



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. APPEAL NO. 1 OF 2019

(FORMERLY HCA NO. 72 OF 2017)

FAUSTINO MUNDIGI.....APPELLANT

VERSUS

SIMON MUNYI MUTURIO.....RESPONDENT

(Being an appeal against the Judgement and decree of the Hon. V.O. Nyakundi, (SRM) dated 22nd November, 2017 in Embu CMCC no. 118 of 2014)

JUDGEMENT

1. This appeal arises from the judgement and decree of Hon. V.O. Nyakundi (SRM) dated 22nd November 2017 in *Embu CMCC No. 118 of 2014 - Simon Munyi Muturio Vs Faustino Mundigi*. By the said judgement, the trial court allowed the Respondent's suit against the Appellant and awarded him costs of the suit.
2. The material on record indicates that by a plaint dated 13th May 2014 and amended on 16th February 2017 the Respondent pleaded that he was the absolute registered owner of *Title No. Mbeere/Kirima/3758* (hereafter the *suit property*) and that the Appellant had wrongfully invaded and occupied it without his consent or authority. The Respondent therefore sought a mandatory injunction, a declaration and other reliefs for the purpose of securing and enjoying his property rights.
3. By a statement of defence dated 8th July 2014 and amended on 24th August 2017 the Appellant challenged the validity and legality of the Respondent's title over the suit property on various grounds. First, it was pleaded that the suit property was created out of community land in violation of **Sections 115 and 116** of the retired **Constitution of Kenya**. Second, that the Respondent's title was not absolute and indefeasible as it was subject to statutory overriding interests. Third, that the Appellant had acquired an overriding interest over the suit property by virtue of **Section 30(g) of the Registered Land Act (Cap. 300)** (now repealed). Fourth, that the Respondent's suit was statute-barred under the **Limitation of Actions Act (Cap. 22)**.
4. The record further shows that upon a full hearing of the suit the trial court delivered its judgement on 22nd November 2017 allowing the Respondent's suit against the Appellant with costs. The trial court held that the Respondent had proved his case against the Appellant on a balance of probabilities as required by law. In particular, the trial court held that there was no evidence on record to demonstrate that the Respondent had unprocedurally or unlawfully obtained title to the suit property. The trial court also held that the Appellant had not demonstrated any overriding interest over the suit property.
5. Being aggrieved by the said judgement, the Appellant filed a memorandum of appeal dated 13th December 2017 which was amended in its entirety on 3rd July 2019. The amended memorandum of appeal raised the following fourteen (14) grounds of appeal:
 - a. *The learned trial magistrate erred in law by entertaining and determining the suit without jurisdiction by virtue of Section 26 (3) & (4) of the Environment and Land Court Act, 2011, Section 9 (a) and 25 of the Magistrate's Courts Act, 2015, Gazette Notice No. 1472 dated 11th March, 2016 and Gazette Notice No. 11930 dated 8th December, 2017.*
 - b. *The learned trial magistrate erred in law by failing to find that Mbeere/Kirima/3758 is part of Plot No. 2244 Kirima Adjudication Section and therefore trust or community land for purposes of Chapter 6 of the Constitution of Kenya (repealed), the Trust Lands Act, Cap 288 (repealed), the Land Adjudication Act, Cap 284, the Land (Group Representatives) Act, Cap287 (repealed), Article 63 of the Constitution of Kenya, 2010 and the Community Land Act, 2016.*
 - c. *The learned trial magistrate erred in law and fact by failing to find that the conversion and registration of individual titles excised from plot number 2244 Kirima Adjudication Section was not initiated and or permitted by the County Council of Embu (County Government of Embu) as required under Section 116 of the Constitution of Kenya (repealed).*

d. The learned trial magistrate erred in law by failing to find that Plot 2244 Kirima Adjudication Section is Trust Land vested in the County Council of Embu (County Government of Embu) in trust for seventeen clans of the Mbeere Community by virtue of Section 115 of the Constitution of Kenya (repealed) and administered by the Commissioner for Lands by virtue of Section 53 of the Trust Land Act, Cap 288.

