



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT APPEAL NO. 101 OF 2012

MBOGO NYAWIRE 1ST APPELLANT

JOSEPH OYIER MBOGO 2ND APPELLANT

BENARD APIYO MBOGO..... 3RD APPELLANT

BENADETA AGALO MBOGO..... 4TH APPELLANT

ELISHA O. OSWAGO 5TH APPELLANT

VERSUS

MICHAEL MBOGO AYACKO RESPONDENT

JUDGMENT

(Being an appeal from the Judgment and Decree of Principal Magistrate's Court - Rongo, Hon Z. J. Nyakundi, in PMCC No. 139 of 2010 dated 9th July, 2012)

1. The appellants being dissatisfied with the decision/judgment of **Hon. Z. J Nyakundi (PM)**, Rongo Law Courts dated 9th July 2012 in Rongo PMCC No. 139 of 2010 has appealed to this court against the whole judgment. The appellants have set out four grounds of appeal as hereunder:-

- 1. The trial magistrate did not have jurisdiction to make orders concerning title and ownership of the suit land.**
- 2. The decision of the trial magistrate was contrary to and against the evidence on record particularly the evidence of the land registrar regarding the title deed issued to the respondent and the alleged ownership conferred thereunder.**
- 3. The decision of the trial magistrate was contrary to constitutional provisions against the principles of justice and fairness.**
- 4. The trial court's judgment was invalid for want of compliance with legal requirements governing judgment and decree under Civil Procedure Rules.**

2. By the plaint, the plaintiff stated that he was the registered proprietor of land parcel **South Sakwa/Waware/1108** and averred that the defendants had without any colour of right unlawfully and without any justification whatsoever encroached onto portions of the plaintiff's said parcel of land. The plaintiff interalia prayed for a permanent injunction against the defendants to restrain them from in any manner dealing with the said parcel of land and further sought a declaration that the suit parcel of land **South Sakwa/Waware/1108** belongs to the plaintiff.

3. The trial magistrate after hearing the plaintiff and the defendants and their witnesses upheld the plaintiff's claim and granted the permanent injunction sought by the plaintiff and declared the plaintiff to be the owner of Land Parcel **South Sakwa/ Waware/1108** provoking the instant appeal by the defendants.
4. Directions on the disposal of the appeal were given on 19th March 2005 when the judge directed that the appeal be canvassed by way of the parties filing written submissions. The appellant filed their submissions dated 12th June 2015 on 15th June 2015. The respondent did not file any submissions and the court on 25th November 2015 reserved judgment on the appeal.
5. The defendants in their defence to the plaintiff's claim that he (the plaintiff) was the legal owner of land parcel number **South Sakwa/Waware/1108** as he was the registered owner and he had been issued with a title deed stated in their defence under paragraph 2 thus:-

2. The defendants though admitting that the plaintiff has obtained a title deed LR No. South Sakwa/Waware/1108 being a mutilation out of LR No. South Sakwa/ Waware/ 277 they deny that the same was properly and legally obtained and that the dispute in respect thereof is still pending before the court for determination between the plaintiff and the 1st defendant.”

6. The defendant under paragraph 5 and 6 of the defence stated:-

- a. **The 1st defendant traverses the averments set out in paragraph 4 of the plaint and avers that he disputes the plaintiff's claim to the portion of land now known as LR No. South Sakwa/Waware/1108 and awaits the decision of the court as to the true ownership of the same.**
- b. **The 1st defendant maintains that the demarcation done to LR No. South Sakwa/Waware/277 was unjust and challenges the same.**

7. I have made reference to the parties pleading to demonstrate what the nature of the dispute was and it is quite evident that the dispute was clearly the ownership of land title number **South Sakwa/Waware/1108** that both the plaintiff and the 1st defendant laid claim to. The defendants under paragraph 9 of the defence denied that the trial court had the jurisdiction to hear and determine the matter.
8. Although the issue of jurisdiction was raised in the pleadings the record does not show whether this issue was specifically dealt with. The record shows a preliminary objection was taken by the defendants that the matter was *res judicata* and or *subjudice* and the court on 14th September dismissed the preliminary objection. The court did not however make any ruling whether or not it had any jurisdiction to hear and determine the matter.
9. The appropriate thing for a court to do once an issue of jurisdiction is raised in pleadings and/or by way of preliminary objection, is to determine whether or not it has jurisdiction to entertain the matter as it would be futile to proceed with the proceedings if the court lacks jurisdiction as such proceedings will be rendered null and void if it is found the court did not have the jurisdiction to handle and/or hear and determine the matter. A court would have absolutely no business to expend scarce and valuable judicial recourses in form of both material, time and personnel by engaging in a futile exercise where it lacks jurisdiction. Any such proceedings will be incompetent, illegal and a nullity *abinitio*. Hence it would be good practice for courts to ascertain they have the requisite jurisdiction before embarking on what could otherwise turn out to be a worthless exercise.
10. In the present matter the defendants had pleaded in their defence that the court did not have jurisdiction to hear and determine the matter. It mattered little that the parties submitted themselves to the jurisdiction of the court. If the court did not have jurisdiction, it simply did not have jurisdiction. Jurisdiction as has repeatedly been held is conferred by the law and a court cannot confer jurisdiction that did not have on itself and neither can the parties to a suit confer jurisdiction on a court even by mutual consent if jurisdiction is not conferred on the court by law.
11. The appellants have before this court raised as one of their grounds of appeal that the trial court lacked the jurisdiction to hear and determine the dispute as it related to ownership and title to land

