



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCA CASE NO. 26 OF 2019

BATHOLOMEW FESTO OLANG'

ANDREW WALICE OTSIENO

GILBERT MAYENDE.....APPELLANTS

VERSUS

CHARLES MEJA MAKOKHA

(suing as the legal representative of the Estate of Peter Makokha (deceased)).....RESPONDENT

JUDGEMENT

The appellant, being dissatisfied with the whole decision of Mumias Senior Principal Magistrate's Court (Hon. Fredrick Nyakundi-Resident Magistrate) made on 12th July, 2019 in Mumias Principal Magistrate's Court Civil Suit No. 120 of 2017, the appellants who were the defendants in the said Mumias Senior Principal Magistrate's Court Civil suit No. 120 of 2017 hereby appeal against the said decision and all orders made pursuant thereto and set forth the following as their principal grounds of appeal:-

1. That the learned trial magistrate erred in law and fact by holding that two acres of land be surveyed and curved out of L.R. No. E. Wanga/Isongo/1613, 1614 and 1615 when he lacked jurisdiction to hear and determine the case.
2. That the learned trial magistrate erred in law and fact by granting prayers that were not prayed for.
3. That the learned trial magistrate erred in law and fact by failing to make any finding in the appellant's counter claim.
4. That the learned trial magistrate erred in law and fact by entertaining a case against a party who is deceased and issuing orders in vain.
5. That the learned trial magistrate erred in law and fact by issuing orders that are contrary to the law and in particular, Sections 14 and 26 of the Land Registration Act.
6. That the learned trial magistrate showed total bias against the appellants by totally ignoring their evidence and finding in favour of the respondent.
7. That the learned trial magistrate erred in law and fact by contradicting himself in his judgment
8. That the learned trial magistrate's orders have cause grave injustice.

The appellants pray that the decision of Mumias Senior Principal Magistrate's Court Civil Suit No. 120 of 2017 be set aside and orders made allowing the appellant's appeal with costs.

By consent dated 16th October 2016 the respondent being dissatisfied crossed appealed on the whole decision of Mumias Senior Principal Magistrate's Court (Hon. Fredrick Nyakundi-Resident Magistrate) made on 12th July, 2019 in Mumias Principal Magistrate's Court Civil Suit No. 120 of 2017 on the following grounds;

1. That the 1st defendant (the Estate of) engaged in fraud and misrepresentation by claiming to have purchased the entire parcel of land L.R. No. E/Wanga/Isongo/416 knowing that he had only purchased 448 footstepsx344 footstepsx149 footsteps.
2. That the land sale agreements relied upon to lay claim to the entire parcel of land L.R. No. E/Wanga/Isongo/416 were forgeries made up to defraud the appellant of part of his land as he was not party to those agreements.
3. That the learned magistrate erred in not appropriately considering that the suit land cannot be of two different acreages to suit the respondents. That the entire parcel of land L.R. No. E/Wanga/Isongo/416 measured 7.28 Ha (approximately 18 acres) but upon subdivision into three parcels mysteriously became 6.38 Ha (approximately 15.7 acres) thereby robbing the appellant of his residual land.
4. That the learned magistrate erred in not finding that land of 0.90 Ha (approximately 2.3 acres) belonged to the appellant and that the respondents have acquired it through unfair and unjust means to his detriment.
5. That the initial contract was invalid, null and void because the full price for the land of Ksh. 1650 was never paid in full.
6. That the learned magistrate erred because Charles Wanguba (Estate of) was the 1st defendant in Civil Suit No. 120 of 2017. He never filed a defence.
7. That the learned magistrate erred in summoning the Kakamega County Surveyor to appear in court on 6th November, 2019 and then failing to arrange for a court site visit or to order the surveyor to visit and survey the suit land.
8. That the magistrate erred in law in failing to find that land parcel No. L.R. E/Wanga/Isongo/416 was acquired by the defendants through fraud and misrepresentation and should have been annulled.
9. That the learned magistrate failed to consider and give due weight to the fact that in the agreement dated 26/3/1965 the land referenced as being bought was No. E/Wanga/Isongo/416 when land adjudication had not been done and the suit land could not have been in existence as L.R. E/Wanga/Isongo/416. The registration was only done in 1967. This is a colossal error and evidence of fraud which was not adequately considered.
10. That the learned magistrate erred and showed bias against the appellant by denying him a definite place to bury his deceased father who has been in the mortuary for close to three years now.
11. That the learned magistrate orders have cause manifest and grave injustice as against the appellant.

