REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC APPEAL NO. 23 OF 2019

KENNETH OMOLLO SIMBIRI.....1ST APPELLANT

ROSELYNE WADENYA SIMBIRI.....2ND APPELLANT

VERSUS

DANIEL ONGOR.....RESPONDENT

JUDGMENT

This appeal arises from the judgment and decree of Chief Magistrate Hon. Julius Ng'arng'ar, delivered on 17th July 2019 in Kisumu CMC ELC Case No. 14 of 2017.

The brief background of this case as can be gathered from the record of Appeal is that the Plaintiffs filed the suit through their Attorney, Duncan Omondi Wadenya, having appointed and authorised him to deal with their immovable properties in Kenya vide a Power of Attorney dated 13th June 2010. The Plaintiff sought for a permanent injunction restraining the Defendant from entering, remaining upon, trespassing on or otherwise interfering with the Plaintiffs' quiet and peaceful use and possession of their parcel of land known as Plot No. 14 Migosi Site - Kisumu. The Plaintiffs also sought general damages for trespass and costs of the suit and interest thereon at court rates from the date of filing the suit until full payment.

The Plaintiffs claimed that the Defendant had unlawfully and wrongly entered into the suit parcel, laid a foundation for a building and continued other developments within the land without any justifiable cause or excuse.

The Defendants, on the other hand, denied entering into the suit parcel and averred that the construction he was undertaking was on Plot No. L.R. 15026/69 MIGOSI SITE/KANYAKWAR which was lawfully allocated to the Defendant by the Municipal Council of Kisumu in 2007.

The matter proceeded to full hearing in which the Plaintiff testified as PW1 and the Defendant testified as DW1 and one Valentine Oiro, a City Surveyor at the County Government of Kisumu testified as DW2.

The Defendant subsequently filed written submission dated 25th May 2019 and took issue with the competency of the Plaintiffs' attorney to file the suit. Counsel for the Defendant submitted that the power of attorney could not be admitted in evidence and used to support the capacity of Duncan Omondi Wadenya and the legality of the suit because it was not registered as required under Section 19 of the Stamp Duty Act and Sections 4 and 9 of the Registration of Documents Act. That the failure to register the said power of attorney rendered the suit incompetent before the law and that the suit should be dismissed with costs.

The Learned Trial Magistrate in his judgment of 17th July 2019, immediately dealt with the question of the legality of the power of attorney as an issue for determination. The Learned Magistrate held that the power of attorney ought to have been registered within 2 months upon arrival in Kenya as required under the mandatory provisions of Section 19 of the Stamp Duty Act as read with Sections 4 and 9 of the Registration of Documents Act. That the failure to comply rendered the suit incompetent as Duncan Omondi Wadenya lacked legal capacity to bring the suit.

The Learned Magistrate considered the Plaintiff's Counsel's contention that the question of legality of the power of attorney was a non-issue as the defence had admitted the capacity of the attorney's power and because the power of attorney was already submitted unopposed as an exhibit. The Learned Magistrate however held that a point of law cannot be bypassed because a party had not raised it at a certain point of the proceedings; and that a point of law can be raised at any stage during the proceedings including the submissions stage. The Learned Magistrate proceeded to strike out the suit with costs to the Defendant.

The Appellant being aggrieved by the judgment and decree of the court filed the current appeal on the following grounds:

1. The learned trial Magistrate erred in fact and law in basing his decision on a fact which was expressly admitted and which was

therefore a non-issue before the court.

2. The learned trial Magistrate erred in fact and law in faulting the power of attorney and refusing to accept it as proper and valid evidence produced before him when it had been admitted in evidence without any objection by the respondent.

3. The learned trial Magistrate misunderstood the import of the Stamp Duty Act Cap 480, Laws of Kenya and The Registration of Documents Act Cap 285 in disregarding the testimony of the Appellants' witness on that basis.

4. The learned trial Magistrate erred in holding that the Appellants' suit was incompetent.

5. The finding of the court was inimical to the constitutional directions on the exercise of judicial authority as well as the overriding objective of all rules applicable to judicial proceedings.

6. The learned trial Magistrate erred in law in failing to assess damages which he would have awarded had the suit before him succeeded.

