



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

CIVIL APPEAL NO. 26 OF 2018

ABRAHAM YATTANI GUYO.....APPELLANT

VERSUS

QUNCHE WOGE.....RESPONDENT

(Being an appeal from the Judgement and Decree of the Marsabit Principal Magistrate Court (Hon. B.M. Ombewa delivered on 18th July 2018 in ELC Suit No. 10 of 2017)

JUDGMENT

1. The appellant herein was the defendant in the trial court while the respondent was the plaintiff. The respondent sued the appellant seeking the following Orders;

- a. "The Defendant be evicted from plaintiff's Parcel of land number Marsabit/ Mountain 391.*
- b. The OCS Marsabit Police station to provide security during the execution of the Orders.*
- c. Costs and interest of the suit.*
- d. Any other relief that this Honourable court may deem fit and just to grant".*

2. The suit before the Marsabit Magistrate's court was allowed in favour of the respondent / plaintiff with costs. Aggrieved by the aforesaid decision, the appellant filed this appeal vide his memorandum of Appeal on 7th August 2018 raising the following grounds;

- 1) "That the proceedings giving rise to the judgement were irregular and a nullity in law in that the Learned Resident Magistrate who initially heard the case and recorded the evidence had no jurisdiction in the absence of being gazetted to hear environment and land disputes.**
- 2) That even assuming that the learned Resident Magistrate would have had jurisdiction, it was un-procedural and unjust for the learned Principal Magistrate to act on the evidence recorded by the Learned Resident Magistrate and write judgement, more so, since the learned Resident Magistrate was still stationed at Marsabit Court.**
- 3) That the learned Principal Magistrate gave a decision on the basis that the Respondent was the registered proprietor of the disputed land when there lacked evidence to support this conclusion.**
- 4) That the Learned Principal Magistrate erred and misdirected himself on the facts by bringing into his judgement matters which were not contested in evidence thereby engendering injustice to the Appellant.**
- 5) That it was a misdirection and an error of the law for the Learned Principal Magistrate to allow the execution before the lapse of the period for appeal and in the absence of a formal application for execution.**
- 6) That the learned Principal Magistrate erred in failing to consider the possibility of claim for land being statute barred as more than 12 years had lapsed before the deceased father of the Respondent asserting his claim".**

3. On 21st May 2019 this Court gave directions for the appeal to be canvassed through written submissions. The appellant in support of the appeal, submitted that without the trial Court ascertaining the pecuniary value of the suit premises, its jurisdiction cannot be established, hence the trial Court erred in proceeding to entertain the suit. In this regard he relied on the provisions of **the Statute laws (Miscellaneous Amendments) Act 2015, Sections 7, 8 and 26 of the Environment and Land Court Act No. 19 of 2011, Section 9 of the Magistrate**

Court Act No. 26 of 2015, Section 101 Land Registration Act and Section 150 Land Act. He also relied on the case of **Law Society of Kenya Nairobi Branch vs Malindi Law Society & 6 Others [2017] eKLR.**

4. He also averred that the trial Magistrate's decision to transfer a matter to its court without recording its reasons amounted to a mistrial and a miscarriage of justice, and that the occurrences during trial and site visit are all clouded and this appellate court must cure this anomaly.

5. It was further submitted for the appellant that his claim of ownership to the suit premises was based on adverse possession and hence, the trial magistrate erred in not considering that he had resided in the suit premises continuously, without interruption for the last 60 years upon allocation by the government. On this point, he cited the case of **M'Mbaoni M'thaara v James Mbaka [2017] eKLR.** The appellant therefore claims entitlement to the parcel of land measuring 3 acres at Dakabaricha in Marsabit County.

