



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC APPEAL CASE NO.23 OF 2016

FRANCIS NGAYA ODANGA.....APPELLANT

VERSUS

DICKSON OTIENO KOGWANG.....RESPONDENT

[AN APPEAL FROM THE RULING AND ORDER

OF THE HON. MR. T.M. OLANDO RM. GIVEN ON

5TH OCTOBER 2016 AT SIAYA PMCC NO.50 OF 2016]

BETWEEN

DICKSON OTIENO KOGWANG.....PLAINTIFF

VERSUS

FRANCIS NGAYA ODANGA.....DEFENDANT

RULING

1. **Francis Ngaya Odanga**, the Appellant, is the Defendant in Siaya PMCC No.50 of 2016, while the Respondent, **Dickson Otieno Kogwang**, is the Plaintiff. The record of appeal contains a plaint dated 16th August 2016 through which the suit was commenced. The main prayers are eviction and permanent injunction restraining the Defendant (Appellant) from among others, entering, erecting any structures or interring the remains of **Peter Enos Odanga** on land parcel **North Gem/Asayi/872**.

The claim is opposed by the Defendant (Appellant) through the statement of Defence dated 22nd August 2016. That also filed with the plaint is the notice of motion under certificate of urgency dated 16th August 2016 seeking for injunction orders restraining the Defendant (appellant) from conducting and or proceeding with the burial rites/ceremony and or interring the remains of the later **Peter Enos Odanga** or any other person on the parcel of land **North Gem/Asayi/872** pending the hearing and determination of the application and thereafter of the suit. That the Defendant (Appellant), while filing his statement of defence, also filed notice of preliminary objection dated 22nd August 2016 and replying affidavit sworn on the same date.

2. The record of appeal has the lower court proceedings between pages 39 to 43. That at page 39, of the proceedings of 17th August 2016, the court certified the application as urgent and directed the Plaintiff (Respondent) to serve it for interpartes hearing on the 24th August 2016. That the proceedings of 24th August 2016 show that both parties informed the court of their consent to the effect that the District Surveyor do visit the land and determine its boundaries. The trial court recorded the consent and directed that the visit be made on 31st August, 2016 at 10.00 a.m. That the proceedings of 31st August 2016 indicates that the trial court went to the suit land with the parties, Land Registrar and Surveyor and thereafter directed the report be availed on the 7th September 2016.

3. That the proceedings of 7th September 2016 show that the County surveyor report received and was explained to the parties who indicated that they agreed with its contents. Thereafter the parties recorded consent to the effect that the Defendant (Appellant) do remove his home and grave from the Plaintiff's land. The surveyor's report dated 6th September 2016 is also part of the record of appeal at page 38. The trial court proceedings at page 42 and 43 of 5th October 2016 contains the order subject matter of this appeal. The trial court had after receiving, the Plaintiff's (Respondent's) complaint that the Defendant (Appellant) had failed to comply with the order of 7th September 2016 and the

Defendant's (Appellant's) plea for appeal ordered as follows;

“ The defendant has the right of appeal to the land and Environment Court. The area Chief and OCS Yala Police station to have the body buried on Land No. Gem/Asayi/872 exhumed and preserved at Siaya Referral Hospital Mortuary and the structure built on the land removed pending the appeal by the Defendant against the consent orders herein.”

4. That the Appellant, Francis Ngaya Odanga, then filed this appeal. The memorandum of appeal sets out five grounds as show hereinbelow;

“ 1. The Learned trial Magistrate erred in fact and in law in failing to find that the Appellant had a meritorious defence entitling it to an opportunity to defend and in generally failing to appreciate the principles applicable in cases where preliminary point of law on jurisdiction are raised at the inception of the case and Learned trial Magistrate ought to have downed the tools at the point it was abundantly clear that he dint have jurisdiction to entertain the matter.

2. The learned trial magistrate erred in fact and in law in failing to find that the defendant upon entering an appearance and filing the defence and reply to the application dated 17th August 2016 was entitled to participate fully in the proceedings but instead the court issued final orders at the preliminary stage of the suit.

3. The learned trial magistrate erred in fact and in law in capturing in the proceedings that parties had consented whereas there wasn't a consent given by the appellant at any stage in the suit.

