



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MIGORI

ELC APPEAL NO. 45 OF 2017

RISPA OKUTA AJWANG (Suing as legal representative of the estate of

OBUYA JABEDO –Deceased).....APPELLANT

VERSUS

SIPROSA AUMA JUMA (Suing as legal representative

of the estate of ONGADI JABEDO- Deceased).....RESPONDENT

(Being an Appeal from the ruling of Honourable J.P. Nandi, SRM, as he then was,

delivered on 9th June,2017 in Oyugis SPM’s Court Misc. Civil application No. 8 of 2017)

RULING

A. Introduction

1. The instant appeal was precipitated by the ruling and order of Honourable J.P. Nandi (Senior Resident Magistrate, as he then was) dated 9th June 2017 in Oyugis Senior Principal Magistrate’s Court Misc. Application Civil case number 8 of 2017 where the trial court allowed the application by way of a Notice of Motion dated 25th April, 2017 initiated by the respondent (the appellant herein) for orders (1) and (2) sought therein. So, the learned trial Magistrate ordered as follows:-

i. “That the District Land Registrar and the District Land Surveyor Rachuonyo are hereby directed to subdivide, ascertain and determine the existing boundary between land parcel No. East Karachuonyo/Kobuya/1296 situated at Kobuya East location as per the ratio in the official search of $\frac{3}{4}$ to $\frac{1}{4}$ respectively.

ii. THAT the officer commanding station (OCS) Kendu Bay police station do provide security during the exercise.”

2. The appellant, Rispa Okuta Ajwang was initially represented by K’Owinoh and Company Advocates. Presently, she is represented by Mwamu and Company Advocates further to a notice of change advocates dated 28th March 2018 and filed in court on 29th March 2018.

3. The respondent, Siprosa Auma Juma appears in person.

B.The respondent’s claim before the trial court.

4. By a notice of motion application dated 25th April, 2017 brought under Order 51, Rule 1 and 2 of the Civil Procedure Rules, section 18 of the Land Registration Act No 3 of 2012, sections 3, 3A of the Civil Procedure Act (Cap 21). The respondent sought the said two (2) orders which were granted by the trial court hence provoking the instant appeal.

5. The application was anchored on the ground that;-

“ There exists a dispute between the above parcel of land which urgently needs to be subdivided and boundary determined by the District Land Registrar and surveyor as per the attachment of the official search.”

6. The application was also premised on the respondent's supporting affidavit of even date. The respondent deponed, inter alia, that she is a daughter to the late Ongadi Jabedo, the registered proprietor of the suit land, LR NO. East Karachuonyo/Kobuya/1296 which was to be shared at the ratio of $\frac{3}{4}$ to $\frac{1}{4}$ between her late father and the late Obuya Jabedo, who were brothers as shown in a copy of certificate of official search. That the appellant trespassed into the portion of the suit land belonging to the respondent hence she sought sub-division of the land and determination of its boundary.

C. The Appellant's response to the respondents claim before the trial court.

7. The appellant opposed the respondent's application by way of her seven (7) grounds of opposition dated 10th May 2017, which include the following:-

i. "The land in dispute was indeed registered in the name of my late father ONGADI JABEDO and the applicant's father in law OBUYA JABEDO (deceased).

ii. The said application is misconceived since the issue does not arise from a boundary ascertainment but it touches the issues of LAND where the applicant claims that I have encroached on a portion entitled to her and confirm that the parcel in dispute is land parcel No. East Karachuonyo/Obuya/1296 which matter should be filed in a High Court and the Respondent claims adverse possession.

iii. This Honourable Court lacks jurisdiction to entertain this suit."

D. The Respondent's reply to the Appellant's grounds of opposition before the trial court.

8. The respondent's reply to the grounds of opposition is dated 15th May 2017 where she stated that the application is merited. That she carried out succession in respect of the estate of her late father as required by the law thus she has capacity to mount the same. That the grounds of opposition lack merit and should be dismissed. That the trial court had the requisite jurisdiction over the matter further to the Court of Appeal decision at Malindi and urged the court to allow the application.

E. The trial Court's findings

9. On 9th June 2017, the learned trial Magistrate allowed the respondent's application dated 25th April, 2017. The court held that:-

"I find the applicant's application dated 25/4/2017 has merits and allow the same as prayed."

10. The appellant's application dated 6th December 2018 for stay of execution of any/all proceedings further to the ruling and order of the learned trial magistrate dated 9th June 2017, was disallowed by the trial court on 14th March 2018. However, this court allowed the application for stay on 19th April, 2018 pending the hearing and determination of the instant appeal to preserve the subject matter of appeal in the interest of justice.