Reasons wherefore the appellant in the cross petition prays that this appeal be allowed and the judgment of the Senior Resident Magistrate be set aside and costs of the appeal be awarded to the appellant.

The respondent submitted that, the plaintiff's claim against the defendants in the Lower Court was for a declaration that the defendant's father registered part of the land parcel E/Wanga/Isongo/416 in trust for the plaintiff's father, the late Peter Makokha. Additionally, the plaintiff was seeking an order that the registration of the entire parcel No. E/Wanga/Isongo/416 in the name of Charles Wanguba and the subsequent subdivision is null and void and fraudulent. The plaintiff claimed that his late father had only sold a portion of the land and the remaining parcel of land, approximately 2 acres still belonged to his father.

That the defendants filed their defence and counter claim on the 4th of April, 2017 in which they denied the plaintiff's claim and filed a counterclaim. They stated that their father was the first registered owner of land parcel E/Wanga/Isongo/416 having bought the land from the plaintiff's father. The learned Magistrate was clear from the onset that the parties did not narrow down the list of issues and he had to come up with them as he considered the evidence before him and the testimony of the witnesses.

In their submissions the appellants raised a preliminary issue of law that the trial Magistrate did not have jurisdiction to hear and determine the matter. The respondent submitted that, during the hearing of the case in the lower court the trial Magistrate had not been appointed or gazette as a Magistrate Honourable Odera who could preside over land cases. When this issue arose he transferred the matter to another Magistrate who had jurisdiction. The trial Magistrate was gazette with effect from 12th November 2018 and the matter was re transferred back to him to write the judgement when he had jurisdiction.

This court has considered the appeal and the submissions therein. The preliminary issue for determination here is whether or not the Trial magistrate had jurisdiction to hear and determine the case. It is not disputed that during the hearing of the case in the lower court the trial Magistrate had not been appointed or gazette as a Magistrate who could preside over land cases. When this issue arose he transferred the matter to another Magistrate Honourable T. Odera who had jurisdiction. The trial Magistrate was gazette with effect from 12th November 2018 and the matter was re transferred back to him to write the judgement when he had jurisdiction. In the case of **The Owners of Motor Vessel 'Lillian S' Vs Caltex Oil Kenya Limited (1989) KLR 1, Nyarangi JA** stated as follows:

“Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction, there will be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds that it is without jurisdiction.”

The Supreme Court in its Advisory Opinion, in the **MATTER OF ADVISORY OPINION OF THE SUPREME COURT**, under Article 163(3) of the Constitution, Constitutional Application No. 2 of 2011, restated the principle in the **Motor Vessel "SS" Lillian**, in the

following terms –

“The “SS” Lillian” case [1989] KLR, establishes that jurisdiction flows from law and the recipient court is to apply the same with any limitation embodied therein. Such a court may not arrogate to itself jurisdiction through craft of interpretation or by way of endeavour to discern or interpret the intention of Parliament where the wording of legislation is clear and there is no ambiguity”

I have perused the lower court file and find that Senior Principal Magistrate’s Court Hon. Fredrick Nyakundi-Resident Magistrate presided over the entire trial in Mumias Principal Magistrate’s Court Civil Suit No. 120 of 2017 on various dates from the 15th May 2017 to the 30th August 2017 when the defence case was closed. He clearly had no jurisdiction at this point in time and he was gazette with effect from 12th November 2018. He then delivered the judgement in the said matter on 12th July, 2019. I find that the trial Magistrate had no jurisdiction to hear the matter at the time of trial and his gazette on 12th November 2018 cannot act retrospectively. Jurisdiction is everything and he should have downed his tools at that point. Having found so there will be no need to go through the merits and demerits of this appeal and cross appeal. I find the appeal succeeds on the issue of jurisdiction and I uphold the same. I order that the decision of Mumias Senior Principal Magistrate’s Court Civil Suit No. 120 of 2017 be set aside. There will be no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 26TH OCTOBER 2020.

N.A. MATHEKA

JUDGE