



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND COURT AT KAKAMEGA**

**ELCA NO. 35 OF 2017**

**MARY VUNDEMBEKA MUJIVANE.....APPELLANT**

**VERSUS**

**JACOB OMIDO**

**ELIUD STANLEY M. OMIDO.....RESPONDENTS**

**JUDGEMENT**

The appellant being dissatisfied with the judgment of the Principal Magistrate, appeals to this honourable court on the following grounds:-

1. That the learned magistrate erred in law and in fact when he disregarded the credible defence evidence when the same raised serious issues.
2. That the learned magistrate misdirected himself in law and in fact when he proceeded to hear and determine the matter when he had no jurisdiction to deal with a land matter.
3. That the learned magistrate misdirected himself in law when the issue of the plaintiff's registration only caused him to find in favour of the plaintiff.
4. That the learned magistrate misdirected himself in law and in fact when he ignored the fact that the defendant has continuously been in occupation of the land since 1978 to-date.
5. That the learned magistrate erred in law and in fact when he failed to properly analyse the money paid by the defendant to the auctioneers and for which evidence had been offered.
6. That the judgment goes against the evidence on record.

The appellants pray that this appeal be allowed and the judgment of the lower court be set aside. That the respondents be condemned to pay the costs of this appeal and of the lower court.

It is the respondent's submission that the appeal herein lacks merit and should be dismissed with costs. On ground 1 of the appeal, they submit that there was no credible evidence adduced by the defence at all. The plaintiff's case on how he acquired the land was not challenged. The seller of the land testified as PW2 (Harun Salamba). He stated how he sold the land and to whom. He confirmed the sale agreement dated 7/6/1978 and produced as plaintiff's Exhibit 7.

The plaintiff produced exhibit 8 (a) and (b) and 9. These documents relate to the transfer and Land Control Board consent. The plaintiff avers that he gave authority to the appellant to plant vegetable when

the husband was abroad. The appellant in 2011 unlawfully constructed a house on the said land prompting the plaintiff to sue. PW3 testified and confirmed the plaintiff's case.

PW4, Fred Mujivane is the appellant's husband. PW4 gave history of the family land as it were before registration. In his testimony he confirms that the land given to him and his siblings is there and that is where he put up his house and married the appellant. He further stated that the plaintiff allowed his family to farm part of the land the plaintiff bought from Harun Salamba (PW2).

He states that when he came back from the U.S the appellant was nowhere in 1980's. He confirm that he never bought the land in question and did not sent any money to the plaintiff while in the U.S. He confirms the land belongs to the plaintiff (Jacob).

To show that the plaintiff unlawfully erected a house in 2011, DW3, Silvanos Lumumba Sivutse, states that she came to the land in 2011. The appellant in her evidence stated that she saved the land from being auctioned. The money deposited to Regent Auctioneers was not paid because she was claiming ownership but she wanted to purchase the land. The appellant did not adduce any evidence as to how she alleges to have bought the land together with her husband, who denied every buying the land in question. Indeed the appellant admits that she has been staying in Ikumba Majengo from 1979 upto 1985 and then moved to Chango. She admits she put up the house in 2011.

On ground 2 of the appeal, they submit that the trial court had jurisdiction to hear the case. Under the Constitution of Kenya and Environment and Land Court (No. 19 of 2011) the Chief Justice had powers to make rules pursuant to sixth schedule part 5 section 22, Article 161 (2) (a) of the constitution and Sections 30 (1) and (2) of the Environment and Land Court Act as regards land matters.

Pursuant to the quoted provision, the chief Justice vide Gazette Notices No's 16268 at directions 7 gave the courts power to hear the same. (A copy is attached). The issue of the Magistrates Court has been conclusively determined in Court of Appeal at Nairobi in Civil Appeal at Nairobi in Civil appeal No. 287 of 2016. The Law Society of Kenya Nairobi Branch vs. Malindi Law Society and 3 others.

