REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC APPEAL NO. 8 OF 2018

FORMERLY HIGH COURT APPEAL NO. 15 OF 2016

JANET NAFULA RUTO.....APPELLANT

VERSUS

DR. JOSEPH MARITIM.....1ST RESPONDENT

REV. PAUL L. LETEITO.....2ND RESPONDENT

REV. STEPHEN NG'ENO.....3RD RESPONDENT

JUDGMENT

The Appellant's Case

1. The appellant filed a memorandum of appeal dated **14/6/2016** in which she raised the following grounds:-

(1)The Learned Trial Magistrate erred in both law and in fact in holding he had jurisdiction to hear and determine the suit in the trial court.

(2)The learned trial magistrate misdirected himself in applying the provisions of GAZZETE NOTICE NO. 16268 dated 9th November 2012 and GAZETTE NOTICE NO. 5178 dated 28th July 2014.

(3) That the learned trial magistrate erred in fact and in law by relying wholly on the opinion of an expert without any evidence as to how the said opinion of an expert was arrived at.

(4) That the Learned Trial Magistrate erred in law and fact by arriving at a decision not supportable in law and not supportable by the evidence on record.

(5) That the learned trial Magistrate erred in law and fact by finding that the Respondent had proved their case on a balance of probabilities despite cogent evidence pointing to the contrary.

(6) That the learned Trial Magistrate erred in law and fact by solely relying on the evidence of the Respondents and failing to consider and analyze the evidence of the Appellant.

(7) That the learned trial magistrate erred in fact and in law in failing to frame the issues for determination and hence arriving at a wrong decision.

(8) The learned Trial Magistrate erred in fact and in law in failing to uphold the sanctity of Appellant's title only.

(9) The decision of the learned trial magistrate hence is plainly wrong.

2. The appellant prayed for the appeal to be allowed with costs in this Court and the Subordinate Court.

3. The genesis of this appeal is the judgment and decree of the Chief Magistrate's Court at Kitale in **Kitale Chief Magistrate's Court Civil Case No. 207 of 2007.**

4. The facts of the dispute in the court below were as follows: the plaintiffs (who are now the respondents) filed a suit against the defendant (who is now the appellant), the Commissioner of Lands as the 2nd defendant and the Attorney General as the 3rd defendant on the **27th April, 2007**.

5. Subsequently an amended plaint was filed on **10/9/2007** in which the plaintiffs sought an order for the defendant to remove the fence and structures on the access road, in default the OCS Kitale Municipality to demolish the same, a temporary injunction restraining the defendant from continuing with the construction and/or development on the access road for **Kitale Municipality Block 7/132** and **133** pending the hearing and determination of this suit, an order for the 2nd and 3rd defendants to cancel title No. **Kitale Municipality Block 7/408** as it is an access road and costs of the suit.

6. The plaintiffs expressed themselves to have brought the suit as registered trustees of **Africa Gospel Church** and alleged that they were the registered proprietors of **Kitale Municipality Block 7/132 and 133** and that there exists an access road between plots numbers **Kitale Municipality Block 7/132, 133,134** and **135.**

7. It was further alleged that the 1st defendant had blocked the access road and denied the plaintiffs use of the same by fencing off the same and constructing a house thereby causing substantial damage to the plaintiff's church activities, as its members were unable to use the road.

8. On **8th May, 2007**, the appellant entered appearance to the suit, and filed a defence on the **14th May, 2007** through the law firm of M/s G.O. Barongo & Company Advocates. On **8th October 2007**, the 2nd and 3rd respondents a memorandum of appearance and a joint statement of defence was filed on the **18/3/2008**.

9. This Court is conscious of its role as the first appellate court as stated in ***Selle -vs- Associated Motor Boat Co. Ltd. [1965] E.A. 123***, and the court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

10. After several hiccups due to several adjournments by counsels, the matter proceeded on the **2/6/2010** where **PW1, Mr. Peter M. Rotich** testified. In his evidence, he stated that **Kitale Municipality Block 7/132** and **Kitale Municipality Block 7/133** belonged to the church and that the 1st Defendant had put up a building on a road reserve leading to **Plot No. 132;** that the Plaintiffs did complain to the Commissioner of Lands and the 1st defendant was ordered to remove the structures and it is her refusal that necessitated the filing of that suit.