6. The Respondent was not having legal representation before the Magistrates' court. He now has. In opposition to the Appeal, it was submitted for the respondent that the Principal Magistrate had jurisdiction vide gazette notice 1745. That upon adoption of the evidence recorded by the Resident Magistrate by the Principal Magistrate, the same operated as if the same was heard and recorded by the Principal Magistrate. That the Appellant had equally admitted to the jurisdiction of the trial Court and cannot therefore raise a challenge to jurisdiction at this stage. He relied on the provisions of **Section 3 of the Judicature Act No. 16 of 1967, Article 159 (2) of the Constitution** and the cases of **The Owners of Motor Vessel "Lillian S" vs Caltex Oil Kenya Ltd [1989] KLR 1, Kiplangat Korir v Dennis Kipngeno Mutai [2006] eKLR.**

7. The respondent further submitted that the Trial Magistrate considered the weight of the evidence before him hence the claim that he misdirected himself must fail. As for the claim of adverse possession, it was the respondent's averment that the same was not pleaded in the Appellants pleadings before the trial court and as such, the appellant must be bound by his pleadings. That even if the same was pleaded, the appellant had not proved the fact that he had adversely possessed the suit property, such that his stay was uninterrupted, exclusive and continuous. He cited the cases of **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others [2014] eKLR and Mbaoni M' thaara v James Mbaka [2017] eKLR.**

8. The respondent desires that the appeal be dismissed with costs.

Analysis and Determination

9. The 1st appellate court has a duty to reconsider the evidence, evaluate it itself and draw its own conclusion, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance, See- **Selle and Another Versus Associated Motor Boat Company Ltd & Others [1968] EA 123.**

10. **Pw1 Qunche Woge Qunche** testified that the suit premises was his father's land from 1960's. That his father was in occupation but later on left it in the care of his uncle Sago Qunche, when he left for Moyale. That the survey of the lands were done in the late 1980's but titles were issued in the year 2002. He told the court that he only saw the appellant in the suit premises in the year 2010. It was also his testimony that when he took out the letters of administration over his father's estate, the appellant objected to the same. The objection was heard in the Kadhi's Court but the same was dismissed. He also told the court that he had previously issued the appellant with a demand letter to leave the premises, but the latter refused to move away. He produced the **letters of Administration as PExh 1 and title deed number Marsabit/Mountain/391** measuring 1.39 hectares in the name of Woge Qunche as **Pexh 2.**

11. **PW2 Garo Woche**, an uncle to Pw1 stated that his late brother had land in Dakabaricha and that presently **Jillo Dadasa** a cousin to the respondent/plaintiff is the one residing on the land. PW2 could not tell precisely the period the appellant had been on the suit land, and he was also not sure whether the appellant and the Respondent's father had any dispute over the land. He stated that the appellant has a semi-permanent house neighbouring Jillo Dadasa.

12. **Pw3 Gobe Jillo** testified that the Respondent's father had land in Dakabaricha and that the appellant had started to lay claim to the same.

13. **Dw1 Abraham Yattani Guyo** testified that he was allocated the suit premises measuring 3 acres by Chief Mato and the land Committee in the year 1970 and by then, no survey had been done. That Ali Chiwe, an employer to the Respondent's father and Tadesa Qunche a brother to the Respondents father had parcels of land next to his. He contended that he has since planted trees on the land. It was his testimony that he is not aware how Woge Qunche came to own Plot No. 391.

14. **Dw2 AbdiKadir Kero** testified that he was familiar to Abraham Yattani and Qunche Woge. He averred that Abraham Yattani got the land in the year 1970 when he was given the same by the land Committee and the area Chief (Chief Mato). That Qunche Woge used to work for Ali Chiwe and used to stay on his brothers land and he is not aware how Qunche Woge got the title to the suit premises. It was also his testimony that a survey was initially done but no numbers were given. However another survey was done and numbers given.