e. The learned trial magistrate erred in law and fact by failing to find that the Appellant is a member of the Mbeere Community who was entitled to occupy, use, control, inherit and dispose of the trust or community by virtue of Section 69 of the Trust Land Act, Cap 288 and Section 14 (1) and (2) of the Community Land Act, 2016.

f. The learned trial magistrate erred in law and fact by failing to find that the amorphous seventeen (17) clans was not a group representative or community or registered community for purposes of Section 23 (5) of the Land Adjudication Act, Cap 283, Sections 5, 7 and 8 (2) of the Land (Group Representatives) Act, Cap 287 (repealed) and Section 7 of the Community Land Act, 2016 and had no capacity and or authority to hold Plot 2244 Kirima Adjudication Section in trust or to administer and manage it or to convert it to private land or to subdivide or to transfer it to individual title holders.

g. The learned trial magistrate erred in law and fact by failing to find that parcel number Mbeere/Kirima /3758 was unconstitutionally, unlawfully and un-procedurally excised from Plot No. 2244 Kirima Adjudication Section and registered as private property of the Respondent.

h. The learned trial magistrate erred in law and fact by failing to find that it was unlawful and discriminatory to allocate Plot No. Mbeere/Kirima/3758 to the Respondent while the Appellant was in the possession and occupation thereof.

i. The learned trial magistrate erred in law and fact by failing to find that the Appellant's possessory and occupation rights over plot No. Mbeere/Kirima/3758 override the Respondent's proprietary rights by virtue of Section 30 (g) of the Registered Land Act, Cap 300 (repealed) and Section 28 of the Land Registered Act, 2012.

j. The learned trial magistrate erred in law by failing to find that the Plot No. 2244 Kirima Adjudication Section was unconstitutionally, unlawfully and un-procedurally converted, subdivided and registered as private land under the Registered Land Act, Cap 300.

k. The learned trial magistrate erred in law by failing to find that by virtue of Section 27 of the Community Land Act, 2016 Title No. Mbeere/Kirima/3758 did not override the community title over Plot No. 2244 Kirima Adjudication Section.

l. The learned trial magistrate erred in law by failing to find that no law permitted divestiture and registration of individual titles to the Trust Land known as Plot No. 2244 Kirima Adjudication Section to individuals under the Registered Land Act, Cap 300 or at all.

m. The learned trial magistrate erred in law by disregarding the binding authorities in *Chengo Katana Koi V Protus Evans Masinde* [2013] eKLR, *Bahola Mkalindi Rhigho V Michael Seth Kaseme & 2 Others* [2012] eKLR, *Melton Lenkakurro & 6 Others V Taiko Moriati & 3 Others* [2008] eKLR, *Njiru Kithua V Minister of Lands & 6 Others* [2011] eKLR and *Luka Kitumbi & 8 Others V Commissioner of Mines & Geology & Another* [2010] eKLR.

n. The learned trial magistrate erred in law by disregarding the law in *Wensely Barasa V Immaculate Awino Abongo* [2017] eKLR and *David Ogutu Onda V Walter Ndede Owino* [2016] eKLR.

6. When the appeal was listed for directions on 26th September 2019 it was directed that the appeal be canvassed through written submissions. The Appellant was granted 30 days to file and serve his submissions whereas the Respondent was given 30 days upon the lapse of the Appellant's period to file his. The record shows that the Appellant filed his submissions on 22nd November 2019 whereas the Respondent's submissions were filed on 13th November 2019.

7. The court has considered the various grounds of appeal and the submissions on record. The court is of the opinion that a determination of the 1st ground, if found meritorious, may well determine the entire appeal. In his written submissions, the Appellant condensed the fourteen grounds into four grounds only. The court shall consider the 1st ground on jurisdiction in the first instance.

8. The jurisdiction of a court to entertain a suit is of paramount importance. In the case of the **Owners of Motor Vessel 'Lilian S' Vs Caltex Oil (Kenya) Ltd [1989] KLR1** the Court of Appeal of Kenya held as follows with regard to jurisdiction:

"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 continuation of proceedings pending other evidence. A court of law must down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction ..."

9. But what is meant by the term "jurisdiction?" The Court of Appeal in the case of the **Owners of Motor Vessel 'Lilian S'** (*supra*) cited the following passage from **"Words and Phrases Legally Defined" – Volume 3 at page 113;**

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or

limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given" (emphasis added).