11. PW2 was one **Christine Kapsilioti**, the **Surveyor Assistant 11**. She produced a map relating to the land in dispute. She stated that the Registry Index Map (RIM) did show that there is a road of access running through land parcels **No. 132** and **134** and giving access to the respondent's land **parcel No. 133.**

12. PW3 was **Aggrey Kavechi**, the Land Registrar at Kitale Land Registry. He testified that according to the records at the land registry, plot No **133** is registered in favour of the Plaintiffs. He produced a photocopy of a lease document in respect to plot no. **132** issued to the registered trustees of African Gospel Church by the Commissioner of Lands. On cross examination, he contended that he was unable to confirm the authenticity of the lease documents issued to both the plaintiffs and the 1st defendant with regards to plot no. **132** as he did not have the records.

13. PW4 testified that he is the director of about **90** local churches. He testified that the church owned the two parcels of land namely **Kitale Municipality Block 7/132** and **133**.

14. PW5 was **Barnabas Mutimba** a Municipal Engineer working with the defunct Kitale Municipal Council. He testified that the records at the Municipal Council indicated that **Kitale Municipality Block 7/132** and **133** were registered in the names of **African Gospel Church**. He produced a letter from the Commissioner of Lands where the said letter was to the effect that the allotment letter held by the 1st defendant was not genuine as **Exhibit 4.**

15. On **11th February 2014**, the matter proceeded for defence hearing. The appellant did testify that the parcel of land known as **Kitale Municipality Block 7/408** is registered in her name and that it is not an access road as alleged by the respondents. She contended that the Certificate of Lease she held is genuine. The 2nd and 3rd defendants did not call any witnesses.

16. With that, parties were directed to file and serve their submissions and Judgement was delivered on **21 January 2015**.

17. In his judgment, the trial Magistrate reviewed the evidence and held that the appellant's structures be demolished and her registration as proprietor of **Title No Kitale Municipality Block 7/408** be cancelled as it was an access road.

18. It is the above judgment which has provoked this appeal but prior to this appeal a notice to show cause was issued to the appellant and eviction orders were issued against the defendant. The appellant has now asked that the judgment of the Magistrate's Court be set aside with costs.

19. On **19/9/2018** the court gave directions for the appeal to be canvassed by way of written submissions. The Appellant filed her submissions on **9/11/2018** while the respondents filed theirs on **19/11/2018**.

The Appellant's submissions

20. The appellant has submitted that the Chief Magistrates Court did not have jurisdiction to entertain the suit that gave rise to this appeal as the dispute touched on the boundaries of the disputed plots that the Respondents claim it was an access road. She quoted ***Section 21(4) of the Registered Land Act*** which provides inter alia,

> **"No court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section".**

21. It is also submitted that the totality of the evidence tendered by the Respondents was not sufficient to warrant the entry of judgement in the favour as against the appellant.

22. The appellant has also submitted that the trial magistrate did not effectively frame the issues for determination and having failed to do so, fell into an error in failing to uphold the sanctity of the title.

The Respondents' Submissions

23. The respondents have submitted that the suit was properly instituted in the lower court which had jurisdiction by virtue of ***Section 30(1) of the Environment and Land Act*** which provides;

> **"All proceedings relating to the environment or the use and occupation and title to land pending before any court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar".**

24. It is the Respondents submission that in accordance with the above provision, the Chief Justice did make directions which were Gazette on **9th November 2012** and on **28th July 2014** which directions empowered the Magistrates' Court to hear and determine all cases relating to the Environment and the use and occupation of land in which the courts have pecuniary jurisdiction.

25. The respondents have submitted on ground **3-6** together, stating that the plaintiffs indeed proved that the 1st defendant had encroached on an access road and that the suit before the court was merited and that the court properly evaluated the evidence adduced and arrived at a correct decision.

26. On ground **7** and **8,** the respondents submitted that the court in its judgement set out the issues properly which enabled it to arrive at its decision.

Determination

27. The first issue that this court has to determine is the issue of jurisdiction. It is now a settled position that, if a court has no jurisdiction, then everything that it does is a nullity and ought to be set aside.

28. The issue of jurisdiction has been dealt with by the Supreme Court in several cases including that of ***Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others (2012) eKLR*** where it held that a court cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law, and that jurisdiction is not a mere technicality but goes to the very heart of the matter. The court pronounced itself as follows:-

> **"(68) A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings."**

29. There is no question that the dispute herein touches on land, in particular, as to whether or not the appellant has encroached on an access road serving parcel nos. **Kitale Municipality Block 7/132** and **Kitale Municipality Block 7/133** registered in the name of the Respondents. It is therefore a boundary dispute.

