



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 53 OF 2020

LAWRENCE MURUNGI.....APPELLANT

VERSUS

BONIFACE NGETU.....RESPONDENT

(Being an appeal from the Ruling of the Chief Magistrate's Court in Meru CMCC No. 247 of 1992 delivered on the 25th day of June, 2020)

JUDGMENT

1. By a Complaint dated 27th April 1992, the Appellant filed a case against the Respondent seeking a declaration that he is entitled to half share(s) in the two suit properties namely Abogeta/Kanyakine/595 and Abogeta/Upper/Kithangari/828. He also sought for a transfer of title to his name with respect to his said shares. He claimed that the properties were jointly purchased by him and the Respondent but were registered in the Respondent's name to be held in trust for both of them. His case was dismissed by the lower Court on 24th July 2017 for want of prosecution pursuant to the provisions of Order 17 Rule 2 (1) of the Civil Procedure Rules 2010. The said provision of law grants the Court powers to dismiss a suit in which no activity has taken place for more than one year.

2. The Appellant made an application dated 20th February 2020 seeking reinstatement of the suit but his application was dismissed by the Ruling of the Court delivered on 25th June 2020. Being dissatisfied with this Ruling, he has lodged the instant appeal raising seven grounds of appeal as per his memorandum of appeal dated 15th July 2020 as follows: -

- i) That the learned trial magistrate erred in law and fact in refusing to accept the explanations given by the Appellant that he failed to attend Court because he was not aware of the dates yet this was a sound explanation.***
- ii) That the learned trial magistrate erred in law in dismissing the explanation by the Appellant meaning that the Appellant was completely locked out of prosecuting the suit. The suit concerns land and the Appellant is very keen to be heard.***
- iii) That the learned magistrate erred in law in punishing the Appellant for the mistakes of his previous advocates who did not attend Court and did not notify him of hearing/mention dates.***
- iv) That the learned trial magistrate erred in law and fact in failing to uphold the rule to a fair trial and appreciate that the right to a fair trial is a constitutional right and has a very high value in our judicial system and that it can only be taken away in very exceptional circumstances.***
- v) That the learned trial magistrate erred in law and fact in failing to appreciate that the Appellant is an old man who depended wholly on his advocate but his advocate failed him terribly and as a result a miscarriage of justice occurred to the prejudice of the Appellant.***
- vi) That the learned trial magistrate erred in law and fact in failing to appreciate the history of the suit before dismissing the application.***
- vii) That the entire finding and ruling of the learned magistrate is bad and is against the law.***

3. The appeal was canvassed by way of written submissions.

Appellant's Submissions

4. The Appellant filed submissions dated 28th June 2021. He blames his former advocates for not notifying him of the hearing date and not notifying him of the dismissal of the suit. He urges that Section 3A of the Civil Procedure Act gives the Court inherent powers to make such orders as may be necessary for the ends of justice to be met. He urges that the Court's discretionary power should be exercised judiciously, with the overriding objective of ensuring that justice is done to all parties and that Article 50 of the Constitution secures a party's right to hearing. He cites the cases of *Gold Lida Limited vs Nic Bank Limited & 2 Others (2018) eKLR* where the other case of *Belinda Murai & Others vs Amoi Wainaina (1978) KLR* was quoted for the proposition that his former advocate's mistake should not bar him from accessing justice. He further cites the case of *Philip Chemwolo & Another vs Augustine Kubede (1982-88) KAR 103*.

5. He urges that by dismissing his application for reinstatement, the learned trial magistrate failed to uphold the right to a fair trial. He urges that dismissal of a litigant's suit is a draconian order which drives away the litigant from the seat of justice. He submits that this is a land matter and therefore sensitive and it is only fair that the same is reinstated for hearing on merit.

Respondent's Submissions

6. The Respondent filed submissions dated 30th June 2021. He urges that before this Court intervenes, the Appellant must demonstrate that the lower Court exercised the said discretion without due regard to the established principles and that the Appellant has failed to demonstrate this. He urges that prior to the dismissal of the Appellant's suit, a notice to show cause was served and that neither the Appellant nor his advocate attended to the same. He urges that the application for reinstatement was made 3 years after the dismissal and that there was no explanation for the absence of the Appellant or his advocate on the date of the notice to show cause. He urges that the Appellant is an indolent litigant who does not deserve exercise of the Court's discretion in his favour. He cites the case of *Mwangi Gacheingu & 2 Others vs Mwaura Githuku & Another (2019) eKLR* and *Stanley Kigotho Miano vs Job Kigotho Miano & Another (2020) eKLR*.

Issues for Determination

7. From the pleadings and submissions, the glaring issue arising for determination is on whether to reinstate the Appellant's suit for hearing on its merits. This Court has however observed that there is a question of jurisdiction arising. Matters touching on jurisdiction of the Court should be heard *in limine* and may be taken by the Court *suo moto*. Without jurisdiction, the Court has no power to make one more step and must down its tools. See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR*.

