



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCA NO. 45 OF 2017

MALICK UPANDE.....APPELLANT

VERSUS

NICKSON SEMBE BARASA.....RESPONDENT

JUDGEMENT

The appellant being dissatisfied with the judgment/decree in Kakamega CMCC No. 146 of 2010 made on 7th November 2014 appeals against the said decree and puts forth the following principal grounds:

- 1) That the learned trial magistrate erred in law and in fact in ordering for the eviction of the appellant from land parcel No. S. Kabras/Lukume/489 contrary to the evidence on record.
- 2) That the learned trial magistrate erred in law and in fact in failing to find that the respondent had no good title in the face of the pending succession cause No. 473 of 2007.
- 3) That the learned trial magistrate erred in law and in fact in failing to find that he had no jurisdiction to order for eviction in the face of the evidence on record and the provisions of the Land Act.
- 4) That the learned trial magistrate erred in law and in fact in finding in favour of the respondent contrary to the weight of evidence on record.

The appellant submitted that the suit was premature and sub judice as there is a succession cause No. 473 of 2007 which is pending. The title owned was not genuine and hence fraudulent as the succession cause is pending determination for the beneficiaries to get their respective shares. That the Magistrates Court had no jurisdiction to entertain a land matter as per Article 162(2)(b) of the Constitution.

The court has carefully considered the appellant's and respondent's submissions in this appeal. The preliminary issue to be determined in my opinion is ground three of the appeal on the issue of jurisdiction. In the case of Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others (2017) eKLR the court held that;

“By parity of reasoning, although under Article 162 (2) of the Constitution Parliament is mandated to establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations and environment and the use and occupation of, and title, to land, that in itself does not confer an exclusive jurisdiction to those specialized courts to hear and determine the specified types of cases. However, as already stated, Article 165 (5) is clear that the High Court has no jurisdiction in respect of matters falling within the jurisdiction of the specialized courts. Whereas Parliament is empowered to enact legislation to confer jurisdiction to the Magistrates courts to hear and determine disputes stipulated under Article 162 (2) of the Constitution, it cannot establish a Superior Court or confer upon a Superior Court jurisdiction to hear employment and labour relations cases and environment and land cases”.

This court of appeal decision was delivered at Nairobi on 19th day of October, 2017. The trial court magistrate delivered this judgment subject of the appeal on 5th May 2014. The appeal was filed in 2014.

After the enactment by Parliament, The Statute Law (Miscellaneous Amendments) Act, 2015, Act No. 25 of 2015 received Presidential assent on 15th 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 15th December 2015. It was to commence on 2nd 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 11th 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. I find that the trial magistrate had jurisdiction to entertain this matter.

On ground 2 of the same being sub judge succession case No. 473 of 2007. I find that the same has not been establish as the matter before the Trial Magistrate was one of title to land and no evidence of fraud was adduced. I find that the learned Ag. Resident Magistrate did not err in law in his judgement. Indeed, the Trial Magistrate stated in his judgement at page 6 that;

“From the above it's therefore clear that the lease executed by the defendant and DW2 has no effect on the plaintiff's title. The lease is therefore valid as between the defendant and DW2 as contract interparties.”

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 17TH DECEMBER 2019.

N.A. MATHEKA

JUDGE