15. **Dw3, Mohammed Tadiko Kumsa** corroborated the testimony of Dw2. He added that Abraham Yattani had been in occupation of the suit premises since 1970. That at the time, people were given virgin land by the land committee and the chief. Dw3 further stated that Qunche Woge was also known to him. He came from Ethiopia and stayed on his brother's land, Gababa Qunche. That he also had another brother Tadesa Qunche who burnt Nuru and Abraham's House in the year 1973. He would later be charged, convicted and imprisoned in Moyale and never came back. In cross-examination, Dw3 testified that his land borders that of Abraham and Gababa Qunche, now occupied by Tadesa's Children. He confirmed that his land was surveyed and a title deed was given.

16. **Dw4** is one **Godana Cholta Elema** whose evidence is also similar to that of Dw2 & 3. He added that one Gababo Qunche was given a small parcel of land in that land which is now occupied by Tadassa Qunche. In cross-examination, Dw4 stated that they were issued the lands by President Moi. His land had been surveyed and he was issued with a title deed.

17. I have carefully considered the evidence on record and the submissions of the parties. I deem it fit to frame the issues for determination as follows; **The question of jurisdiction (Ground 1 & 2); Whether the trial Magistrate misdirected himself on law and fact in arriving at the decision in his judgement (Ground 3& 4); The question of stay of execution (Ground 5) and Whether the suit before the trial court was statute barred (Ground 6).**

Grounds 1 and 2; Jurisdiction.

18. The question of jurisdiction raised by the respondent has two limbs. The first one is that the Resident magistrate T. M. Wafula had no jurisdiction to hear the case, and secondly, that the Principle Magistrate, B.W. Ombewa un-procedurally took over the matter from his colleague. The common thread emerging and touching on the two limbs of jurisdiction is that this issue was not raised or contested before any of the two magistrates throughout the trial. In **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR Nyarangi J** held as follows;

“.....A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. I can see no grounds why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.....”

19. In **Kiplagat Korir v. Dennis Kipngeno Mutai (2006) eKLR**, it was held that ;

“In this case, the appellant has raised the issue of jurisdiction so much later in the day. Substantial justice frowns upon a party who invokes provisions of the law unduly and at a later stage of a proceeding to take undue advantage against an opponent. In any event, this court would be placed in an awkward situation were it to uphold the argument of the appellant where it has been called upon to decide on an issue which is raised for the first time on appeal. If this court were to make a determination on the issue of jurisdiction on this appeal as urged by the appellant, this court would not be sitting on appeal, but be acting as a court of first instance. This is because the issue of jurisdiction was not raised before the trial resident magistrate’s court. I say no more on that score. I will disallow the grounds of appeal on jurisdiction”.

20. In respect of the first limb of jurisdiction, the initial point of call are the pleadings. The appellant had admitted the jurisdiction of the court as set out in paragraph 5 of his statement of defence. Thereafter, when the matter was mentioned for directions before T.M. Wafula (the Resident Magistrate) on 12.9.2017, counsel for the appellant is the one who sought for a hearing date on 9.11.2017 before that court. Come the date of the hearing on 9.11.2017 and the counsel for the appellant had stated that **“I am ready”**. It is worthy to note that the respondent was not represented throughout the trial. The appellant did not raise any objection as to the jurisdiction of the trial magistrate during the conduct of the proceedings. The appellant was well aware of the pecuniary value of the subject property. He never availed any valuation report to support his submission to the pecuniary value for the trial court to establish whether it lacked jurisdiction to entertain the matter. No prejudice therefore befell the appellant with regard to the conduct of the proceedings. The issues now being raised by the appellant were therefore not investigated or tested by the trial court. They were equally not a subject of contest. The appellant is therefore estopped from invoking the issue of jurisdiction before this court.

21. On the second limb of jurisdiction, I note that both the plaintiff’s and defence case were heard and closed before T.M. Wafula, (Resident Magistrate). On 26/6/2018 the matter was taken over by Hon. B.M.Ombewa (Principal Magistrate) when he issued directions to that effect. The record of 26.6.2018 states as follows;

“Mr Kiogora- We can proceed with the evidence on record. I appear for the Defendant. Plaintiff is in person. We can do a scene visit on 4/7/2018.