7. The Learned Trial Magistrate ought to have allowed the Appellants' suit as they had successfully proved their claim to the standard set by law.

The Appellants therefore seek for orders setting aside the judgment and decree of the trial Magistrate; that judgment be entered for the Appellants against the Respondent as prayed in the plaint; an award of damages for trespass made in favour of the Appellants with accrued interest from the date of judgment of the court appealed from; and an order condemning the Respondent to pay the costs of this appeal and of the suit in the subordinate court.

Counsel filed their respective submissions as ordered by the court.

APPELLANTS'SUBMISSIONS

Counsel for the Appellants submitted that the fact that the suit had been brought by the Appellants through PW1 in his capacity as a holder of a power of attorney was pleaded in the plaint and expressly admitted in the Respondent's statement of defence. That the issue was therefore a non-issue.

Counsel cited the provisions of Order 2 Rule 11 of the Civil Procedure Act and Section 61 of the Evidence Act which provides that facts admitted or deemed to be admitted in civil proceedings need not be proved.

Mr. Otieno Counsel for the Appellant asserted that parties are bound by their pleadings unless the same are amended as required by law; and that the only exception was issues which emerge in the course of the trial and on which the parties expressed themselves and the matter left to the court to adjudge. That the issue of the mandate of PW1 did not arise at all.

Counsel relied on the cases of ***Kinyanjui Kamau George Kamau Njoroge*** **[2015] eKLR** and ***Nairobi City Council v Thabiti Enterprises Ltd*** **[1996-98] 2 EA 231**. Counsel for the Appellants further submitted that the issue did not come to the Respondent as a surprise, the power of attorney having been filed among the Appellants' list of documents and served on the Respondent's counsel on 22nd September 2014. That the issue was not raised at the case conference as required pursuant to Order 11 Rule 3(b) of the Civil Procedure Rules

It was counsel's submission that PW1 produced the power of attorney without any objection therefore the Respondent could not thereafter raise questions regarding the admissibility of the document and that the issue was introduced for the first time in the submissions.

Mr. Otieno counsel for the Appellants submitted that issues of whether the document was registered and stamp duty paid were questions of evidence requiring the facts to be proved by evidence and cited the case of ***Agnes Nduume Kioko v Alexander Njue*** **[2019] eKLR** where Odunga J held as follows:

> " *In this case however, the learned trial magistrate, quite properly in my view, was not amused by the procedure adopted. Instead of producing the exhibits by consent or otherwise, the parties proceeded to file submissions instead. Submissions, with due respect, do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions. As was held by* ***Mwera, J*** *(as he then was) in* ***Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007****:*
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> "*Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."*

Counsel also relied on the case of **Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR** and submitted that submissions do not amount to evidence unless expressly adopted as such. Counsel submitted that the Learned Magistrate in effect allowed the Respondent to offer evidence on submissions without testing the evidence and affording the Appellants an opportunity to respond.

Counsel for the Appellants submitted that the provisions of Section 19 of the Stamp Duty Act and Sections 4 and 9 of the Registration of Documents Act did not bar admission of the concerned documents for want of payment of stamp duty or registration. That the authorities

cited by the Respondent on the issue did not apply to the circumstances of this case as the objecting parties raised the issue of admissibility from the outset.

Mr. Otieno further submitted that the lack of payment of stamp duty is not fatal and does not lead to the automatic rejection of the document in evidence. Counsel also submitted that the finding of the court was inimical to constitutional directions on the exercise of judicial authority as well as the 'Oxygen Principle' under Sections 1A and 1B of the Civil Procedure Act. That the court decided the case on a narrow technicality and ignored the real issues in dispute.

