



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC APPEAL NO. 7 OF 2018

(ORIGINALLY KITALE HCCA NO. 9 OF 2001)

KAJOLITUM LOKOULEM.....APPELLANT

VERSUS

THOMAS R. CHELIMAL.....1ST RESPONDENT

(Being an appeal from judgment of

Hon. C.M MWEBI, RM in KITALE SPMCC No. 38 of 1992

delivered on the 10th April, 2001)

BETWEEN

THOMAS RUMAITA CHELIMANIPLAINTIFF

VERSUS

KAJOLITUM LOKOULEM.....DEFENDANT

JUDGMENT

The Appellant's Case

1. This appeal arises from a suit in which the Respondent, then plaintiff, filed a plaint dated 3/2/1992 in *Kitale SPMCC Civil Suit No. 38 of 1992* in which he sought the following orders against the appellant, then defendant therein:-

(a) Eviction from parcel of land number W.Pokot/Siyoi/530.

(b) Costs of suit and interest.

(c) Any other relief the court may deem just to grant.

2. The appellant filed a defence dated 26/2/92 simply denying the respondent's claim and praying that the respondent's claim be dismissed with costs to the appellant.

3. On 18/7/2000, the appellant then filed a notice of preliminary objection dated 18/7/2000 objecting to the jurisdiction of the court to handle the matter purportedly in the light of the Land Disputes Tribunals Act.

4. It is the judgment of the court dated 10/4/2001 that the appellant is aggrieved by.

5. In the appellant's Memorandum of Appeal dated 18/6/2001 he listed 2 grounds as follows:

(a) The learned trial magistrate erred in law and in fact in failing to appreciate that the trial court had no jurisdiction to grant reliefs sought in view of the provisions of the Land Disputes Tribunals Act No 18 of 1990;

(b) That the findings of the trial magistrate were against the weight of the evidence adduced.

6. The appellant seeks that the trial court's judgment be set aside. 7. According to the grounds the issues for determination in this appeal are: whether the trial court had jurisdiction and whether the findings of the trial magistrate were against the weight of the evidence.

8. Concerning the issue of jurisdiction the appellant submits in his written submissions filed on 12/11/2018 that although the Land Disputes Tribunals Act had been enacted, the commencement date had not yet been gazetted. The same came into operation on 1/7/1993 vide Legal Notice No. 91 of 30/4/1993. The impugned judgment was delivered on 2/10/1992. However the respondent appealed to the High Court and an application was filed in the High Court during the appeal for adduction of further evidence. In its decision the high court allowed the application and ordered the lower court to vacate its decree and judgment and proceed to call the Land Registrar to produce documents. The Lower Court thereafter delivered its judgment on 10/4/2001.

9. It is the appellant's case that by the time the High Court issued its order on 28/4/1994, the Land Disputes Tribunals Act had been operationalized with effect from 1/7/1993. Some of the lower court's proceedings were therefore conducted after this period.

10. The appellant submits that the **Land Disputes Tribunals Act** repealed the **Magistrates' Jurisdiction (Amendment) Act of 1981**. The appellant argues that **Section 159** of the **Registered Land Act** intended that the matters falling within the provisions of **Section 3(1)** of the **Land Disputes Tribunals Act** be dealt with under that latter Act.

11. Consequently, the appellant further argues, the claim by the respondent in the lower court fell squarely within the jurisdiction of the Land Disputes Tribunal Act.

12. In my view this argument is correct.

13. The second issue is whether the High Court by its order made after the Land Disputes Tribunal Act had been operationalized could have conferred jurisdiction on the lower court.

14. The appellant submits that transitional provisions existed. **Section 13 (1)** of the **Act** stated that where any proceedings had been commenced at the Magistrate's Court as at the time of the Act's commencement date, unless the court has heard and pronounced judgment thereon the proceedings shall be discontinued until the dispute has been referred to the tribunal and determined in accordance with the Act. The Act became applicable upon the lower court being ordered by the High Court to vacate its judgment and decree and proceed to deliver its judgment.

15. In my view, when the judgment was vacated the effect was that the proceedings were deemed to be pending before the Magistrate's Court within the meaning of provisions of **Section 13(1)** and the Magistrate could not then proceed as he was barred by statute from so doing. Therefore I agree with the appellant's argument that jurisdiction can never be assumed but is conferred by statute. The proper approach to take that would accord harmony between the express provisions of the statute and the order pronounced by the High Court is that the order could not override the express provision of the statute so as to confer jurisdiction on the lower court.

16. However, this appeal comes up for determination 17 long years after it was filed, and as fate would have it, 6 years after the Land Disputes Tribunals Act under which the dispute would have now been referred to the Tribunal, was repealed.

17. It may be rhetorically asked, first, whether it is not necessary to allow the judgment to remain unaffected for the sole reason that the Magistrate's Court, now being vested with jurisdiction, will only go through the same motions and possibly arrive at the same judgment and whether consequently, it is not a waste of much valued resources including judicial time.

18. In my view whether or not the Magistrate's Court that will rehear the dispute will arrive at the same decision as the one dated 10/4/2001 does not matter. What does is that the judgment arrived at through proceedings that were illegal on their face is gone and proceedings that are untainted by illegality will be pursued henceforth.

19. For those reasons this appeal succeeds.

20. I hereby issue the following orders:

(a) That this appeal is hereby allowed.

(b) That the judgment of the magistrate's court dated 10/4/2001 in Kitale SPMCC Civil Suit No. 38 of 1992 is hereby set aside.

(c) That the respondent shall meet the costs of the appeal and the costs of the suit in the trial court below.

It is so ordered.

Dated and signed and Delivered at Kitale on this 28th day of January, 2019.

MWANGI NJOROGE

JUDGE

28/01/2019

Coram:

Before -Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Wanjala for appellant

Mr. Karani for Mr. Magal for respondent

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

28/01/2019