REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

HIGH COURT CIVIL APPEAL No. 27 OF 2016

DAVID KAROBIA KIIRU.....PLAINTIFF

VERSUS

CHARLES NDERITU GITOI.....1ST DEFENDANT

FAMILY BANK LTD.....2ND DEFENDANT

(An appeal from the ruling and order of Chief Magistrate's Court

at Nakuru (Hon. F. Muguongo RM) dated 22nd February 2016

in CMCC No. 1427 of 2015)

JUDGMENT

1. By this appeal, the appellant challenges the ruling and order of Chief Magistrate's Court at Nakuru (Hon. F. Muguongo RM) rendered on 22nd February 2016 in CMCC No. 1427 of 2015 by which his suit in the said court was struck out with costs to the 1st respondent. In the said suit, the appellant was the plaintiff, the 1st respondent herein was the 1st defendant while the 2nd respondent was the 2nd defendant.

2. The suit was filed through plaint dated 14th December 2015. It was pleaded in the plaint that pursuant to an agreement dated 31st July 2013 the appellant was to sell to the 1st respondent a parcel of land known as Laikipia/Lariak/567. The 1st respondent was unable to raise the purchase price and following a subsequent agreement dated 3rd April 2014, the appellant and the 1st respondent agreed that the appellant refunds the portion of the purchase price that he had received from the 1st respondent and the 1st respondent who had by then charged the title in favour of the 2nd respondent obtains discharge of charge and transfers the land back to the appellant. It was further pleaded that despite the appellant performing his part of the agreement, the 1st respondent had neither discharged the property nor transferred it back to the appellant and was instead threatening to sell it.

3. Based on the foregoing, the appellant prayed for judgment against the respondents jointly and severally for:

> ***a. A permanent injunction restraining the defendants from disposing off, selling, transferring, alienating, re-charging or in any other way so to do interfering with land parcel No. Laikipia/Lariak/567.***
>
> ***b. A mandatory injunction compelling the defendants to discharge title No. Laikipia/Lariak/567 and execute transfer instruments in favour of the plaintiff immediately upon settlement of any sums that may be due to the loan account respecting the above title with the 2nd defendant.***
>
> ***c. Costs of this suit plus interest at court rates.***
>
> ***d. Any other or further relief that this honourable court may deem just and expedient to grant.***

4. The 1st respondent responded to the suit by filing Notice of Preliminary Objection dated 11th January 2016. The grounds specified in the objection were that:

> ***1. The Nakuru Chief Magistrate's Court lacks jurisdiction to hear and determine the plaintiff's suit.***

2. ***The plaintiff's suit is incompetent, fatally defective, bad in law and an abuse of the court process.***

3. ***The plaintiff's suit and the application dated 14th December, 2015 should be struck out with costs to the 1st defendant.***

5. The preliminary objection was heard by Hon. F. Muguongo RM who upheld it and struck out the appellant's suit with costs to the 1st respondent in a ruling delivered on 22nd February 2016.

6. Being dissatisfied with the ruling the appellant filed the present appeal and urged this court to set aside the ruling and dismiss the preliminary objection. The grounds of appeal as stated in the Memorandum of Appeal dated 8th March 2016 are:

1. ***That the learned trial magistrate erred in law and in fact in upholding the 1st respondent's preliminary objection dated 11th January 2016 despite the clear wording of the proviso to Section 12 of the Civil Procedure Act which provides that a suit can be filed where the property in question is situate or where the defendant actually and voluntarily resides or carries on business or personally works for gain.***

2. ***That the learned trial magistrate erred in law and in fact in upholding the 1st respondent's preliminary objection dated 11th January 2016 despite the fact that the 2nd respondent, M/s. Family Bank Ltd has two branches within Nakuru Town and actually carries on business within Nakuru Town.***

3. ***That the learned trial magistrate erred in law and in fact in upholding the 1st respondent's preliminary objection dated 11th January 2016 despite the fact that from the clear wording of section 15 of the Civil Procedure Act, a suit can be filed where any of the defendants resides or carries on business meaning so long as the 2nd respondent carries on business within Nakuru Town, the suit could competently be filed in the Nakuru Chief Magistrate's Court.***

4. ***That the learned trial magistrate erred in law in failing to hold and find that the dispute before her was purely a commercial dispute which could be competently filed before the Nakuru Chief Magistrate's Court so long as the 2nd respondent carries on business in Nakuru.***

5. ***That the learned trial magistrate's ruling is based on a misapprehension of the law.***

7. The appeal was heard by way of written submissions. Counsel for the appellant argued on his written submissions that the learned magistrate misinterpreted the provisions of **Sections 12** and **15** of the **Civil Procedure Act** as read against the provisions of **Section 3 (1)** of **Magistrates Court Act**. Citing the cases of **Simon Njogu Karithi & Another –vs- Cleti Kembio Kimaio [2015] eKLR** and **Aly Jamal – vs- Erastus George Momanyi & 2 others [2014] eKLR** counsel argued that the court should sustain rather than strike out a pleading. He thus urged the court to allow the appeal.