F. The appeal before this court.

11. The appellant mounted the instant appeal dated 10th July, 2017, and the same is anchored on the grounds that:-

a) The learned trial magistrate erred in law in bearing and determining a matter in which it had no jurisdiction.

b) That learned trial magistrate erred in law in entertaining proceedings which were incompetent fatally defective and a nullity ab initio.

c) The learned trial magistrate erred in law in addressing the issues of law raised by the appellant.

12. Thus, the appellant is seeking the following orders:-

a) That the Appeal be allowed,

b) The orders of the trial magistrate be set aside and

c) The lower court suit be struck out and/or dismissed with costs here and below.

13. On 19th April, 2018, the instant appeal was admitted. Consequently, on 29th January, 2019, this court directed that the appeal be argued by written submissions and the parties complied accordingly.

14. In their submissions dated 14th February 2019 and filed in court on 13th March 2019, learned counsel for the appellant made reference to the grounds of appeal and analysed the same in favour of the appellant. Counsel submitted that the trial court had no jurisdiction over the respondent's application dated 25th April, 2017 pursuant to **sections 18 (1) and (2) and 19 of the Land Registration Act, 2016 (2012)**. Counsel relied on **Samwel Kamau Macharia and another –vs- Kenya Commercial Bank limited and 2 others (2012) eKLR** and

Owners and Masters of the Motor Vessel “Joey” –vs- Owners and Masters of the Motor Tugs “Barbara” and “Steve B” (2008) 1EA 367 as well as a persuasive decision in **Willis Ocholla –vs- Mary Ndege (2016) eKLR**.

15. Counsel further submitted that respondent could not have commenced a proper suit by way of a miscellaneous application under **Order 51 Rule 1 (supra)** hence the application was defective and should have been dismissed by the trial court. To that extent, counsel relied on the case of **Joseph Kibowen Chemjor –vs- William C. Kiseru (2013) eKLR** and urged this court to allow the present appeal.

16. In her submissions dated 3rd July, 2019, and filed on even date, the respondent urged the court to dismiss the appeal with costs to the respondent. She submitted that a party should not be permitted to raise a ground which is not pleaded because the respondent will not have an opportunity to rebut it as held by Muriithi J in **Twaher Abdulkarim Mohamed –vs- Independent Electoral and Boundaries Commission (IEBC) and 2 others (2014) eKLR**.

17. The respondent also submitted that the court dealt with an application even if the case was originated by way of a miscellaneous application. She relied on the decision of Sila Munyao J in **David Macharia Kinyuru –vs- District Land Registrar, Naivasha and another (2017) eKLR** where the court allowed a miscellaneous application to remove restriction on the disputed parcel of land. That the orders granted by the trial court did not prejudice the appellant in any way.

G. Analysis and determination

18. This being the first appeal from the trial court, I subscribe to the view of Sir, Kenneth O’Connor, P in **Peters –vs- Sunday Post Ltd (1958) EA 424 at 429** where he reasoned that :-

“The appellate court has indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is jurisdiction which should be exercised with caution.”

19. In respect of the first ground of appeal, the Black’s Law Dictionary 10th Edition, defines the following terms:-

a) *“Jurisdiction “ – A court’s power to decide a case or issue a decree*

b) *“Judicial Jurisdiction”- the legal power and authority of a court to*

make a decision that binds the parties to any matter properly brought

before it.”

20. I take into account the considered view of the Court of Appeal regarding jurisdiction, of a court in the **Owners of Motor Vessel “Joey” Willis Ocholla and Samwek Kamau Macharia cases (supra)**. Accordingly I am guided by the said decisions.

21. It is also trite law that where a court lacks jurisdiction then the decision rendered thereby becomes null; See the case of **Lemankan Aramat –vs- Harun Maitamei Lempaka and 2 others (2014) eKLR**.

22. Moreover, in the case of **Republic –vs- Karisa Chengo and 2 others (2017) eKLR**, the Supreme Court of Kenya pronounced itself, inter alia,

“Jurisdiction goes to the root of litigation.”

