



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANGA

ELCA NO.11 OF 2018

MARY WATIRI MBATHO

(legal representative of the Estate of Charles Mbatho Kamanjara).....APPELLANT

VERSUS

LUCY NYAGATHERE NJUNU.....RESPONDENT

JUDGMENT

1. Before me is an appeal arising from the judgement and orders of A K Ndungu, Principal in SPMCC No 188 of 1994 delivered on the 14/3/2007. This dispute has been in the corridors of justice for sometime now. This year marks its 25th anniversary.
2. Parcel No LOC19/RWATHIA /376 measuring 3.24 ha became registered in the name of Waithanji Waithaka on the 17/4/1963.
3. Upon his death the said land was distributed to his heirs in accordance with the confirmation of grant issued on the 5/7/1989 (dated 26/7/1989 at Muranga) vide Succ Cause No 161 of 1986 in which his estate was succeeded as follows; Francis Ndugi Waithanji, Lusia Nyagathere Njunu, Mwangi Waithanji and Samuel Kariuki were to get 0.5 acres of parcel LOC19/RWATHIA /376. The rest of the land was to be shared equally amongst Francis Ndugi Waithanji, Lusia Nyagathere Njunu and Samuel Kariuki.
4. According to the green card on record the beneficiaries were registered as owners in the proportions as set out in the grant on the 7/9/1989.
5. According to the agreement of sale on record and dated the 1/12/1989 Francis Ndugi Waithanji and Samuel Kariuki agreed to sell a portion of 0.1 acres out of parcel LOC19/RWATHIA /376 to Charles Mbatho Kamanjara and Jessee Mwangi Kamanjara at the consideration of Kshs 50,000/-. It is acknowledged that Kshs 42,000/- was paid leaving a balance of Kshs 8000/- which was paid and acknowledged by the vendors on the 23/3/1990.
6. On the 16/3/90 the title was closed on subdivision that yielded parcel Nos. LOC19/RWATHIA /1920, 1921 and 1923. On even date the title in respect to parcel LOC19/RWATHIA /1923 became registered in the names of Francis Ndugi Waithanji, Lusia Ntagathere Njunu , Mwangi Waithanji and Samuel Kariuki to hold equal undivided shares. Shortly thereafter on the 19/10/1990 this title in respect to 1923 was closed upon partition that yielded parcel numbers LOC19/RWATHIA /1957, 1958, 1959 and 1960.
7. According to the record, the Appellant became registered as owner of title No LOC19/RWATHIA /1959 measuring 0.08 has on the 22/11/1990.
8. The succession Court upon hearing an objection in succ cause No 161 of 1986 issued orders on the 10/3/1994 interalia nullifying the subdivision of parcel LOC19/RWATHIA /1923. The transfer to the Appellant was also nullified. All dealings were prohibited in respect to the resultant titles of LOC19/RWATHIA /1923 that is to say LOC19/RWATHIA /1957, 1958, 1959 and 1960.
9. It is the above orders that prompted the Appellant to file the suit in the lower Court by way of an originating summons on the 6/6/94 against the Respondent and 3 others (Francis Ndugi Waithanji, Lusia Nyagathere Njunu and Samuel Kariuki Mugikuyu, Mwangi Waithanji and Consolata Wanjiku Stanley). By the time of the hearing of this appeal, save for the Respondent the rest have since died and the appeal against them marked abated.
10. The Appellant sought declaratory orders that he is the registered owner of the suit land LOC19/RWATHIA/1959. In the motion he averred that in December 1989 he purchased a portion of land out of LOC19/RWATHIA /375 from the 2nd and 3rd Defendants in the lower Court. Upon completion of subdivision of LOC19/RWATHIA/ 375, parcel LOC19/RWATHIA /1959 measuring 0.08 ha or thereabouts was transferred to him. The requisite land control board consent was obtained and the title was transferred to his name on the 22/11/1990. He stated further that in February 1994 the Respondent obtained orders in Succ cause No 161 of 1986 prohibiting all dealings in the suit land. That he was not a party to the succession proceedings and was never notified of the said orders.

11. It was his case that he had constructed 3 permanent shops valued at the sum of Kshs 3.5 million on the suit land.
12. It is on record that by the time of filing this motion, the 5th Defendant had passed away. The 2nd and 3rd Defendants (Francis Ndugi Waithanji and Samuel Kariuki Mugikuyu) admitted the Appellant's claim in the lower Court leaving the Respondent to contest the same alone.
13. The Respondent contested the claim vide a Replying Affidavit dated the 24/8/1994 where she deponed that she was a stranger to the agreement of sale aforesaid and that a portion of her inheritance was included in the 0.08 ha parcel subject of the agreement of sale. She contended that the suit has been overtaken by events in view of the Court orders in Succ Cause No 161 of 1986 in which the Appellant was said to have been a party and the title for parcel 1923 and consequently parcel 1959 was cancelled. Interalia she raised a preliminary point that the Court was bereft of jurisdiction on ground of the value of the subject matter being Kshs 3.5 million then. She further argued that the suit was resjudicata on grounds of the existence of succ cause No 161/1986.
14. After hearing the matter the learned magistrate dismissed the Appellants case on grounds interalia; the vendors did not have capacity to contract and to bind the estate in any sale; That the vendors lacked capacity to enter into a sale of undistributed estate; The suit parcel measures 0.2 acres while the sale agreement set out the agreed acreage as 0.1 acres ; there was no contract in respect to the additional 0.1 acres; The Court found that the additional claim for 0.1 acres could not be allowed since the agreement to acquire the land from goods taken by the 2nd Defendant from the Appellants' shop had not been reduced to writing pursuant to Section 3 of the Law of Contract Act.
15. Aggrieved by the decision of the Learned Magistrate the Appellant proffered the following grounds of appeal; That the trial magistrate;
 - a. erred in law and in fact in his judgment in finding that
 - b. The deceased purchaser had no right over L.R LOC 19/RWATHIA /1954.
 - c. That the finding was erroneous since the 2nd and 4th Defendant admitted they had disposed off the parcel to the said late purchaser.
 - d. That the purchaser built an 8 roomed permanent house whose value exceeded the monetary jurisdiction of the Court, thus the judgment was null and void on grounds of jurisdiction.
 - e. That the trial magistrate erred in dismissing the claim despite the evidence on record.
16. The appeal was canvassed by way of written submissions. Both parties filed written submissions which I have read and considered.
17. The following issues are framed for determination:
 - a. Whether the trial Court had jurisdiction.
 - b. Whether the sale was valid.
 - c. Whether the Appellant was entitled to declaratory orders sought.
 - d. Whether the judgment was proper, just and informed on evidence.
18. The power of the appellate Court sitting as on a first appeal has been established and has been reiterated severally. In **Selle-Vs-Associated Motor Boat Co. [1968] E A 123**, these have been set out thus:

“....Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.
19. In the case of **Abok James Odera & Associates –Vs- John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** the Court stated as follows regarding the duty of first appellate Court:-

“This being a first appeal, we are reminded of our primary role as a first appellate Court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
20. As to whether the trial Court had jurisdiction, according to the record, the trial Court gave three rulings that determined the Defendant's contention that the Court lacked jurisdiction. This was raised thrice during the trial. On the 16/5/95 Hon Nyaga Njage SRM declined to allow the Preliminary Objection and preferred to hear the evidence of parties. The Court then observed that the plaintiffs' claim was grounded on fraud and illegality and that there was no injustice that would be occasioned if the matter proceeds. On 27/4/04 the Hon. Mwaura G.K, Principal Magistrate held that the issue was resjudicata and that there was no appeal against the earlier ruling .
21. The parties did not dispute that the Appellant's developments on the land valued of the land to 3.5 M and this was take to be the subject value of the matter.

22. The first time the issue of jurisdiction of the magistrate was raised in 1994, the pecuniary jurisdiction of the magistrate's Court was Kshs 125,000/- and by hearing the matter, the Court acceded to jurisdiction that it did not have.

23. The current jurisdiction of Magistrate's Courts is set out in section 7 of the Magistrates Act as follows;

“(1) A magistrate's Court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed— (a) twenty million shillings, where the Court is presided over by a chief magistrate; (b) fifteen million shillings, where the Court is presided over by a senior principal magistrate; (c) ten million shillings, where the Court is presided over by a principal magistrate; (d) seven million shillings, where the Court is presided over by a senior resident magistrate; or (e) five million shillings, where the Court is presided over by a Resident Magistrate.

24. The Chief Justice may from time to time, by notice in the Gazette, revise the pecuniary limits of jurisdiction set out in subsection (1), taking into account inflation and change in prevailing economic conditions.

25. Jurisdiction is everything and whenever a jurisdictional issue is raised, it is important for the Court to pause and determine the issue before proceeding with the case. The Supreme Court of Kenya in the cases of **In Re The Matter of the Interim Independent Electoral Commission S.C., Constitutional Application No. 2 of 2011; [2011] eKLR** and in **Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others S.C. Application No. 2 of 2012; [2012] eKLR**, held that the assumption of jurisdiction by Courts in Kenya, is a subject regulated by the Constitution, statute law, and judicial precedent. It stated:

“A Court's jurisdiction flows from either the Constitution or legislation or both. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity”.

26. The law is well settled that a decision which is arrived at without jurisdiction is a nullity. In the case of **Sir Ali Bin Salim vs. Shariff Mohamed Shatry civil Appeal No. 29 1940** it was stated that; -

“If a Court has no jurisdiction over the subject matter of the litigation, its judgments and orders however precisely certain and technically correct are mere nullities and not only voidable; they are void and have no effect either as estoppel or otherwise and may not only be set aside at any time by the Court in which they are rendered, but be declared void by every Court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a Court by consent of parties and any waiver on their part cannot make up for the lack or defect of jurisdiction”.

27. The *locus classicus* on jurisdiction is the celebrated case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

28. There is no evidence that the jurisdiction of the Hon Senior Resident Magistrate that determined the issue on jurisdiction had been enhanced by the Hon Chief Justice, then.

29. It is the finding of the Court that the Court had no jurisdiction.

30. Having made the finding that the Court did not have jurisdiction, there is no point in determining the merit of the appeal as the decision of the lower Court and all the subsequent proceedings were a nullity. Nullity begets a nullity.

31. In the upshot the appeal is struck out. The case of the Plaintiff is dismissed in the lower Court. All consequent orders are set aside.

32. It is not lost on the Court that the Appellant filed the case in the wrong Court and even opposed the Preliminary Objection in the lower Court to the effect that the Court had jurisdiction. It is curious that at the appellate stage he has seen the light and one of his grounds is that the Court had no jurisdiction. I direct that the costs shall be paid by the Appellant both in the appeal and the lower Court.

33. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS DAY OF 24TH OCTOBER 2019

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Kirubi HB for Ndirangu for the Appellant

Mugo for the Respondents

Irene and Njeri, Court Assistants