Plaintiff- It is okay.

Court- The matter to proceed from where it had reached. Site visit on 4/7/2018”.

22. The circumstances under which the principle magistrate B. Ombewa took over the matter are not captured. However, it is clear that the appellant was the one who prompted the second magistrate to proceed from where matter had stopped on 26.6.2018. Again, the appellant cannot now turn around to cry foul on this issue especially considering that the opponent was un-represented.

23. In light of the foregoing analysis, I come to the conclusion that it would be improper for this court to determine the question of jurisdiction. The grounds 1 & 2 of the appeal hence fail.

24. The **3rd and 4th grounds of appeal** relate to the decision of the trial Magistrate, whether the court arrived at a wrong decision in holding that the respondent was the registered proprietor of the suit premises. The elementary principle of law is that he who alleges must prove the allegations. This is stipulated in **Section 107(1) (2) of the Evidence Act** that provides thus:

“(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

25. **Section 112 of the Evidence Act** also provides thus:

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

See- **David Mwangi Murathi vs. Samuel Mbuthia Thuo ELC (2018)eKLR.**

26. The respondent presented a title over the suit premises. Dw3 and Dw4 confirmed that a survey had been done upon their premises and they had also acquired title over their respective parcels of land. The appellant on the other hand laid his claim on adverse possession and that he was issued the suit premises by the former Chief and land Committee but he had no documents to support his claim. In its determination, the Court relied on the Provisions of Section 24, 26 and 28 of the Land Registration Act to reach a conclusion that, the respondent had a genuine and indefeasible title. The appellant had not led any evidence of mistake, fraud or misrepresentation. The trial Magistrate also held that there was no counterclaim for adverse possession and therefore parties were bound by their pleadings.

27. I have considered the evidence on record. Indeed the appellant never led any evidence that would defeat the indefeasible title of the respondent. There was no allegation of fraud and/or misrepresentation. The appellant solely relied on his occupation of the said premises.

28. On the element of adverse possession the appellant never raised a counterclaim in this regard, nor did he provide evidence to this end. A party is not allowed to depart from their pleadings, See- **Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others (2014)eKLR**. In the Court of Appeal case of **Caltex Oil Kenya Limited vs. Rono Limited (2016)eKLR**, the court had this to say about pleadings;

“They have the potential of informing each party what they expect in the trial before the court. If a party wishes the court to determine or grant a prayer, it must be specifically pleaded and proved. The pleadings are a precursor for a party to lead evidence in satisfaction of the prayers he seeks to be granted in his favour. Where no such prayer is pleaded in a specific and some what particularized manner, the party is not entitled to benefit and the court has no jurisdiction to whimsically grant those orders”.

29. Nowhere in his statement of defence, did the appellant claim the suit land. His contention was that he was not the only one on the suit land. I’m in agreement with the trial magistrate that the appellant was bound by his pleadings. I therefore find that the 3rd and 4th Grounds of appeal fails.

30. **Ground no. 5; Stay of execution.** The legal platform on stay of execution pending appeal is found under order 42 rule 6 of the civil procedure rules to the effect that no appeal shall operate as a stay of execution. The power to allow an application for stay of execution pending appeal is discretionary and is based on the criteria set out in the aforementioned rule. In the present case however, the appellant was granted an automatic stay of execution of 30 days as from when Judgment was delivered. Thus Ground 5 in the appeal fails.

31. **Ground 6; whether the suit was time barred.** Just like the question of Jurisdiction, this issue of limitation was neither pleaded, nor was it raised during the trial. As stated earlier in this judgment, parties are bound by their pleadings. I will belabor on this point no more. Ground 6 of the appeal hence fails.

Conclusion

32. **In the final analysis, I find no reason to disturb the decision of the lower court. This Appeal is hereby dismissed with costs to the Respondent.**

DATED, SIGNED AND DELIVERED AT MERU THIS 20TH DAY OF MAY, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE