REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KISUMU

ELC APPEAL NO. 4 OF 2018

JORAM OKOTH.....................APPELLANT

VERSUS

LEONARD O. ODADA.........RESPONDENT

J U D G M E N T

(Being an appeal from the ruling and decision of the Lower Court Chepkwony Mrs. (SPM dated 29/2/2012 in the original NYANDO SPMCC NO. 152 of 2009 LEONARD OUKO ODADA –VS- JORAM OKOTH)

This is an appeal from the ruling of **HON. D. CHEPKWONY – SENIOR PRINCIPAL MAGISTRATE** (as she then was) dated 29th February 2012 whereby she granted an order of injunction restraining the Appellant from interfering, remaining on, cultivating or in any other way trespassing onto land parcel **No. 524 WAWIDHI B ADJUDICATION SECTION** pending the hearing and determination of the suit. Having obtained leave, the Appellant filed this appeal on 28th March 2012 and raised the following six (6) grounds of appeal:-

1. The learned Magistrate erred in allowing the application dated 4th June 2009 by granting the plaintiff/Respondent a temporary injunction pending the hearing and determination of the suit.

2. The learned magistrate failed to appreciate the totality of the evidence before her and the submission made on behalf of the Appellant thus reaching to a conclusion that was contrary to the evidence before her and the law.

3. The learned magistrate erred in hearing and determining the application yet the court had no jurisdiction to hear the same.

4. The learned magistrate erred in failing to appreciate that the Respondent had failed to make full discourse to the court as regards the suit land.

5. The learned magistrate failed to appreciate that the matter before her is res judicata as a previous suit WINAM SRMCC NO. 152 OF 2010 which dealt with similar issues had been dealt with to its meaningful conclusion.

6. The ruling was against the evidence as adduced in the Appellant's replying affidavit dated 18th May 2010 and the annextures thereto thus contrary to the law.

When the appeal came before me on 27th November 2018 during the service week in Kisumu, it was agreed that it be canvassed by way of written submissions. These were duly filed both by **MR. SALA ADVOCATE** for the Appellant and **MR. OLEL ADVOCATE** for the Respondent.

I have considered the record of appeal and the submissions by counsel.

This appeal can be determined on ground No. 3 which questions the trial Court's exercise of jurisdiction which it did not have in the dispute before it but before I consider the issue of jurisdiction of the trial court, the Respondent's counsel has submitted that the appeal before me is incompetent is view of the provisions of Order 42 Rule 2 of the Civil Procedure Rules which provides as follows:-

> **"Where no certified copy of the decree or order appealed against is filed with the Memorandum of appeal, the Appellant shall file such certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the *appeal summarily under section 79B of the Act until such certified copy is filed*"**

It is the submission of the Respondent's counsel that there is no extracted copy of the order being appealed in the record of appeal and therefore this appeal is incompetent and untenable. The Appellant's counsel made no submissions on that issue. In support of the submission that this appeal is incompetent because there is no record of the order being appealed, counsel for the Respondent cited the following cases:-

> **1. MUNISHRAM CO –VS. SODA WATER FACTORY 1934 16(1) LRK 2 MANASES KURIA AND OTHERS –V- NJOROGE NBI CIVIL APPEAL NO. 153 OF 1994.**

Unfortunately, copies of those cases were not availed for my consideration. Counsel should always annex copies of any judgments on which they seek to rely if they are to be of any benefit to the Court. Having said so, however, it is clear from the record of appeal that the ruling being appealed is part of the record and duly certified. The Respondent therefore was not prejudiced as he knew the issues being raised in the appeal. It would have been different if the record of appeal did not have a copy of the ruling dated 29th February 2012 which is the subject of this appeal. That ruling is at page 67 to 69 of the record of appeal and in my view; it meets the purpose of Order 42 Rule 2 of the Civil Procedure Rules. And whereas this Court has not had the benefit of perusing the two cases cited by the Respondent's counsel, it is clear from their citations that they were determined long before the promulgation of the 2010 constitution which in Article 159(2) (d) provides that:-

> **"Justice shall be administered without undue regard to procedural technicalities"**

I therefore rule that there is a competent appeal for my determination.