Jurisdiction of the Court

8. This Court observes that the subject matter of the primary suit filed at the lower Court was on ownership of and title to land. Disputes relating to the environment, ownership and use of, and title to land are the preserve of the Environment and Land Court as established by Article 162 (2) of the Constitution of Kenya and the Environment and Land Court Act. Section 13 of the Environment and Land Court provides for the jurisdiction of the Court as follows: -

13. Jurisdiction of the Court

1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

2) In exercise of its jurisdiction under Article 162 (2) (b) of the of the Constitution, the Court shall have power to hear and determine disputes—

a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources

b) relating to compulsory acquisition of land

c) relating to land administration and management

d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

e) any other dispute relating to environment and land

3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

9. This Court considers that although it is the Chief Magistrate's Court that was seized with the matter prior to its dismissal, the matter was filed in 1992 prior to the establishment of the Environment and Land Court in 2012. Upon the establishment of the Environment and Land Court, the matter ought to have been transferred from the Chief Magistrate's Court to the Environment and Land Court. This Court is, however, aware that there are certain environment and land matters which are heard by the Chief Magistrates' Courts within their jurisdiction over environment and land matters, in the same way they hear certain employment and labour relations matters.

10. This Court finds that should these matters result in decisions which are the subject of appeals, the appeals should be filed in the specialized Court. In the present case, the instant appeal ought to have been filed in the Environment and Land Court. Section 13 (4) of the Environment and Land Act gives the Environment and Land Court appellate jurisdiction over decisions of subordinate courts in respect of matters falling within the jurisdiction of the Court.

11. Article 165 (5) (b) of the Constitution expressly ousts the jurisdiction of the High Court to hear or make determinations over environment and land matters. It provides as follows: -

The High Court shall not have jurisdiction in respect of matters-

a) Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

b) Falling within the jurisdiction of the courts contemplated in Article 162 (2).

12. The above provision is supported by the holding of the Supreme Court in ***Petition No. 5 of 2015, Republic v Karisa Chengo & 2 others [2017] eKLR***, as follows: -

“[79] It follows from the above analysis that, although the High Court and the specialized Courts are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. From a reading of the statutes regulating the specialized Courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from Article 165(5) of the Constitution, which prohibits the High Court from exercising jurisdiction in respect of matters “reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the Courts contemplated in Article 162(2).”

13. Based on the above this Court finds that the Appellant ought to have lodged his appeal in the Environment and Land Court.

14. Having found that the Court lacks jurisdiction on the grounds that the Appellant’s primary suit which is the subject of the appeal is an environment and land dispute, which is the preserve of the Environment and Land Court, this Court will down its tools and refrain from going into the merits of the appeal.

Conclusion

15. The Appellant filed a suit at the Chief Magistrate’s Court seeking a declaration that he owns half share(s) in the two suit properties namely Abogeta/Kanyakine/595 and Abogeta/Upper/Kithangari/828. He also sought for a transfer of title to his name with respect to his said shares. His claim was premised on his assertion that he had jointly purchased the suit properties with the Respondent but the properties were registered in the Respondent’s name to be held in trust for both of them. His matter was dismissed for want of prosecution pursuant to the provisions of Order 17 Rule 2 of the Civil Procedure Rules. An attempt to have his suit reinstated by the trial Court failed. His appeal seeks to challenge the Ruling of the trial Court which declined to reinstate his suit.

16. This Court has observed that the Appellant’s matter, as filed in the lower Court, principally relates to the use and occupation of, and title to land. Such matters fall within the exclusive jurisdiction of the Environment and Land Court Act, pursuant to the provisions of Article 162 (2) (a) of the Constitution and Section 13 of the Environment and Land Court Act. This finding is supported by the holding of the Supreme Court in the case of ***Petition No. 5 of 2015, Republic v Karisa Chengo & 2 others [2017] eKLR***. The Court further finds that the Environment and Land Court’s jurisdiction extends to appellate jurisdiction over matters arising from subordinate courts touching on environment and land, pursuant to the provisions of Section 13 (4) of the Environment and Land Court Act. This instant appeal, therefore, ought to have been filed in the Environment and Land Court. In the end, this Court finds that it has no jurisdiction to entertain the appeal filed by the Appellant.

ORDERS

17. Accordingly, for the reasons set out above, this Court makes the following orders: -

i. The Appellant’s appeal is hereby struck out.

ii. For the avoidance of doubt, the Appellant is at liberty to file his appeal at the Environment and Land Court for appropriate determination.

iii. There shall be no order as to costs.

DATED AND DELIVERED ON THIS 7TH DAY OF OCTOBER, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S G. M. Wanjohi & Co. Advocates for the Appellant

M/S Gatarai Ringera & Co. Advocates for the Respondent