Counsel relied on the case of **Robert Ngande Kathathi V Francis Kivuva Kitonde (2020) eKLR** where Odunga J held as follows:

> *"The current trend is that the Court must always be on the driving seat of litigation and this was appreciated by the Court of Appeal in **Stephen Boro Gitiha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009**, where the it was held inter alia that:*
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> *"on 23rd July 2009 both the Civil Procedure Act and the Appellate Jurisdiction Act were amended to incorporate sections 1A and 1B in the Civil Procedure Act and sections 3A and 3B in the case of the Appellate Jurisdiction Act. These provisions incorporate into the civil process an overriding objective which has also been defined. All courts are required when interpreting the two Acts and the rules made under both Acts or exercising the power under both Acts and the rules to ensure that in performing both functions the overriding objective is given the pride of place including the principal aims of the objective…The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with and whatever is in conflict with it must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The court must warn the litigants and counsel that the courts are now on the driving seat of justice and the courts have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible."*

Counsel faulted the trial Magistrate on dwelling on technicality to dismiss the suit without going to the merits of the case. Counsel relied on the case of **Hagos Birikti Tewoldebren & Another V Evans Ihura & another (2020) eKLR** on the issue that it is not mandatory for a plaintiff to attend court to testify in support of his or her case and that the plaintiff can use the evidence of any other competent witness to bolster his or he case.

On the issue that the trial Magistrate erred in failing to assess damages, counsel submitted that the trial Magistrate should have assessed damages had the suit been successful and relied on the case of **Glady Wanjiru Njaramba Vs Globe Pharmacy & Another (2014) eKLR** where Wakiaja J. held that:

> *"It is trite law that the trial court was under duty to assess the general damages payable to the plaintiff even after dismissing the suit. This position is confirmed by the court of appeal in the case of MORDEKAI MWANGI NANDWA v BHOGALS GARAGE LTD CA NO. 124 OF 1993 reported in [1993] KLR 4448 where the court held that the practice that damages be assessed even if the case is dismissed does not imply writing an alternative judgment" and in the case of MATIYA BYABALOMA & OTHERS v UGANDA TRANSPORT CO. LTD UGANDA SUPREME COURT CIVIL APPEAL No. 10 OF 1993 IV KALR 138 where the court held that the judge erred in not assessing the damage he would have awarded had the appellant been successful in her claim".*
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> *From the above authorities it is clear that the trial court fell into error by not assessing the award of general damages he would have awarded to the appellant had she been successful in proving her case."*

Counsel therefore urged the court to allow the appeal and award Kshs. 500,000/ per year since 2010 for trespass plus costs of the appeal.

RESPONDENT'S SUBMISSIONS

Counsel for the respondent filed submissions and reiterated the provisions of Section 19 of the Stamp Duty Act and Sections 4 and 9 of the Registration of Documents Act and submitted that the court rightly found that the suit was incompetent. That the production of the power of attorney did not stop the trial court from examining and interrogating its probative value.

Counsel relied on the case of ***Kenneth Nyaga Mwinge v Austin Kiguta & 2 others*** **[2015] eKLR** for the proposition that the mere admission of a document in evidence does not amount to its proof and that when the court is called upon to determine the admissibility of a document, it concentrated only on the document but when called upon to determine whether it has been proved or disproved, the court considers all facts and evidence on record.

Mr. Omollo relied on the case of **Francis Mwangi Mugo v David Kamau Gachago [2017] eKLR** where Munyao J held that a power of attorney dealing with immovable property must be registered and had this to say:

> *"l do not think capacity is a technicality curable under Article 159 of the Constitution, 2010. It is either YOU have it or YOU do not. YOU do not gain capacity retrospectively. At the time of filing suit, Francis Mwangi Mugo in my view did not have capacity because he had not registered the power of Attorney. I therefore, have no option but to strike out the suit with costs which shall be paid by the said Francis Mwangi Mugo."*

Counsel for the Respondent submitted that constitutional provisions, particularly Article 159 of the Constitution, did not apply as what was

raised was a point of law that went to the root of the case. That the said point of law could be raised at any time before the final judgment. Counsel therefore urged the court to dismiss the appeal with costs to the respondent.

ANALYSIS AND DETERMINATION

I have considered this appeal, the rival submissions made by counsel for both parties and the authorities cited. This being a first appeal, it is the court's responsibility as a first appellate court to subject the evidence that was adduced at the trial court to a fresh analysis and come up with a conclusion.