8. Counsel for the 1st respondent submitted that the suit property is located in Laikipia County and that the suit in the subordinate court was a suit for recovery of immovable property as well as one for determination of a right or interest in immovable property. Consequently, and in view of the provisions of **Section 12 (a)** and **(d)** of the **Civil Procedure Act**, the court with jurisdiction to hear the suit was Nyahururu Chief Magistrate's Court or Nanyuki Chief Magistrate's Court. Citing the Court of Appeal's decision in **Francis Ndichu Gathogo –vs- Evans Kitazi Ondansa & another Civil Appeal No. 287 of 2002 Nyeri**, counsel submitted that the decision of the learned magistrate was sound. He urged the court to dismiss the appeal.

9. On his part, counsel for the 2nd respondent also submitted that the suit ought to have been filed either at Nyahururu Chief Magistrate's Court or Nanyuki Chief Magistrate's Court both of which are closest to the suit property. Counsel therefore took the position that the decision of the learned magistrate was the right one. He urged the court to dismiss the appeal.

10. I have considered the grounds of appeal and the submissions made. This being a first appeal, my role is to re-evaluate, re-assess and re-analyse the material that was before the subordinate court and draw my own conclusions.

11. The learned magistrate had before her a preliminary objection to the effect that the court did not have territorial jurisdiction. A valid preliminary objection must be on a pure point of law. In **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd** (**1969) EA 696,** the *locus classicus* on preliminary objections in this region, Law JA stated:

So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

12. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.

13. I have reviewed the record of the proceedings before the subordinate court. The thrust of the 1st respondent's objection was that in view of the provisions of **Section 12 (a)** and **(d)** of the **Civil Procedure Act** and considering that the suit property is located in Laikipia County, the Chief Magistrate's Court Nakuru did not have jurisdiction. The said section provides:

12. Subject to the pecuniary or other limitations prescribed by any law, suits—

(a) for the recovery of immovable property, with or without rent or profits;...

(d) for the determination of any other right to or interest in immovable property;...

where the property is situate in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the property is situate:

Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the court within the local limits of whose jurisdiction the property is situate, or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides or carries on business, or personally works for gain.

14. A perusal of the plaint herein reveals that the suit before the subordinate court was one seeking an injunction to restrain the defendants from disposing of or alienating the suit property and an injunction to compel the defendants to discharge the title and transfer the suit property to the appellant upon payment of any amounts due to the 2nd respondent. The suit therefore fell squarely within the provisions of **Section 12 (a)** and **(d)** of the **Civil Procedure Act**.

15. Parties herein agree that the suit property is located in Laikipia County. The case ought therefore to have been filed either at Nyahururu Chief Magistrate's Court or Nanyuki Chief Magistrate's Court, both of which have territorial proximity to the suit property. I do not think that the proviso to **Section 12** of the **Civil Procedure Act** would form any basis for filing the suit in Nakuru since there are two defendants in the case and there is no conclusive evidence that both reside or carry on business in Nakuru.

16. In view of the prayers sought in the plaint which include an order that the defendants be compelled to discharge and transfer the suit property to the appellant, the suit was essentially one concerning title to and use of land. Therefore, a magistrate's court had jurisdiction to hear the matter pursuant to **section 9(a)(i)** of the **Magistrate's Court Act 2015** which provides:

9. 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;

17. Having considered the preliminary objection, the learned magistrate stated as follows in conclusion:

Having established that the subject property is situate in Laikipia County, and with the express provisions of section 12 CPA it follows that the Nakuru Chief Magistrate's Court lacks the territorial jurisdiction to hear and determine the plaintiff's suit. Now it has been said that jurisdiction is everything and without it the court has no power to make one more step …

18. In view of the provisions of **Section 12 (a)** and **(d)** of the **Civil Procedure Act**, the learned magistrate was right in finding that the matter ought not to have been filed in the Chief Magistrate's Court Nakuru. The question that then emerges is: should a matter which is filed in a court other than the court within the local limits of whose jurisdiction the property is situate be struck out?

19. Having been invited to strike out the suit, the learned magistrate ought to have considered the drastic nature of an order of striking out. In that regard, the wise counsel of Madan JA in **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another[1980] eKLR** ought always to be borne in mind:

As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case, through discovery and oral evidence, it should be used sparingly and cautiously.