30. The plaint was filed on **27th April 2007** at which time, the operative land statute was the **Magistrate's Court Act**. It is the submission of the appellant that that Act underwent amendments culminating in the **Magistrate's Courts Act No 26 of 2015** and that there was no provision that the new Act would operate retrospectively. The appellant submits that the magistrate's decision was made devoid of jurisdiction and should be set aside *ex debito justitiae.* The appellant argues that by dint of the provisions of the **Land Disputes Tribunal Act Number 18** of **1990** subordinate courts had been divested of all jurisdiction in civil matters touching on determination of boundaries, claims to work or occupy land and that the said Act was repealed by the Environment and Land Court Act. The appellant further contends that **Section 159** of the **Registered Land Act** must be considered while determining the issue of jurisdiction of the court; that it conferred jurisdiction relating to title or possession of land title to lease or charge on the High Court, or where the value of the subject matter did not exceed 25,000/ pounds on the magistrate's court, or where the dispute came within the provisions of **Section 3(1) of the Land Disputes Act**, on the Land Disputes Tribunal**.**

31. The submission of the appellant is that the dispute touched on the boundaries of the disputed plots and the court was therefore not seized of jurisdiction.

32. The appellant further submits that under **Section 21** of the Registered Land Act no court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this Section. He submit further that there was a dispute as to whether land parcel No. **Kitale Municipality Block 7/408** is on an access road or not and to determine that the boundaries have to be determined and therefore the procedures set out in **Section 21** of the Registered Land Act had to be complied with. He submits that there was no evidence that those procedures under that Section had been complied with. He stated that **PW2** a Survey Assistant produced a survey map as **Exhibit 10** and mentioned nothing about it but confirmed that the map was prepared in **1992** way before the appellant was issued with title in **1999** and was not sure whether the map had been amended. He faulted the court's reliance on **Petition No. 72 of 2013 - Edward M. Gaturu & Another -vs- The Hon. Attorney General & Another** and **Gazette Notice No. 16268** of **9/11/2012** and **Gazette Notice No**. **5178 of 28/7/2014**, stating that the said decision and notices refer to pecuniary jurisdiction of a court and are distinguishable from the case before the trial court. Further submitting on this point the appellant stated that if the claim was pecuniary then the value of the subject matter would have been disclosed in the plaint to enable the court assess whether it had jurisdiction or not and asserts that it did not.

33. I find that the appellant's argument suffers a serious setback when viewed against the prism of facts and the law applicable at the time of the decision. First the **Magistrates Court Act**, having set the maximum pecuniary jurisdiction value as **25,000 pounds** gave the magistrates court jurisdiction to deal with *some* land disputes. All that mattered was whether the land involved and the dispute at hand was **25000 pounds** and below in which case the Magistrate must have had jurisdiction. I do not hear the appellant to be contending the value of the subject matter land was in excess of **25000 pounds**. The recondite argument I understand him to advance is that the subject matter was not expressed in pecuniary terms and the court did not therefore have jurisdiction. To this I will respond by stating that even where the pecuniary value of land has not been stated and it falls under **25000 pounds** the Magistrate's Court has jurisdiction.

34. Secondly **Section 3(1) of the Land Disputes Tribunals Act No. 18 of 1990** could not be applied to the dispute as this was expressedly registered land that has been held by a plethora of case law to be beyond the powers of a land disputes tribunal.

35. Lastly **Section 21** of the **Registered Land Act** bars certain proceedings relating to boundaries. However in the scenario before the trial court the dispute was whether a road of access existed which served **Plots Nos. 132** and **133** and whether the owner of **Plot No. 408** had encroached on the same.

36. What better manner of proceeding the court could have adopted other than reliance on the evidence of a surveyor armed with a map of the area, the appellant does not say. Neither does he produce any evidence to show that map, procedurally and regularly and legally amended having regard to all relevant statutes including the **Survey Act** and the **Public Roads and Roads of Access Act Cap 290** to effect the closure of the road seen in **Exhibit 10**.

37. For that reason I find that the allegation that the Magistrate's Court has no jurisdiction bears no merit and the same ought to be rejected.

38. I also find that the issue of jurisdiction should have been raised by way of a Preliminary Objection at the first instance for determination for the court to pronounce itself upon. The Trial Magistrate could not therefore determine an issue that was only raised in the submission stage as the court was not bound to be swayed by those submissions which the other side had no opportunity to rebut.