As I stated earlier in this judgment, the only issue for my determination in this appeal is whether the trial Court had the jurisdiction to determine the issue before it. As was held in **OWNERS OF MOTOR VESSEL 'LILLIAN S' V. CALTEX OIL (K) LTD 1989 KLR 1**, jurisdiction is everything and a Court of law downs it's tools the moment it finds that it has no jurisdiction in a matter.

On the issue of jurisdiction, counsel for the Appellant has submitted that the land in dispute is in a land adjudication area and therefore it was mandatory that the consent of the Land Adjudication Officer be obtained before the suit was filed in the trial Court as mandated by **SECTION 30 OF THE LAND ADJUDICATION ACT CHAPTER 284 LAW OF KENYA**. Counsel for the Respondent has however submitted that Section 30 of the Land Adjudication Act was fully complied with and that having been unable to solve the dispute between the parties, the Land Adjudication Officer by this letter dated 18th March 2009 wrote as follows:-

> **"All parties present were advised to follow the legal laid down procedure in case of any grievances."**

Counsel for the Respondent then goes on to submit that:-

> **"We submit that this letter amounts to consent as envisaged by section 30(10 of the Land Adjudication Act".**

It is common ground therefore that the land in dispute is in an adjudication section. Indeed the land is referred to as parcel **No. 524 WAWIDHI B ADJUDICATION SECTION.** That being the case, then **section 30 (1) of the Land Adjudication Act Chapter 284 LAWS OF KENYA** had to be complied with before the plaint in the trial Court was filed. The Section reads:-

> **"Except with the consent in writing of the Adjudication Officer, no person shall institute, and no Court shall entertain any Civil proceedings concerning an interest in land in an adjudication section** ***until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act*****"** Emphasis added.

It is clear from the above that unless a party has obtained, in writing, the consent of the Land Adjudication Officer he cannot institute in Court any proceedings over an interest in Land in an adjudication section. And without such consent, no court shall entertain such a dispute. There is no evidence placed before me showing that when the Respondent filed **CIVIL SUIT NO 152 OF 2010 at the NYANDO SENIOR RESIDENT MAGISTRATE'S COURT** on 15th April 2010, he had obtained the consent referred to under section 30(1) of the **Land Adjudication Act.** Therefore, the Respondent had no right to file the suit and the trial Court had no jurisdiction to entertain it. It was dead on arrival and I do not consider the letter by the Adjudication Officer dated 18th march 2009 to be the consent envisaged by section 30(1) of the Land Adjudication Act as submitted by **MR. OLEL**. It is neither addressed to the parties nor to the Court and is instead addressed to the Area Chief Wawidhi Location expressing the Land Adjudication Officer's frustration in trying to resolve the dispute between the parties. If that letter was meant to be a consent, it would have been in very clear and un-ambiguous terms. **In BENJAMIN OKWARO ESTIKA –V- CHRISTOPHER ANTONY OUKO AND ANOTHER – C.A CIVIL APPEAL NO. 115 OF 2009** (2013 eKLR), the Court of Appeal faced with a similar scenario said:

> **"That being so, the mandatory requirements of section 30(1) had to be complied with i.e. consent of the Land Adjudication Officer had to be obtained before filing a case in respect of a dispute on land in that adjudication section or before the court could be clothed with jurisdiction to hear it"**

It follows therefore that the orders of injunction issued by the trial Court by its ruling dated 29th February 2012 were made without jurisdiction and must be set aside.

The upshot of the above is that this appeal is merited and is allowed. This Court makes the following orders:-

1. The orders issued on 29th February 2012 are set aside.

2. The Respondent's plaint filed on 15th April 2010 and the application dated 14th April 2010 and the order of injunction issued on 12th May 2010 are struck out.

3. The Appellant shall have costs of the appeal and in the Court below.

B. N. Olao

JUDGE

21st March, 2019.

Judgment dated, delivered and signed in open Court this 21st day of March 2019 at Kisumu.

Ms Kagoya for Appellant present

Mr. Olel for Respondent present

Respondent present

Right of Appeal explained.

B. N. Olao

JUDGE

21st March, 2019.