The court has carefully considered the submissions in this appeal. On ground 2 of the appeal which touches on jurisdiction of the Magistrates court, The Statute Law (Miscellaneous Amendments) Act, 2015, Act No. 25 of 2015 received Presidential assent on 15<sup>th</sup> December 2015. Under Section 2 thereof, several laws were amended as indicated in the schedule thereto. Of relevance to this judgment were amendments made to The Environment and Land Court Act, Act No. 19 of 2011(the ELC Act) with a view to conferring on the Chief Justice the mandate to transfer Judges from the specialized courts to the High Court and vice versa, and clothing Magistrates courts with authority to hear and determine disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land. The relevant sections are as follows;

*"26. Sitting of the Court*

*(1) The Court shall ensure reasonable and equitable access to its services in all Counties.*

*(2) A sitting of the Court may be held at such places and at such times, as the Court may deem necessary for the expedient and proper discharge of its functions under this Act.*

*(3) The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country.*

*(4) Subject to Article 169(2) of the Constitution, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle —*

*(a) disputes relating to offences defined in any Act of Parliament dealing with environment and land; and*

*(b) matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Courts Act.*

*(4) Appeals on matters from the designated magistrate's courts shall lie with the Environment and Land Court."*

Amendments were made to Section 101 of the Land Registration Act which was amended by inserting the words "*and subordinate courts*" immediately after the expression "2011" and Section 150 of the Land Act that was amended by deleting the words "*is vested with exclusive jurisdiction*" and substituting therefore the words "*and the subordinate courts as empowered by any written law shall have jurisdiction.*" The Magistrates Courts Act, Act No. 26 of 2015, an Act of Parliament to give effect to Articles 23(2) and 169(1)(a) and (2) of the Constitution was enacted to confer jurisdiction, functions and powers on the magistrates' courts; to provide for the procedure of the magistrates' courts, and for connected purposes. It received Presidential assent on 15<sup>th</sup> December 2015. It was to commence on 2<sup>nd</sup> January 2016. Section 9 of that Act deals with claims in employment, labour relations claims; land and environment cases and provides that:

*"A magistrate's court shall —*

*(a) in the exercise of the jurisdiction conferred upon it by section 26 of the Environment and Land Court Act (Cap. 12A) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to —*

*(i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*

*(ii) compulsory acquisition of land;*

*(iii) land administration and management;*

*(iv) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and*

*(v) environment and land generally.*

*(b) in the exercise of the jurisdiction conferred upon it under section 29 of the Industrial Court Act, 2011 (No. 20 of 2011) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to employment and labour relations."*

The appeal *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others* (2017) eKLR arose from the judgment of the High Court (Emukule, Chitembwe, Thande, JJ) delivered on 11<sup>th</sup> November 2016 in which the court decreed that Section 2 of the Statute Law (Miscellaneous Amendments) Act, 2015;

*"in relation to the jurisdiction of the subordinate courts, in respect of matters relating to environment and the use, occupation of and title to land is inconsistent with Article 162(2) of the Constitution, and therefore null and void."*

This means that magistrate's court had jurisdiction at that time to entertain land matters prior to the amendments in 2015 discussed above. The case was filed in October 2011.

On the other grounds of appeal, I have perused the record of appeal. On the credibility of the evidence. The seller of the land PW2 gave evidence and stated how he sold the land. He confirmed the sale agreement dated 7/6/1978 and produced as plaintiff's Exhibit 7. The plaintiff produced exhibit 8 (a) and (b) and 9. These documents relate to the transfer and Land Control Board consent. The defendant was a licensee on the suit premises but illegally constructed a house. The plaintiff's case on how he acquired the

land was not challenged. I find that the learned Principal Magistrate did not err in law in the judgement.

In **Mwanasokoni v Kenya Bus Service (1982 - 88) 1 KAR 870**, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision was judiciously arrived at and will not interfere with the same. The court finds no basis to interfere with the award as it was based on cogent evidence. This appeal is dismissed for lack of merit. The appellant is to meet the costs of the appeal.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 19<sup>TH</sup> DAY OF MARCH 2019.**

**N.A. MATHEKA**

**JUDGE**