in respect of which the court had no jurisdiction to determine. The jurisdiction of Magistrates was as set out in the Magistrate's Court Act, Cap 10 Laws of Kenya (now repealed and replaced by the Magistrate's Court Act 2015). Before the repeal of the Magistrates' Court Act, Cap 10 Laws of Kenya, the Magistrates' Court had no jurisdiction to hear and determine matters relating to ownership and title to land. The previous provisions of the **Magistrates' Act** being **Section 9A-F** which had conferred jurisdiction on Magistrates' Courts having been repealed following the enactment of the **Land Disputes Tribunal Act No. 18 of 1990**. Under the Magistrates' Courts Act, the Magistrates only had jurisdiction to deal with land held under customary tenure. Under Section 9 of the Magistrates Act, a District Magistrates Court had jurisdiction to determine proceedings of a civil nature where either:-

(a) The proceedings concern a claim under customary law;

12. The civil jurisdiction of the Resident Magistrate's Court was as provided under Section 5 (1) of the **Magistrate's Courts Act** and was pegged on the pecuniary value of the subject and dependent on whether the court was held by the Resident Magistrate, Principal Magistrate, Senior Resident Magistrate or Chief Magistrate all of whom had varying pecuniary jurisdictions depending on the rank with discretion on the part of the Chief Justice to enhance the pecuniary limit of jurisdiction in the case of each cadre of Magistrates.
13. However the jurisdiction of Magistrates to deal with disputes relating to land ownership, occupation and trespass was taken away by the enactment of the Land Disputes Tribunal Act of 1990 which by its Section 3 (1) provided thus:-

3(1) Subject to this Act, all cases of a civil nature involving a dispute as to:-

- (a) The division of, or the determination of boundaries to land, including land held in common;**
- (b) A claim to occupy or work land; or**
- (c) Trespass to land Shall be heard and determined by a Tribunal established under Section 4.**

The role of the Magistrates' Court was limited to receiving and endorsing the Tribunal's decision as provided under Section 7 of the Land Disputes Tribunals Act which provides as follows:-

7(1) The Chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the Magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal.

(2) The court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.

14. I have reviewed the record of the proceedings before the trial magistrate and it is clear the matter in dispute was the ownership of the suit land **South Sakwa/Waware/1108** which the plaintiff and the 1st defendant each laid claim to. Regrettably my view is that the trial magistrate lacked the jurisdiction to hear and determine the matter. The law as at the time the suit was filed was that the Magistrates' Courts did not have the jurisdiction to hear and determine disputes relating to ownership of land. In consequence the proceedings are a nullity and the position is as if no proceedings were ever instituted. The parties are where they began. This court cannot validate proceedings which were otherwise a nullity for want of jurisdiction on the part of the court.
15. Hon. Justice Khamoni (as he then was) in the case of **Republic –vs- Chairman Land Disputes Tribunal, Kirinyaga District & Another, Ex parte Kariuki [2005] 2 KLR pg 10** while considering the issue of jurisdiction of the Disputes Tribunal held that:-

“No court can confer jurisdiction upon itself and if a court never had jurisdiction, a party or parties cannot give it that jurisdiction and a party cannot be said to have acquiesced to the jurisdiction which the court before which the appearance claimed to have constituted appearance was made did not have.”

16. Having held that the trial magistrate did not have jurisdiction to hear the matter that should be sufficient to dispose of the appeal. The lack of jurisdiction renders the proceedings illegal and a nullity as they ought not to have taken place in the first place before the said court. In the result therefore, I allow the appeal and set aside the judgment and decree herein and all consequential orders emanating therefrom. The costs of the appeal and of the court below are awarded to the appellants.

Judgment dated, signed and delivered at Kisii this 4th day of March, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the 1st to 5th Appellants

..... for the Respondent

J. M. MUTUNGI

JUDGE