2015] eKLR**; and **Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR**.

1st Respondent's Submissions

He submitted that the lower court was not seized with jurisdiction to hear and determine this matter as it was a boundary dispute. Further from the Plaintiff, the dispute therein was a boundary dispute which had to be first ascertained by the Land Registrar before the court could be seized of the matter. To support his arguments, he relied on sections 18 and 19 of the **Land Registration Act** as well as the following decisions: **Munywoki Musuva Ngao vs. Mutua Mbinda & Another (2019) eKLR** and **George Kamau Macharia vs. Dexka Limited (2019) eKLR**.

Analysis and Determination

Upon consideration of the materials presented in respect to the Appeal herein including the Memorandum of Appeal, Record of Appeal and the rivaling submissions, I have summarized the following issues for determination:

- Whether the Preliminary Objection culminating in the striking out of the Kajiado CMCC No. 347 of 2009 was merited.
- Whether the lower court was seized with jurisdiction to hear and determine the Kajiado CMCC No. 347 of 2009.
- Whether the Appeal is merited.
- Who should bear the costs of the Appeal.

Before I proceed to deal with all the aforementioned issues jointly, I wish to highlight the excerpt of the prayers sought in the Further Re Amended Plaintiff dated the 20th August, 2014 in Kajiado CMCC No. 347 of 2009.

a) A declaration that the Plaintiff is entitled to exclusive uninterrupted right of possession and occupation of Plot No. 315 Residential Noonkopir T. Centre and that the 1st Defendant is a trespasser and not entitled to remain in the property and should therefore give vacant possession of the suit property to the Plaintiff.

b) The 2nd Defendant be and is hereby ordered to provide a comprehensive and satisfactory explanation/report as to whether PLOT NO. 315/RESIDENTIAL – NOONKOPIR T. CENTRE and PLOT NO. 2603/RESIDENTIAL - NOONKOPIR T. CENTRE is one and the same property.

c) An order be and is hereby issued by the Honourable Court for cancellation of the letter of allotment of PLOT NO. 2603/RESIDENTIAL - NOONKOPIR T. CENTRE by the 2nd Defendant to the 1st Defendant if the same is allegedly PLOT NO. 315/ RESIDENTIAL – NOONKOPIR T. CENTRE.

d) A permanent injunction restraining the 1st Plaintiff, his servants, agents or otherwise howsoever from constructing, developing, interfering, remaining on or continuing in occupation of the suit property.

e) Kshs. 50,000/= being the costs of the demolished house and the fence and general damages for trespass.

f) Costs of this suit and interest.

g) Any other or further relief that the Honourable Court may deem fit to grant.

As per the impugned Ruling delivered on 21st December, 2018, the trial Magistrate proceeded to uphold the 1st Respondent' Preliminary Objection and struck off the said suit with costs on the ground that the court did not have jurisdiction to deal with the said matter as the issues in contention was a boundary dispute. This is what culminated in this Appeal.

I note in this instance, both the Appellant and 1st Respondent hold their respective letters of allotment to their plots. Further, that none of them holds a Certificate of Title or Lease in respect to their plots. From the impugned Ruling, I note the trial Magistrate proceeded to hold that the matter in contention was a boundary dispute and should hence be referred to the Land Registrar in accordance with section 18 of the Land Registration Act. Section 18 of the Land Registration Act provides that: **'Boundaries (1) Except where, in accordance with Section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel. (2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section. (3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary: Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act, (Cap. 299).'**

From a reading of this section, it is clear that the Land Registrar has mandate to only deal with boundaries for registered land, which in essence means Land in which the owner holds a Title or Lease. Insofar as I concur with the 1st Respondent's contention that boundary disputes have to be first determined by the Land Registrar, however from a reading of the interpretation section in the Land Registration Act as well as Section 7 of the said Act, since neither the Appellant nor the 1st Respondent held Certificates of Titles or Leases to their respective plots; there was hence no Land Register for the said plots. Further, on perusal of the Further re amended Plaintiff, I note it raises other issues including identification of the suit land; declaration on ownership of suit land, orders of injunction; cancellation of the 1st Respondent's Letter of Allotment as well as compensation. It is trite that Section 13 of the Environment and Land Court Act confers jurisdiction to this court and I opine that the issues raised in the Plaintiff are within the ambit of the jurisdiction of the ELC Court and the Magistrates mandated to deal with Land matters.

On the issue of the Preliminary Objection raised, I will refer to the case of **Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited (1969) EA 696**; where the Court held that **'A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.'**

While in the case of **Independent Electoral and Boundaries Commission V Jane Cheperenger & 2 Others Civil Application No. 36 of 2014**, the Supreme Court reiterated the principles set out in the aforementioned case and held as follows: **'A preliminary objection consists of a point of law which has to be pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.....it cannot be raised if any fact has to be ascertained of if what is sought is the exercise of judicial discretion.'**

Based on the facts before me while relying on the legal provisions cited above as well as associating myself with the quoted decisions, I find that the learned trial Magistrate erred in law and fact in holding that the Honourable Court had no jurisdiction in this matter including an interpretation that the lower court matter was a boundary dispute under Section 18 of the Land Registration Act No. 3 of 2012. I opine that the Preliminary Objection was founded on the wrong interpretation of the law as the suit property herein is an unregistered land since both parties only hold letters of allotment as proof of ownership of their respective plots. Further, **Section 18 (2) of the Land Registration Act No. 3 of 2012** vests the jurisdiction to determine boundary disputes relating to only registered land, on the Land Registrar. I further find that the Learned trial Magistrate erred in law and in fact by upholding the Preliminary Objection that did not raise a pure point of law but mixed point of law and fact as he failed to consider other prayers sought in the further re-amended Plaintiff. It is my considered view that the trial Magistrate ought to have been cautious in proceeding to strike out this case yet this was not a clear case.

I suffice to say that the Learned Magistrate wrongly interpreted section 18 of the Land Registration Act and erred in upholding the Preliminary Objection culminating in the striking out of the suit with costs.

It is against the foregoing that I find the Appeal merited and will allow it. I will proceed to set aside the Ruling of the Lower Court and make the following final orders:

i. The Appeal be and is hereby allowed.

ii. The Ruling and order of the lower court delivered on 21st December, 2018 striking out the Kajiado CMCC No. 347 of 2009 be and is hereby set aside and the said suit reinstated for hearing.

iii. The Appellant be and is hereby awarded the costs of this Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 21ST DAY OF OCTOBER, 2021

CHRISTINE OCHIENG

JUDGE