39. On the issue of weight of evidence tendered by the respondents the appellant submitted that it was not sufficient to warrant entry of the judgment against the appellant. On this point the appellant submitted that the respondents had acknowledged that the appellant had title to **Kitale Municipality Block 7/408** hence their desire it be cancelled because it was an access road.

40. The appellant submitted that the only expert witnesses who appeared before the trial court were **PW2 (Surveyor Assistant II) PW3 (Land Registrar)** and **PW5 (Municipal Engineer).**

41. The Magistrate then proceeded to frame the issues for determination to be whether the appellant had a genuine title which she answered in the negative.

42. The appellant submitted that **PW2** conceded that when there are subdivisions, the map **P. Exhibit 10** is likely to be altered and that the amendments to the map are usually done at the headquarters and that it was clear that the plaintiffs were in possession of an obsolete map.

43. He adopted as grist for his argument a statement made by **PW2** to the effect that *"I do not know whether P. Exhibit 10 has been amended"*.

44. However on this issue it is clear that amendments to the Registry Index Map (RIM) do not begin at the Director of Survey Headquarters office but at the ground level in this case the offices of **PW2** where the appropriate mutation and amendments are lodged before being transmitted to the national office.

45. This fact should have compelled the appellant not to just rely on cross examination of **PW2** but to also endeavor to secure his own evidence showing the RIM had been amended which fact if proved would have immensely aided his case. This he did not do and the only expert available, that of **PW2, PW3 and PW5** was relied on.

46. The appellant faulted **PW3's** evidence stating that he never mentioned **Kitale Municipality Block 7/408** in his entire examination in-chief. The appellant submits that when shown in cross examination the appellant lease certificates duly signed and sealed by the Registrar, **PW3'**s answer was that he did not have the records on that plot; neither did he have records of **Plot No. 132**.

47. He submits that the learned trial magistrate misconstrued the evidence in holding that the appellant's certificate of lease did not bear the signature of the Commissioner of Lands whereas it was the respondents' lease for **Plot No. 132** that did not possess the Commissioner's signature. I think there is merit in this argument, for as much as there may or may not be a signature of the Commissioner of Lands **Plots Nos.** and **132** and **133** are said to have been in existence before **Plot No. 408** and further it was the existence road of access to those properties that was in issue in the suit before the trial court.

48. Regarding the evidence of **PW5** there is the submission of the appellant that it could not support the cancellation of the appellant's title. Firstly, the evidence in form of letters produced at the hearing did not refer to the appellant's plot but to the mere access to **Plot No. Kitale Municipality Block 7/132**; secondly the appellant's witnesses confirmed that the Kitale Municipality was not involved in the issuance of certificate of lease to the appellant's land and that their evidence was of no probative value on the contentious issue of ownership. Thirdly it is argued that since an assessment of land rates has been conducted in respect of appellant's land the same could not be an access road.

49. The appellant submits that the trial magistrate erred in coming to the conclusion that having regard to the evidence of **PW2, PW3** and **PW5, Kitale Municipality Block 7/408** is an access road. The appellant submitted that the magistrate shifted the burden of proof upon her holding that she did not respond to letters written to her when she was very clear she did not receive those letters.

50. Lastly she faulted the court in holding that she did not call any witness to verify the authenticity of the lease when the same was not the issue before the court and that she never produced a map showing the existence of **Kitale Municipality Block 7/408** and non-existence of the road.

51. I have already stated hereinabove that the lack of expert evidence of the appellant's case before the trial court and especially the lack of map demonstrating that there was no road dealt the appellant's claim before the trial court an excruciating blow from which, I think, her case could not have been expected to recover. That position still obtains.

52. It is incumbent upon any party who wishes a favourable order to be made regarding a certain state of affairs to adduce evidence in support of that state of affairs. He who alleges proves. The Court of Appeal observed as follows in the case of **Peter Kanithi Kimunya v Aden Guyo Haro [2014] eKLR Civil Appeal No. 307 of 2008**

> **"The respondent denied the occurrence of the accident in question and or that he was to blame for its occurrence and the injuries allegedly sustained by the appellant. He put the appellant to strict proof of all the allegations contained in the plaint. Under Sections 107 and 108 of the Evidence Act, the person who alleges is under a duty to prove all allegations as contained his claim against the respondent on a balance of probability. As was held in the case of Kirugi & Another -Vs- Kabiya & 3 Others [1987] KLR 347, the Court of Appeal held thus:**
>
> **"The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof."**
>
> **It was therefore incumbent upon the appellant to prove the occurrence of the accident which he stated took place when he was alone. He did not produce a police abstract. In my view, a police abstract form or Form P10A is a critical document that would prove that the occurrence of the accident was reported to the police, although it does not prove the occurrence of an accident itself."**

53. It will not suffice in this cases for the appellant to merely probe the respondents' expert evidence without producing her own. Besides the argument concerning the letters not bearing **plot no. Kitale Municipality Block 7/408** appears quite trivial in view of the ultimate revelation in the proceedings in the trial court that that plot which the appellant purported to be in existence is the one that blocked the access to the respondents' plots.

