



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC APPEAL NO. 34 OF 2018.

(Formerly Bungoma High Court Civil Appeal Case No. 98 of 2010)

TIMOTHY WEKESA MULUPI

(Substituted with CATHERINE NEKESA WEKESA).....APPELLANT

VERSUS

MASASABI WABULE (Substituted with

JOINA NABANGALA MASASABI - (DECEASED)

(Substituted with: -RESPONDENTS

1. JOSEPHAT WANGILA SAWA

2. JOHANSON WAFULA MASASABI)

J U D G M E N T

By an amended plaint dated 31st May 2004 and filed at the **BUNGOMA SENIOR PRINCIPAL MAGISTRATE'S COURT** on 3rd June 2004, **TIMOTHY WEKESA MULUPI** (the Appellant herein now substituted with **CATHERINE NEKESA WEKESA**) sought against **MASASABI WABULE** (the Respondent herein later substituted with **JOINA NABANGALA MASASABI** and now substituted by **JOSEPHAT WANGILA SAWA** and **JOHANSON WAFULA MASASABI**) the following order in paragraph 8A thereof: -

“It is the plaintiff's case that the defendant holds 5 acres comprised in title NO KIMILILI/KIMILILI/561 in trust for the plaintiff and accordingly prays that this Honourable Court do declare a trust to this effect and order the defendant to transfer the said 5 acres to the plaintiff and in default thereof the Executive Officer or such other Officer authorized by this Court to do so in place of the defendant.”

The Appellant also sought costs and interest.

By an amended defence dated 18th June 2004, the Respondent denied all the allegations levelled against him adding that the Appellant is infact a trespasser on the land parcel **NO KIMILILI/KIMILILI/561** and sought orders that he and his agents and servants be evicted therefrom.

The record of proceedings in the trial Court show that the Appellant testified before **HON R ODENYO (SENIOR RESIDENT MAGISTRATE)** on 3rd December 2004. Thereafter, the trial proceeded before **HON P ACHIENG (RESIDENT MAGISTRATE)** on 11th September 2007 who heard the Appellant's witnesses **JOHN WACHILONGA (PW 2)**, **ROBERT WAFUNAFU (PW 3)** and **DAVID NAMUTALI (PW 4)**. The Appellant's case was closed on 30th September 2009.

Despite having been granted several adjournments, the Respondent who was said to be aged and sickly, did not testify. The Respondent's case was subsequently closed on 12th May 2010.

In a short-reserved Judgment delivered on 14th July 2010, **HON P ACHIENG** dismissed the Appellant's case with costs. The 5th, 6th, 7th and 8th paragraphs of that Judgment are relevant for purposes of this appeal and I shall therefore recapitulate them: -

5: “The plaintiff therefore prays that this Court makes a declaration that the land is being held in trust and order the defendant

to transfer the said 5 acres to the plaintiff and in default, the Executive Officer or other Officer authorized by the Court to do so in place of the defendant.”

6: *“I have considered the plaintiff’s claim and the evidence tendered in support thereof at the hearing.”*

7: *“The effect of the orders sought by the plaintiff would be to interfere with and/or to cancel existing title to land. This Court lacks jurisdiction under the Registered Land Act CAP 300 to make such orders.”*

8: *“That being the case, I will not endeavour to evaluate the evidence tendered and I dismiss the suit with costs to the defendant.”*

Aggrieved by that Judgment, the Appellant filed this appeal on 11th August 2010, originally in the High Court before it was transferred to this Court on 9th November 2018, seeking to have it set aside and in its place, this Court do allow the Appellant’s claim in the lower Court or grant any other alternative relief.

The following six (6) grounds were raised in the Memorandum of Appeal: -

1: *“The learned trial Magistrate erred both in law and in fact in finding that she did not have jurisdiction over the Appellant’s claim when she was indeed seized with jurisdiction.”*

2: *“The trial Magistrate grossly erred both in law and in fact in failing to all (sic) consider or analyze all of the evidence placed before her.”*

3: *“The trial Magistrate misdirected herself in failing to note that the Respondent had not tendered any contrary evidence hence the Appellant’s claim was uncontroverted and unchallenged.”*

4: *“The learned trial Magistrate did not give any candid reasons for her decision.”*

5: *“The decision of the trial Magistrate is contrary to law.”*

6: *“The decision of the trial Magistrate is hence plainly wrong in view of the foregoing.”*

With the consent of the parties, the appeal has been canvassed by way of written submissions. The same have been filed both by **MR MURUNGA** instructed by the firm of **J. O. MAKALI & COMPANY ADVOCATES** for the Appellant and by **MS NANZUSHI** instructed by the firm of **LUCY NANZUSHI & CO ADVOCATES** for the Respondent.