23. Admittedly, this court is bound by the procedure laid down by Civil Procedure Act (Cap 21) as provided for under **Section 19 (2) of the Environment and Land Court Act, 2015, (2011)**. In that regard, I note that **Section 5 of the Civil Procedure Act (ibid)** reads:-

“ Any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred.” (Emphasis laid)

24. The appellant asserts that the trial court had no jurisdiction to embrace the dispute between the parties herein. At the outset, he raised that issue at ground (e) of the grounds of opposition before the trial court. The learned trial magistrate concisely dealt with the issue and remarked ;-

“The first issue is that the court has jurisdiction to hear land matters.”

25. It is discerned from order number one (1) sought in the respondent’s application before the trial court that the dispute between the parties concerns determination of boundary of the suit land, LR. Number East Karachuonyo/Kobuya/1296. The appellant’s grounds of opposition thereto disclose that the suit land is registered in the name of the deceased father of the appellant and the deceased father in law of the respondent. The appellant contended that their dispute did not relate to boundary. That the appellant claimed adverse possession over the suit land. However, the respondent maintained that it was a boundary dispute as the respective shares of the two (2) proprietors were revealed in the certificate of official search in respect of the suit land.

26. **Sections 18,19, 20, and 21 of the Land Registration Act, 2016 (2012)** provide for boundaries, fixed boundaries, maintainance of

boundaries and interference with boundary features respectively. In particular, section 18(2) provides:-

“The court shall not entertained any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.”

27. In the case of **Andrew Marigwa –vs- Josephat Ondiek Kebati (2017) eKLR**, my senior brother John Mutungi, J took a stand point which I endorse without reservation and he held, inter alia,

“ Recognising the instant suit related to a boundary dispute which definitely the court lacked the technical ability to deal with, the court made reference of the matter to the Land Registrar and the County Surveyor who are the persons who are mandated under the Act to deal with disputes relating to boundary.....”

28. In the instant appeal, I recognized that the learned trial magistrate was satisfied that the dispute related to boundary of the suit land. Therefore by his ruling dated 9th June 2017, he made reference of the dispute to the Land Registrar who is mandated under **sections 18 and 19 (supra)** to deal with such disputes. The trial court did not determine the dispute between the parties.

29. Quite plainly, the dispute between the parties concerns boundary in respect of the suit land. On that score, ground one (1) of this appeal fails.

30. As regards ground two (2) of the grounds of appeal, **section 2 of the Civil Procedure Act (supra)** has fashioned the definition of the term **“suit”** as thus:-

“Suit” means all Civil proceedings commenced in any manner prescribed.

31. I also note the meaning of the terms **“Prescribed”** and **“Rules”** under **section 2 (Ibid)**. I further consider **Chemjor and Ochola cases (supra)**, but find them relevant to and rather distinguishable respectively in the present scenario.

32. It is further noted that **Section 19 of the Civil Procedure Act (supra)** governs the institution of suits. Order 3 Rule 1 of the Civil Procedure Rules,2010 provides for commencement of suits and case track allocation.

33. Every suit shall be filed in the court of lowest grade competent jurisdiction to try the same as stipulated under **section 11 of the Civil Procedure Act (supra)**. The instant dispute between the parties fell within the jurisdiction of the Land Registrar as the first port of call. The trial court correctly referred the dispute to the relevant statutory organ for the resolution of the boundary dispute as noted in **Andrew Marigwa case (supra)**. The proceedings before the trial court were not fatally defective, incompetent and a nullity abinitio as alleged by the appellant herein in view of sections 3 and 19 (1) of the Environment and Land Court Act, 2015 (2011); sections 3 and 3A of the Civil Procedure Act (Cap 21) and Article 159 (2) (d) of the Constitution of Kenya,2010 (**supra**). Accordingly, the second ground of appeal also collapses.

34. In respect of ground number three (3), the trial court held that it had jurisdiction over the land dispute. I find that holding to be correct bearing in mind the Court of Appeal decision in **Malindi Law Society of Kenya, Nairobi Branch and 5 others Civil Application number 20 of 2017 eKLR**. To that extent, ground three (3) fails, too.

35. The net result is that the ruling of the learned trial magistrate delivered on 9th June 2017 is faultless. This appeal lacks merit.

36. Thus, the instant appeal originated by way of a memorandum of appeal dated 10th July, 2017, be and is hereby dismissed.

37. Costs of the appeal to be borne by the appellant.

DELIVERED, SIGNED and DATED in open court at MIGORI this 31st day of OCTOBER 2019.

G.M.A. ONGONDO

JUDGE

In the presence of :-

Mr. Kisia learned counsel holding brief for J. Mwamu learned counsel for the appellant

The respondent in person.

Tom Maurice – Court Assistant