4. The learned trial magistrate erred in fact and in law in issuing a substantive order on a mention date.

5. The learned trial magistrate erred in fact and in law in not appreciating sufficiently or at all that the appellant had raised matters of a fundamental nature to warrant striking of the suit.”

The Appellant prays for the ruling and orders appealed against be set aside, and in its place Siaya PMCC No.50 of 2016 be struck out for want of jurisdiction. The appellant also prays for costs in this appeal and the lower court suit.

5. That Mr. Omondi and Kirenga, the learned counsel for the Appellant and Respondent respectively, appeared in court on the 30th May 2017 when directions on filing and exchanging written submissions were given. The appeal was then fixed for mention on the 14th November 2017. That on that day the counsel for the Appellant requested for 30 more days to file and serve their submissions. That the application was opposed by counsel for the Respondent who had already filed and served theirs dated 13th November 2017. That the court declined to adjourn the matter and instead fixed it for ruling today.

6. The following are the issues for determination by the court;

a) Whether the lower court has jurisdiction in the suit filed by the Respondent against the Appellant.

b) Whether the Appellant has presented reasonable grounds to show that the consent recorded before the trial court was obtained through coercion, misrepresentation or fraud.

c) Who pays the costs.

7. The court has considered the grounds on the memorandum of appeal, submissions by counsel for the Respondent, the record and supplementary record of appeal and come to the following determinations;

a) That the Appellant participated in the exercise carried out by the Land Registrar and surveyor whose findings is evidenced in the Surveyor's Report at page 38 of the record of appeal. That the report contains the followings observations;

“ Parcel No. N.Gem/Asayi/872 has its boundary features distinctively marked with live hedge around it. Inside it is a recently constructed semi-permanent dwelling structure and a new grave close to it. The rest of the land is under cultivation of subsistence crops in final stages of germination.”

That at paragraph 1 of the report the names of the Appellant and Respondent are at position 2 and 1 respectively. That against the name of the Appellant is parcel **North Gem/Asayi/949** and against that of Respondent is parcel **North Gem/Asayi/872**.

b) That the certificate of official search for **North Gem/Asayi/872** and title deed at page 9 and 10 of the record of appeal show that the land is a subdivision from **plot 695** and was registered in the name of the Respondent on the 19th September 2008. That the copy of the title deed for land parcel **North Gem/Asayi/949** at page 27 of the record of appeal show that the same is a subdivision from plot 871 and was registered in the name of the Appellant on the 14th July 2016.

c) That the reference of the matter to the Land Registrar and surveyor was by consent of the parties and was meant to confirm whether the ground position where the grave and structure had been placed was within the land parcel **North Gem/ Asayi/872** or 949. That upon the Surveyor confirming that the grave and the structure were on **North gem/Asayi/872**, the parties had the option of using the report as the basis of settling the dispute or contesting the Surveyor's findings and after subsequent hearing of evidence the court was to make its findings.

d) That this appeal is not on the Surveyor's finding, but on the order issued by the Honourable Mr. T.M. Orlando, Resident magistrate on the 5th October 2016, in Siaya PMCC No.50 of 2016, as set out on the heading of the memorandum of appeal. That the order was directed to the area Chief and O.C.S Yala to assist the Plaintiff (Respondent) have the body buried on his land exhumed and taken to Siaya Referral Hospital Mortuary for preservation, and also to get the structure erected thereon demolished. That order was issued pursuant to the Defendant's (Appellant's) failing to comply with the consent order of the 7th September 2016, which has not been appealed against.

e) That having evaluated afresh the affidavit evidence presented by the parties in respect of the notice of motion dated 16th August 2016, the Surveyor's report dated 6th September 2016 and the record of appeal, this court finds that the dispute before the lower court was not on who between the parties had the right to bury the body of the late **Peter Enos Odanga**. The dispute was rather on who between the parties has the legal proprietary rights and entitlement to use that portion of the land on which the structure had been erected and the body of the late Peter **Enos Odanga** interred.