20. The magistrate ought also to have considered the provisions of **Article 159 (2) (d)** of the **Constitution of Kenya** as well as the provisions of **Sections 1A** and **1B** of the **Civil Procedure Act**. The upshot of all these provisions is that while enforcing rules of procedure, the court should not lose sight of the bigger picture: the court's mission to render substantive justice. The Court of Appeal has recently addressed the issue in **Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others[2018] eKLR** as follows:

We draw from the judgment of this Court in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR (Civil Appeal No. (Application) 228 of 2013) where Ouko, JA. in the majority stated that:

"Deviations from and lapses in form and procedures which do not go to the jurisdiction of the court, or which do not occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of

injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed at the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness…it ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike are, thus, enjoined to abide strictly by the rules. Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. And while the court, in some instances, may allow the liberal application or interpretation of the rules that can only be done in proper cases and under justifiable causes and circumstances. That is why the Constitution and other statues that promote substantive justice deliberately use the phrase that justice be done without "undue regard" to procedural technicalities."

We agree with those sentiments. In this appeal as well, justice should not have been sacrificed at the altar of the procedural requirements …., particularly because those lapses did not go to the fundamental dispute that was before the court. This does not mean that procedural rules should be cast aside; it only means that procedural rules should not be elevated to a point where they undermine the cause of justice. …

The elevation and prominence placed on substantive justice is so critical and pivotal to the extent that Article 159 of the Constitution implies an approach leaning towards substantive determination of disputes upon hearing both sides on evidence. …

21. There was no suggestion that there was any jurisdictional bar to the suit aside from the issue of the case being filed in a court other than the court within the local limits of whose jurisdiction the property is situate. Assuming that the suit property was situated in Nakuru, the magistrate would have comfortably handled the matter to conclusion. Strictly speaking, the magistrate had jurisdiction and the requirement of filing the case elsewhere was more of an issue of distribution of work among the various magistrates' court stations. It's important to reiterate that a valid preliminary objection should, if successful, dispose of the suit. The preliminary objection before the magistrate could not and ought not to have resulted in a striking out of the suit.

22. In **William Kiprono Towett & 1597 Others v Farmland Aviation Ltd & 2 Others [2016] eKLR** the Court of Appeal stated as follows while dealing with a situation where a preliminary objection on the alleged misjoinder of 1,598 parties to a suit was upheld and the suit struck out:

Whereas the trial court was of the considered opinion that the suit filed before it could not be conveniently tried and determined as filed, the court was at liberty to and should have, in our considered and respectful opinion, either upon the application of any party, or on its own motion ordered separate trials, or made such order as may be expedient. See Order 3 Rule 8 of the Civil Procedure Rules (2010). Given that avenue that was available to it, the trial court's order to strike out the appellant's suit comes into sharp focus. The same was discretionary in the face of the grounds adduced by the respondents and submissions both in favour and against the issuance of the said order. Thus, strictly speaking the respondent's preliminary objection did not meet the requisite threshold and should not have been allowed. We think that Newbold, J.A. was right to opine that matters discretionary are outside the purview of preliminary objections and while we note Mr. Musangi's contrary view, we respectfully think counsel has it wrong.

23. Had the magistrate considered that the court's overall mission is to hear parties and do justice, it would have become apparent that the transgression of filing the case in a court other than the court within the local limits of whose jurisdiction the property is situate could be cured in a manner that allows the parties to have the real dispute between them determined in a just, expeditious and affordable manner. The learned magistrate had a discretion to handle the matter in such a way as to give the parties a chance to have the suit heard in a court within the local limits of whose jurisdiction the property is situate. A pragmatic approach in the circumstances would have been to order the parties to file an appropriate application to this court seeking transfer of the suit to the appropriate court station.

24. In view of the foregoing discourse, I find that the appeal has merit. I therefore make the following orders:

a) This appeal is allowed.

b) The ruling and order of the learned magistrate dated 22nd February 2016 is set aside and substituted with an order dismissing the preliminary objection dated 11th January 2016.

c) Costs of this appeal as well as costs of the preliminary objection before the subordinate court are awarded to the appellant and shall be paid by the 1st respondent.

d) Parties are at liberty to make an appropriate application for transfer of the subordinate court case to the appropriate court station.

25. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 20th day of July 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Chelule holding brief for Mr Ngure for the appellant

Mr Langat holding brief for Mr Njogu for the 1st respondent

Mr Langat for the 2nd respondent

Court Assistants: Gichaba & Lotkomoi