



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL APPEAL NO. 81 OF 2019

BETWEEN

RICHARD OCHIENG ANYIKO.....APPELLANT

AND

1. KENNEDY OYUGI OBETI

2. CAROLINE ATIENO.....RESPONDENTS

RULING

1. When this matter came up for directions on 12th July 2021, I asked the advocates on record to address me on the issue of jurisdiction. This was informed by the grounds of appeal which were as follows:

- a) The trial magistrate at Ndhiwa erred in fact and law, in her assessment and evaluation of evidence in regards to the respondents' claim for adverse possession, by finding that the 2nd respondent and the estate of the deceased had proved actual occupation and possession of a portion of land parcel K/K/Karading/2690 measuring 0.05 Ha (hereinafter referred to as "the suit land") and was entitled to such portion by way of adverse possession despite filing of Civil Suit No.159 of 2012 at Homa Bay Law Courts.
- b) The trial magistrate erred in law and in fact in failing to find for the appellant for the ownership of the suit land on a balance of probabilities.
- c) The trial magistrate at Ndhiwa erred in law, in failing to hold that the 2nd respondent and the estate of the deceased alleged overriding interest in the suit land had been interrupted by the institution of Civil Suit No. 159 of 2012, Richard Ochieng -vs- Mboya Ouma when this issue had been pleaded, sufficient evidence tendered thereon and submissions in respect thereof made by the appellant.
- d) The trial magistrate at Ndhiwa erred in fact and law, in her assessment and evaluation of evidence in respect to cultivation in the suit land in holding that it was sufficient to prove adverse possession while such evidence on cultivation was not definite as to the area and time.
- e) The trial magistrate failed to properly appreciate and evaluate the evidence and documents in support of the plaintiff's case and came to a wrong conclusion/decision.
- f) The trial magistrate erred in law in making a finding that the Respondents' and the estate of the deceased have an overriding interest in the suit land measuring a portion of 0.05Ha while there was no sufficient evidence to support the claim.
- g) The trial magistrate erred in law and fact in holding that the remains of the late deceased be buried on a portion of 0.05Ha of the suit land despite decree in Civil Suit 159 of 2012 against the deceased who as per the decree was not entitled to either or use of the suit land.
- h) The trial magistrate erred in finding that the appellant to pay part of the deceased mortuary expenses without any evidence in support hence arriving at a wrong decision.
- i) The trial magistrate erred in law by not appreciating the mandatory nature of Order 7 Rule 5 of the Civil Procedures Rules 2010 (Cap 21 Laws of Kenya) and thereby failed to give its proper effect by finding that noncompliance with the provision was a

procedural technicality.

2. The suit in the lower court was Ndhiwa Magistrate's Court ELC No. 17 of 2019. From the grounds of appeal, it is clear that this court is not seized of the jurisdiction to entertain the appeal. The issues raised are in the ambit of the ELC. The Court of Appeal on the issue of jurisdiction in **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] KLR 1** (Nyarangi JA) held as follows:

I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

3. The advocate for the appellant must have realized the same. When the parties came before me on 13th October, 2021 he sought for orders to transfer the matter to the ELC. The application was opposed. He cited and tendered several authorities but unfortunately none addressed the issue of jurisdiction.

4. The Court of Appeal in **Equity Bank Limited vs. Bruce Mutie Mutuku t/a Diani Tour & Travel [2016] eKLR** stated as follows:

In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under Section 18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the "O2" principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the situation. In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer.

The Court went on to quote the case of **Abraham Mwangi Wamigwi vs. Simon Mbiriri Wanjiku & Another [2012] eKLR**, where it was held as follows:-

It is therefore trite that where a suit is instituted before a tribunal having no jurisdiction, such a suit cannot be transferred under section 18 aforesaid to a tribunal where it ought to have been properly instituted. The reason for this is that a suit filed in a court without jurisdiction is a nullity in law and whatever is a nullity in law is in the eyes of the law nothing and therefore the court cannot purport to transfer nothing and mould it into something through a procedure known as "transfer". In other words, courts can only transfer a cause whose existence is recognised by law.

5. From the foregoing, I find that I cannot grant orders to transfer the appeal to the Environment and Land Court. The appeal is therefore struck out with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 9TH DAY OF NOVEMBER, 2021

KIARIE WAWERU KIARIE

JUDGE