This court as a first appellate court can therefore examine the evidence afresh and make a determination on the Appellants' claim on its merits, as per ***Selle and another v Associated Motor Boat Company Ltd and others*** **[1968] 1 EA 123**:

> *"…this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ..."*

There are a number of facts that were not in dispute. These include the fact that the plaintiffs donated a power of attorney to one DUNCAN OMONDI WADENYA dated 13th June 2010 to deal with any immovable properties and all lands on behalf of the donee, that the power of attorney was neither registered nor was stamp duty paid for, that the appellant and the respondent claimed parcel No 14 and 69 respectively which were a resultant sub division of parcel L R No. 15026. It is also on record that the appellant and the respondent produced PDP plans indicating the position of the plot and that the two parties might be claiming distinct parcels of land No 14 and 69 with different numbers. Another important fact that was not in dispute is that the respondent has constructed on the suit land a storey building with the necessary approvals from the County government.

The issues that were in dispute were as to whether the plaintiff 's allocation of plot No. 14 was lawful, whether the allocation by Municipal Council of Kisumu of plot No 156026/69 to the defendant was lawful, the location of plot No. 14 in comparison to plot No. 69, whether the defendant has trespassed on plot No. 14, whether the plaintiff's suit is competent and which PDP the court should rely on

The first issue that the court will deal with is the issue of requirement of registration of a power of attorney in terms of the provisions of Registration of Documents Act. It is not in dispute that the power of attorney was executed in Pennsylvania in the United states of America on 13th June 2010 and that the same ought to have been registered within two months upon arrival in Kenya and that the same was not registered by the plaintiff. The question is whether an unregistered power of attorney to deal with immovable property is valid in law? Can it be used to transact business? What legal effect does it have on subsequent transactions? Does a holder of such a document have locus standi to prosecute a suit on behalf of the donor?

In answering the above questions, the court will rely on the case of **Sanjay Varma & 2 others v Jackson Eshiwani Likoye & 7 others [2020] eKLR** where Ombwayo J. held that:

> *"The powers of attorney that the 1st Plaintiff sought to produce were executed in the United Kingdom and not registered in Kenya as required under Section 44 (4) of the Land Registration Act, therefore he lacked the capacity to be enjoined in the suit and the evidence he tendered ought to be disregarded*."

Section 44(4) provides that an instrument executed outside Kenya shall not be registered unless it has been endorsed or is accompanied by a certificate in the prescribed form completed by a notary public or such other person as the Cabinet Secretary may prescribe. There was no evidence that this requirement was complied with.

Further section 9 of the Registration of Documents Act Cap 285 provides that every document the registration whereof is compulsory shall be registered within two months after its execution, and if executed outside Kenya it shall be registered within two months after its arrival in Kenya. There is further no evidence that this provision was complied with.

Section 4 of the Registration of Documents Act Provides that; :-

> **"All documents conferring, or purporting to confer, declare, limit or extinguish any right, title or interest, whether vested or contingent to, in or over immovable property (other than such documents as may be of a testamentary nature) and vakallas shall be registered as hereinafter prescribed:'**

A Power of Attorney being one of the said documents that confers rights, it then follows that as the instant Power of Attorney in issue herein was dealing with immovable property hence it needed to be registered before it could be used.

The issue that the appellant has issue with is that the point of registration of the power of attorney was never raised in the pleadings or at the time of admitting the document as an exhibit. The respondent submitted that it is trite law that a point of law can be raised at any time before judgment.

In the Court of Appeal case of **John K. Malembi v Trufosa Cheredi Mudembei & 2 others [2019] eKLR** the court held that:

> *"An issue urged in this appeal is that the trial judge considered matters not raised in the pleadings. The appellant contends that the issue of validity or otherwise of the sale agreement between the appellant and the deceased was never pleaded by either party. That the judge erred in considering the issue and invoking the provisions of the* ***Section 3 (3)*** *of the* ***Law of Contract Act*** *when the matter had never been pleaded."*

> *"On our part, we find it was proper for the trial court to suo motu raise and determine the issue of its own jurisdiction. The suit before the trial court was instituted on 23/10/2000 at the High Court prior to the 2010 Constitution before and establishment of the Environment and Land Court. We are of the view that the learned High Court Judge misdirected himself that he had jurisdiction pursuant to Paragraphs of the Practice Directions on Proceedings in the Environment and Land Court vide Gazette Notice No. 5178 dated 25/7/2014".*

Regarding new issues that may arise in the course of a trial, the Court of Appeal in **Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR** held:

> *"Of course if an issue arises in the course of hearing, and the same is fully canvassed by the parties, then even if that issue was not pleaded, then the court will make a determination on the matter. As was held in* ***Odd Jobs v Mubia*** ***[1970] EA 476,*** *"a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision."*

In the present case, the Respondent did not raise the issue of the legality of the power of attorney or the standing of the Appellant's Attorney in their statement of defence or during the hearing. The court is under an obligation to evaluate the case in its totality and if there is any anomaly or illegality with the process which is mandatory in nature then the court cannot sanitize such anomaly or illegality even though it was not raised as an issue for determination. The court also has an obligation to frame issues from the pleadings or summarize the issues put forth by the parties.