I have considered the record herein and the submissions by Counsel.

In my view, this appeal can be determined on ground **NO 1** which assails the trial Magistrate for declining jurisdiction in the case before her yet she was seized of the same.

As is clear from the plaint filed in the Subordinate Court, the Appellant’s claim was based on trust. It was his case that the Respondent holds 5 acres out of the land parcel **NO KIMILILI/KIMILILI/561** in trust for him. The trial Magistrate appreciated that the claim before her was one of trust and indeed she said as much in paragraph 5 of the impugned Judgment. However, in paragraph 6 of the said Judgment, she declined jurisdiction to determine the dispute citing the **Registered Land Act Chapter 300 LAWS OF KENYA** (now repealed but which was the applicable law in 2010 when the Judgment was delivered).

Although the trial Magistrate did not cite the particular provision of the repealed law which divested her of the jurisdiction to determine the dispute before her, she probably had in mind **Section 159** of the **repealed Registered Land Act** which provided for the jurisdiction of Courts. That section provided as follows: -

“Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate’s Court, or where the dispute comes within the provisions of Section 3(1) of the Land Disputes Tribunal Act, in accordance with that Act.”

Other than stating in paragraph 7 of the impugned Judgment that *“this Court lacks jurisdiction under the Registered Land Act CAP 300 to make such orders”*, the trial Magistrate did not clarify whether by lack of jurisdiction she meant pecuniary jurisdiction or that she could not determine an issue relating to trust. If she meant pecuniary jurisdiction, there is nothing in the Judgment to indicate what the land parcel **NO KIMILILI/KIMILILI/561** was valued at and if so, whether it was beyond the twenty-five thousand pounds stipulated in **Section 159** of the repealed **Registered Land Act**. I have however perused the testimony of the Appellant and his witnesses and what is clear is that the Appellant’s father had in 1971 purchased from the Respondent’s husband 5 acres out of the land parcel **NO KIMILILI/ KIMILILI/561** at a consideration of Kshs. 2,000/=. The reference to pounds in **Section 159** of the repealed **Registered Land Act** could only mean the Kenyan pound which was twenty (20/=) shillings. So, the pecuniary jurisdiction of the Resident Magistrate in civil cases was pegged at Kshs. 500,000/=. That would mean that the value of the 5 acres was well within the pecuniary jurisdiction of the Resident Magistrate in 2010. Therefore, the trial Magistrate had the necessary pecuniary jurisdiction to determine the dispute before her.

If by lack of jurisdiction the trial Magistrate was referring to the issue of trust, then again, she erred both in law and fact because, in **PAUL MUTHUITA .V. WANOE C.A CIVIL APPEAL No 12 of 1982 [1982 eKLR]**, **MADAN J A** (as he then was) addressed that issue as follows: -

“However, in my view the learned Judge was not correct in saying that the Resident Magistrate had no jurisdiction to declare the existence of a trust. The jurisdiction of the Resident Magistrate was derived from Section 159 (now repealed) of the Registered Land Act.

Where the Resident Magistrate had jurisdiction under that section by virtue of the value or location of the subject matter, his jurisdiction was as wide as that of the High Court.”

This case involved a claim by the Appellant that since 1971 when his father purchased 5 acres out of the land parcel **NO KIMILILI/KIMILILI/561**, he and his family have lived thereon yet in 2013, the same was fraudulently transferred to the Respondent. This was clearly a matter within the jurisdiction of the trial Court.

Finally, it is instructive to note that in their respective pleadings, both the Appellant and the Respondent admitted the jurisdiction of the trial Court. While there is nothing wrong in a trial Court raising the issue of jurisdiction suo motto, there was really no basis upon which the trial Magistrate concluded that she had no jurisdiction to determine the dispute before her. By declining jurisdiction in the matter, the trial Court did not address the merits of the parties' cases. The dispute therefore remains un – resolved and this Court must make appropriate orders in that regard.

Ultimately therefore, this appeal is allowed in the following terms: -

- 1. The Judgment dated 14th July 2010 and all subsequent orders flowing therefrom are hereby set aside.**
- 2. BUNGOMA SENIOR PRINCIPAL MAGISTRATE'S CIVIL SUIT No 437 of 2001 be placed before the CHIEF MAGISTRATE BUNGOMA on 23rd November 2020 for directions as to hearing and final disposal before that Court.**
- 3. In view of the age of the case, the hearing be expedited.**
- 4. The Appellant shall have costs of the appeal and in the Court below.**

Boaz N. Olao.

J U D G E

19th November 2020.

Judgment dated, signed and delivered at **BUNGOMA** this 19th day of November 2020 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

Boaz N. Olao.

J U D G E

19th November 2020.