10. Similarly, in the case of **Samuel Kamau Macharia & Another Vs Kenya Commercial Bank & 2 Others** [2012] eKLR the Supreme Court of Kenya held as follows:

"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. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondent in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...where the constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."

11. So, where does a magistrate derive jurisdiction to entertain environment and land matters? **Article 162 (2) (b) of the Constitution of Kenya 2010** and the **Environment and Land Act, 2011** vest such jurisdiction upon the Environment and Land Court. However, under **Section 26 (3) of the Environment and Land Court Act** and **Sections 9 and 25 of the Magistrates' Courts Act 2015**, the Hon. Chief Justice is empowered to gazette magistrates to handle environment and land matters.

12. **Section 26 (3) of the Environment and Land Court Act** stipulates as follows:

"(3) The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving the environment and land matters of any area of the country."

13. The court has perused the two Gazette notices published under **Section 26 (3) of the Environment and Land Court Act** which have a bearing on this appeal. The first is Gazette Notice No. 1472 of 11th March 2016 by which the Hon. Chief Justice published the names of several magistrates of the ranks of Principal Magistrates, Senior Principal Magistrates and Chief Magistrates to preside over environment and land matters. The name of Hon. V.O. Nyakundi was not in the list. The second notice is Gazette Notice No. 11930 of 8th December 2017 in which the name of Hon. V.O. Nyakundi (SRM) was included.

14. There is no doubt from the material on record that the judgement and decree the subject of the appeal was passed on 22nd November 2017 before Hon. V.O. Nyakundi was gazetted by the Hon. Chief Justice. It is, therefore, obvious that the impugned judgement was passed by a magistrate who had no jurisdiction under the law to entertain the suit. The court is of the opinion that the jurisdiction of the magistrate was conditional upon gazette under **section 26(3)** of the **Environment and Land Act** and that condition was not satisfied. Consequently, the court has no hesitation in finding and holding that the Hon. V.O. Nyakundi had no jurisdiction to entertain the suit hence the resultant judgement was a nullity. The subsequent gazette of 8th December 2017 did not cure that anomaly since the gazette notice did not operate retrospectively. The 1st ground of appeal shall, therefore, succeed.

15. In view of the court's holding on the issue of jurisdiction, the court is of the opinion that this matter calls for fresh trial before a magistrate with jurisdiction. A retrial may be ordered where there is no valid judgement or where the proceedings were defective in substance. In the case of **National Bank of Kenya V Thomas Owen Ondieki** [2016] eKLR, the Court of Appeal ordered a re-trial where it found that there was no valid judgement on record since it was neither signed nor dated hence a nullity. By parity of reasoning, there can be no valid judgement on record when the same was delivered without jurisdiction.

16. The decision on whether or not a re-trial should be ordered depends on the circumstances of each case. The main consideration is whether or not it would be in the interest of justice to order a re-trial and whether such order would occasion any prejudice to the parties. The court is of the opinion that the parties in this appeal have a right to be heard by a court of competent jurisdiction. That is an indispensable component of the right of access to justice which is guaranteed under **Article 48** of the **Constitution of Kenya**.

17. Since the court is minded in ordering a re-trial by a court of competent jurisdiction it would be prejudicial to comment on the rest of the grounds of appeal. The parties shall be canvassing those very matters before the trial court during the fresh hearing.

18. The upshot of the foregoing is that the court finds merit in the appeal on account of the 1st ground of appeal. Accordingly, the court makes the following orders for disposal of the appeal:

a. The Appellant's appeal be and is hereby allowed.

b. The judgement and decree of Hon. V.O. Nyakundi dated 22nd November 2017 together with all consequential orders are hereby set aside.

c. The matter is hereby remitted to the Chief Magistrates' Court for hearing de novo before a court of competent jurisdiction.

d. Each party shall bear his own costs both before this court and the Magistrate's Court.

19. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED at EMBU this 16TH DAY of JANUARY, 2020.

In the presence of Ms. Koome holding brief for Mr. Gachuba for the Appellant and Ms. Mbwiria holding brief for Mr. Guantai for the Respondent.

Court Assistant: Mr. Muinde

Y.M. ANGIMA

JUDGE

16.01.2020