The parties might ignore pertinent issues which the court may find to be the real issue for determination. This does not mean that the court would be dealing with unpleaded issues for determination. I find that the trial Magistrate was right in finding that the suit was incompetent as the power of attorney was not registered as required. The issue could be raised at any time and even if it was not raised the trial Magistrate in evaluating the evidence in totality would have noticed the anomaly and flagged it out.

Counsel relied on the case of the case of **Kenneth Nyaga Mwige v Austin Kiguta & 2 others (2015) eKLR** eKLR that;

> *The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not became part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.*

The fact that the power of attorney was produced as an exhibit did not mean that the probative value had already been established. The court is under an obligation when making a judicial opinion to look at the document and the facts and evidence on record together with the relevant laws including precedents on the issue.

On the issue of award of general damages, the learned trial Magistrate having found that the plaintiff had no capacity to sue due to non-registration of the power of attorney, had no obligation to award damages as the entire suit was dismissed on want of capacity.

Capacity or locus standi goes to the root of the case and cannot be termed as a technicality that can be salvaged by Article 159 of the Constitution. I agree with Judge Munyao in the case of **Francis Mwangi Mugo v David Kamau Gachago [2017] eKLR** where he stashed that:

> *" there is a difference between the requirement of registration and the requirement to pay stamp duty. Registration is a formal entry of a document in a specified register so that certain rights may pass by such entry or so that the public may notified of the existence of the said document. Stamping is a question of revenue collection by the Government. It is normal for stamp duty to be paid on registration of a document, that is, for the Government to raise revenue by requiring that documents that need registration be stamped, but the two, that is stamp duty and registration, do not mean the same thing. It is indeed not always the case that stamp duty must be paid for all documents that require to be registered or that it is only registered instruments that attract stamp duty."*

This shows that the omission of registration if it is a mandatory requirement attracts consequences for non-compliance. Late payment of stamp duty can attract penalties.

On the issue whether the plaintiffs are entitled to the orders sought regarding the issue of ownership of L.R. 15026 the Appellants produced the certified copy of the Grant No. I.R. 63455 with respect to L.R. 15026 issued to the Kisumu County Council.

However, on the question of whether the Appellants' Plot 14 Migosi Site - Kisumu was indeed one and the same as the Respondent's Plot

No. L.R. 15026/69 MIGOSI SITE/KANYAKWAR, the evidence tendered by the plaintiff does not prove that the plot he is claiming is either in existence or the same as the one the respondent is claiming.

Both the appellant and the respondent produced copies of deed plans indicating different positions of the plots that they were claiming. The respondent went further and called a County Surveyor who gave evidence and confirmed the position of the respondent's plot. Both parties claimed to have identified their allocations accompanied by a Surveyor, but the appellant did not see the need of calling a surveyor as a witness or anyone from the Lands office to beef up his case. This would have been helpful in this case. The maxim that he who alleges must prove is relevant in this case

A consideration of the development plan indicating the position of Appellant's Plot 14 and the provisional deed plan indicating the position of the Respondent's Plot 69 points to the fact that the plaintiff's and the respondent's plots are distinct and separate. The plaintiff should have gone a mile to call a witness either from the lands office or Survey office. Without evidence from a surveyor or the Physical Planner regarding the exact position of the plots in relation to each other, the Appellants case remains unproved to the required standard.

I find that even if the case was not dismissed for want of capacity the same would still have been dismissed for failure of the Appellant to prove his case on a balance of probabilities. This appeal is therefore dismissed with costs to the respondents.

DATED* and *DELIVERED* at *ELDORET* this *6TH day* OF *October, 2020

DR. M. A. ODENY

JUDGE