



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 129 OF 2019

CIOMATU M'IMULA.....APPELLANT

VERSUS

CHRISTINE MUTHONI KIRAMUNYA.....RESPONDENT

JUDGMENT

1. The appeal before the court is the one dated **19th November 2019** seeking to overturn the orders made by **Honourable AG Munene** in **Maua CMC ELC no. 102 of 2019** on **30th May 2019** declining jurisdiction over the matter.

2. The appellant has set out 6 grounds of appeal namely:

(i) The learned trial magistrate erred in law and in fact in that he failed to appreciate the facts and the dispute before him and came to wrong conclusion.

(ii) The learned trial magistrate erred in law and in fact to appreciate the fact that the appellant was and has been on the land in dispute for a period of over 80 years and developed the same, the land being her home.

(iii) The learned trial magistrate erred in law and in fact in failing to appreciate the provisions of the law of succession act, the environment and land court act and that the only way of handling the issue of possession and ownership was by way of filing environment and land suit as provided for in the law.

(iv) The ruling of the learned trial magistrate is against the weight of the evidence placed before him.

(v) The ruling of the learned trial magistrate is ban in law.

3. Directions were given by this court and through a consent parties have opted to hear the appeal by way of written submissions dated 22nd March and 29th March 2021 respectively.

Background

4. By a plaint dated **29th May 2019** the appellant sought for:-

A declaratory order against the respondent over Parcel No. Njia/Buri/Ruiri/2028 herein after the suit land claiming customary/ancestral trust; rights to occupy, adverse possession and permanent injunction barring and restraining the respondent from dealing with the suit land in breach of family, ancestral and customary law. Simultaneously the appellant brought a notice of motion dated 10th May 2019 seeking for inhibition and temporary orders restraining the respondent from evicting her from the suit land.

5. Attached to her supporting affidavit was a copy of a judgment delivered on **29th April 2019** arising out of High Court **Meru Succession Cause No. 351 of 2004** in which the court had revoked a grant issued in her favour and re-issued it and granted the suit land to the respondents wholly.

6. The learned trial magistrate who upon perusal declined the same for lack of jurisdiction and ordered the application be either filed in the High Court or Court of Appeal. This made the appellant move to this court.

7. The appellant submits the lower court had no basis in law to decline jurisdiction in limine and urges the court to look at the entire file and

establish that the issues before it were within its mandate by dint of **Article 162 2(b) of the Constitution**, the **Environment and Land Court Act** and **Magistrates Courts Act 2015**. The appellant relies on the case of **Stephen Waithaka Gatumbi administrator of the estate of Gatumbi (2017) eKLR**. The appellant prays the lower court order be set aside and a pretrial ordered.

8. On the other hand the respondent is of contrary opinion and submits the appeal lacks merits since the succession matter in the High Court on in which the appellant is aggrieved of its ruling or judgment, could not be challenged by filing the suit in a lower court.

9. The issue before this court is whether the lower court was right in declining jurisdiction **Section 7 of the Magistrate's Court Act** mandates a magistrate court to hear civil claims. This includes claims concerning land held Land and under Customary Tenure.

10. Similarly the **Judicature Act Cap 8 Laws of Kenya** under **Section 3 (2)** grants courts to be guided by African customary law in civil matters so long as its application is not inconsistent with any written law or repugnant to justice and morality.

11. Sections 7 and 38 of the **Limitations of Actions Act** Cap 22 allows parties to bring a case on adverse possession at the High Court..

12. **Order 37 Rule 7 of the Civil Procedure Rules** provides application under **Section 38 of the Limitations of Actions Act** shall be made by originating summons supported by an affidavit with a certified copy of the title deed in issue.

13. Due to the above provisions, ordinarily matters of adverse possession are traditionally filed in the High Court and with the enacted of **Environment and Land Court Act 2011** in the ELC Courts.

14. However **Section 26 (3) & (4) of Environment and Land Court Act and 9 of Magistrates Courts Act 2015** empowers the Chief Justice to gazette certain magistrates to preside over land and environment matters in their areas of jurisdiction provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in **Section 7 of the Magistrates Courts Act 2015**. The Chief Justice exercised those powers and issued **gazette notice No's 1472 dated 1st March 2016** **gazette notice No. 1475 dated 4th March 2016**, **gazette no. 11930 dated 5th December 2017** **gazette notice No. 2575 dated 28th February 2019** respectively.

15. Although **Section 38 (1) of the Limitation of Action Act** specifically refers to the High Court, construction of statutes require that laws be construed liberally and within the letter and their spirit of promulgation of our **Constitution 2010**.

16. There should be harmonious interpretation of our laws especially those predating the Constitution 2010 as provided roved under **Section 7 (1) of the sixth schedule of the Constitution**. It could not have the intention of the legislature to deprive such gazetted magistrates certain powers otherwise our ELC Courts would be clogged with many matters if all magistrates courts were to decline jurisdiction. Similarly such a strict interpretation would be against the concept of devolution of justice services, in line with **Article 6 (3)** as read together with **Article 48** of the Constitution as held by **Hon. Justice Dalmas O. Ohungo in Patrick Ndegwa Munyua vs Benjamin Kiira Mwangi & another (2020) eKLR**. The second issue which may have triggered the court is that the appellant had alluded to the fact that the matter had arisen out of a recent determination in a succession matter at the High Court Meru. Perhaps this is the reason the court made an order the appellant to either appeal to the Court of Appeal or move to the ELC Court. With greatest respect to the learned trial magistrate he misconstrued the law and fell into error. A cursory glance at the judgment in the succession matter indicates the issue before the trial court were never determined and hence it was premature to decline jurisdiction without giving the appellant an opportunity to be heard. (**See Isaac Kinyua & 3 Others -vs- Hellen Kaigongi (2018) eKLR**).

17. WHILE ELC Courts and High Court may have concurrent jurisdiction on the so-called mixed civil cases it has been the jurisdiction of the High Court in succession matters is limited to dispute between personal representatives and the deceased survivors, beneficiaries, and dependants. (**See Joseph Koori Ngugi -vs- Stephen Ndichu & Mukima (2017) eKLR, The Estate of Mbai Wainaina (deceased) 2015) eKLR, The Estate of Alice Mumbua Mutua (Deceased) 2017) eKLR, Joseph Kaberia Kumari -vs- Mwenda Muthaura (2021) eKLR**). Given the foregoing, I reach the conclusion issues pleaded by the appellant fell within the jurisdiction of the trial court.

18. The upshot is that the appeal herein is allowed with each party to bear its own costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 6TH DAY OF OCTOBER, 2021 IN PRESENCE OF:

Ojiambo for Appellant

Mburugu & Co. Advocates for Respondent

Court Clerk: Kananu

HON. C.K. NZILI

ELC JUDGE