54. The conclusion that this court arrives at is that in the face of all evidence available to the trial court, it could not have arrived at a different decision and that therefore the weight of the evidence in the trial court was clearly against the appellant.

55. Regarding **grounds 7** and **8** in the memorandum of appeal the appellant submits that the trial Magistrate did not effectively frame the issue for determination and having failed to do so fell into an error of failing to uphold the sanctity of title. The appellant refers to **Order 21 rule 4** of the **Civil Procedure Rules** which requires that a judgment shall contain a concise statement of the case the points of determination, the decision and reasons for the decision. He submits that the issue was whether there was an access road or not and whether the appellant's lease certificate was genuine or not. He submits that the only issue framed by the magistrate was whether or not the appellant had a genuine title and she proceeded to hold that the appellant did not.

56. Citing **Section 27** and **28** of the then **Registered Land Act** (now repealed), the appellant submits the absolute rights of proprietorship were vested in registered owner subject only to such leases, implied agreements, charges, and other encumbrances noted on the registered and that such absolute right of the proprietor can not be defeated save in the manner provided for in the Act.

57. Further, citing **section 37** of the **RLA** the appellant argues that the title deed or certificate of lease is prima facie evidence of ownership and that *"every document purported to be signed by a registrar shall in all proceedings be presumed to have been so signed until the contrary is proved"*.

58. The appellant submits that the respondents while not claiming her title were claiming an access road and that no particulars of irregularity fraud or any irregularity that would impeach the appellant's title was pleaded. If they were claiming irregularity in the procurement of the title, so submits the appellant, they should have in accordance with **Order 2 Rule 10** of the **Civil Procedure Rules** have provided the particulars of misrepresentation fraud, breach of trust, willful default or undue influence which they did not do and therefore the court lacked the proper basis for cancelling the appellant's title. I find that though the appellant is correct in stating that the magistrate failed to frame the

issues correctly, I find that this failure does not affect the substance of the outcome of his analysis of the evidence and the law.

59. Further, it is argued if the appellant had blocked an access road it would have amounted to interfering with right of public to use the said access road as a public access road and **Section 61** of **Civil Procedure Act** provides that that such a case can only be filed with a written consent of the Attorney General, yet no such written consent was written and the suit does not lie. He cites the case of Michael **Githinji Kimotho -vs- Nicolas Muratha Mugo Civil Appeal No. 53 of 1995** (Court of Appeal) on this point.

60. This court has had the occasion to deal with the provisions of **section 61** of the **Civil Procedure Act** in the case of **Kitale Land Case No. 129 Of 2017 Edward Nyaoga Onsongo Versus Job Mekubo Mogusu** where it observed as follows:

> "**Article 50** also emphasizes that:
>
> > **"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."**
> >
> > **The impact of the provisions of Section 61 of the Civil Procedure Act is therefore obliterated by the provisions of Section 3 of the EMCA which are backed word for word by Article 62 of the Constitution. In my view if the Constitution, the supreme law or the land removes the requirement of locus standi in environmental disputes lodged before this court, this court should not fetter itself with discordant provisions of a statute that has not been amended to rhyme with the spirit of the constitution, fore to do so would amount to denying a citizen of a constitutional right to be heard on his own accord as an individual on matters environment. This ground therefore has no merit and must be dismissed."**

61. That being said, however, I must reiterate here that the issue of jurisdiction was not raised before the trial court by the appellant until at the submission stage.

It is also well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings should not be admitted. This position was re-affirmed by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings:-

> **"…..it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded……**
>
> **…In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation".**

62. In the circumstances the judgment of the Trial Magistrate delivered on **21st January, 2015** must be upheld**.** This appeal is hereby dismissed. Each party will bear its own costs.

Dated, signed and **delivered** at **Kitale** on this **9th** day of **April, 2019**

MWANGI NJOROGE

JUDGE

9/4/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Makali for appellant

Mr. Karani holding brief for Arunga for respondent

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

9/04/2019