f) That subject to the provisions of **Article 169 (3) of Constitution 2010, Section 9 of the Magistrates Court Act No.26 of 2015**, the Lower Court presided by a Magistrate gazetted by the Honorable the Chief Justice under **Sections 26(3)** of the Environment and Land Court Act No.19 of 2011, as amended by **Section 2** of the Statute Law (Miscellaneous Amendments) Act No.25 of 2015, is with Jurisdiction to hear and determine the dispute between the parties herein. That when the pleadings filed by the Respondent (Plaintiff) were served to the Appellant (Defendant), his response through the statement of defence, replying affidavit and notice of preliminary objection questioned the jurisdiction of the court. That it is trite law that when the Court's Jurisdiction is questioned, the issue takes precedence to be determined before any other matter can be dealt with, as without jurisdiction the court has to down its tools.

g) That having evaluated the proceedings before the lower court, the court finds no record of the Honorable trial Magistrate having pronounced himself on the issue of jurisdiction. That this court is aware of that the Magistrates gazetted by the Chief Justice under Gazette Notice No.1472 of 11th March 2016, none of them goes by the name Hon. Mr. T.M. Orlando, Resident Magistrate. That the Hon. Tom Mark Orlando, Senior Resident Magistrate, was gazetted for Environment and Land cases vide gazette notice No.11930 of 8th December 2017 and therefore did not have jurisdiction to deal with environment and land cases before that date. That however urgent the matter in dispute was, it was paramount for the Learned Trial Magistrate to have asked to parties to address the court on the issue of jurisdiction or move on the court's own motion, and then make a determination in accordance with the law. The Appellant's grounds (1) in this appeal is mainly on the trial court's lack of jurisdiction which is an issue of law that the Learned Trial Magistrate failed to address and determine.

h) The Court of Appeal in **Owners of Motor Vessel "Lillian S" V- Caltex Oil (Kenya) Ltd C.A. No.50f 1989**, the court held that a question of jurisdiction may be raised by a party or by the court on its own motion, and must be decided forthwith on the evidence before the court. The court further held that ones the court finds that it has no jurisdiction to deal with the matter before it, then it should down its tools. That the facts presented before this court through the documents (pleadings) filed by the Appellant (Defendant), which form part of the record of appeal, confirms that he had questioned the court's jurisdiction. That therefore, the Learned Trial Magistrate erred on failing to determine the issue of jurisdiction before embarking on recording and adopting the consent that eventually led to the order subject matter of this appeal. That had the Learned Trial magistrate addressed that issue and come to the inevitable and obvious decision that as he had not been gazetted in accordance with the law to handle Environment and land cases, then he was without jurisdiction, the order of 5th October 2016 would not have been made by that court. That on that ground the appeal has merit.

i) That while issuing the order in relation to the appeal, which the court has found to be with merit, it is important to take notice of the disclosure to the court by the Respondent of 26th October 2016 that the body had already been exhumed and the structure demolished. The court is of the view that it would not be fair and just to order the re-erection of the structure, and reburial of the body before the Lower Court with jurisdiction deals with the main suit that is still pending.

8. That flowing from the foregoing, the court allows the appeal in the following terms:

a) That all the proceedings that took place in Siaya P.M. CC No.50 of 2016, between 17th August 2016 and 5th October 2016, and the orders made thereof by the Learned Trial Magistrate Hon. Mr. T.M. Orlando, Resident Magistrate, (as he then was), not being a magistrate gazetted to handle Environment and Land cases then are hereby set aside.

b) That the parties herein do take steps without undue delay to have Siaya P.M. C.C. No.50 of 2016 mentioned for directions before a duly gazetted Magistrate with jurisdiction to deal with the matter at Siaya Law Courts.

c) That as this court is aware that the lower court's Jurisdiction on Environment and Land cases had not been settled until the Court of Appeal decision in **Civil Appeal No.287 of 2016** on 19th October 2017, the costs in this appeal will abide the outcome of Siaya P.M. CC No.50 of 2016.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 21ST DAY OF FEBRUARY 2018

In presence of;

Appellant Absent

Respondent Present

Counsel None

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

21/2/2018

21/2/2018

S.M. Kibunja Judge

Joane court assistant

Defendant present

My advocate told me he would sent somebody but none has come. I have not seen the Appellant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

21/2/2018

Court: The ruling dated and delivered in open court in the presence of the Respondent.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

21/2/2018