



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC CIVIL APPEAL CASE NO. 05 OF 2018

PETER NDIRANGU MUCHEMI.....APPELLANT

VERSUS

ASIEMO NDATHO MARENGE.....RESPONDENT

JUDGMENT

1. In his plaint dated 24th October, 2013, the plaintiff prayed for judgment against the defendant for:
 - a) That the actual boundary between land parcel No. 543 Chiakariga 'A' Adjudication section and the defendant's land be determined.
 - b) An order that the defendant do restrict himself to his land.
 - c) An order of permanent mandatory injunction restraining the defendant by himself, agents, family from entering and or trespassing into land parcel No. Chiakariga 'A' Adjudication section.
 - d) Costs of this application.
2. The lower court struck out the apposite plaint on 10th May, 2018. Hence this appeal.
3. The Memorandum of Appeal reads as follows:

MEMORANDUM OF APPEAL

[An appeal from the decision of the Learned Magistrate MESA L.N. read on 10th May, 2018 in Marimanti ELC Case NO. 2 OF 2017]

The appellant herein having been aggrieved by the decision of the Learned Senior Resident Magistrate L. N. MESA in ELC No. 2 of 2017 read on 10th May, 2018 appeals to this court and sets forth the following grounds of Appeal.

1. The Learned Senior Resident Magistrate grossly erred and misconstrued the provisions of order 11 of the Civil Procedure Rules.
2. The Learned Senior Resident Magistrate erred in law and in fact by reaching at a finding that the court had no jurisdiction to determine the suit before it.
3. The Learned Senior Resident Magistrate prayed the role of a defence counsel instead of being an impartial arbiter of the dispute before the court.
4. The learned Senior Resident Magistrate erred in law and fact by not making a finding that the consent recorded in court by both counsel amounted to admission of facts by the defendants counsel.
5. The Learned Senior Resident Magistrate failed to appreciate that the case was basically unopposed as the defendant did not tender any evidence to counter the plaintiff' evidence and thus arrived at a wrong finding.
6. The Learned Senior Resident Magistrate erred in law and grossly misconstrued the provisions of the Land Adjudication Act and

arrived at a wrong finding.

7. The entire judgment of the Learned Senior Resident was not based on law and fact, and therefore was wrong and remains to be so.

Its proposed to seek orders:-

- a) That the appeal be allowed and the judgment read on 10th May, 2018 be set aside in its entirety.
- b) That judgment be entered in favour of the plaintiff in accordance with the plaint plus costs of this appeal and lower court.

DATED AT MERU THIS 4TH DAY OF JUNE, 2018

.....

LEONARD K. ONDARI & CO.

ADV. FOR THE APPELLANT

4. This court ordered that the appeal be canvassed through written submissions.

5. The plaintiff's written submissions are pasted herebelow in exactly the format they were submitted to court and hence without any changes whatsoever:

APPELLANT'S SUBMISSIONS

May it please your Lordship,

These submissions are pursuant to the court's directions issued on 22nd of October 2018 directing that the parties herein do file their written submissions to **the Civil Appeal case No 05 of 2018.**

INTRODUCTION

Your Lordship this is an appeal from the decision of the Learned Magistrate MESA L.N read on 10th May 2018 in Marimanti ELC Case No 6 of 2013 which the appellant prays that it be set aside ,the appeal be allowed and a Judgement be entered in favour of the Plaintiff in accordance with Plaint dated 24th October 2013.

BRIEF HISTORY

Your Lordship due to land dispute on the boundaries and ownership involving **Land Parcel No 543 Chiakariga A Adjudication Section** ,the appellant upon obtaining the requisite consent from Land Adjudication Officer Tharaka District instituted Civil suit no 6 of 2013 with a claim that the actual boundary between Land **Parcel 543 Chiakariga A Adjudication Section** and the defendants Land be determined plus an order of Permanent injunction restraining the defendant from entering and or trespassing into Land Parcel 543 Chiakariga 'A' Adjudication Section.

Your Lordship by a consent dated 19th March 2015 and adopted in open court ,it was agreed that the Officer in-charge of Chiakariga Adjudication section do visit the Locus in quo **Land parcels 543 and 544 Chiakariga Adjudication Section** and do determine boundaries and to file a report in court within 30 days from the date of service .

This was done your Lordship and vide a letter 22nd July 2015 S.K THIONG'O the Land Adjudication and Settlement Officer Tharaka North and subcounties filed a report in Court. In a nutshell the report indicated that P/NO was recorded in the name of the Plaintiff Peter Ndirangu Muciemi whileas P/NO 545 was recorded in the name of the Defendant Anselimo Ndatho Marengé. The report also indicated that when the officer went to the ground with intention of remarking the boundary the defendant Ndatho Marengé refused claiming that a portion of land approximately two acres to be his. The Land Adjudication and Settlement Officer Tharaka North and subcounties hence concluded that the issue was of Land Claim but not an issue of boundary.

SUBMISSIONS

Your Lordship our Appeal is premised on 7 grounds upon which and on behalf of the Appellant, we wish to address you on the followings as Follows;

WHETHER THE COURT HAD THE REQUISITE JURISDICTION.

Your Lordship in *Halsbury's Laws of England (4th Ed.) Vol. 9 at page 350* it defines "jurisdiction" as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."

Your brother Justice Nyarangi stated in the celebrated case of *Owners of Motor Vessels Lillian S -v- Caltex Oil (Kenya) Ltd (1989) KLR 1* as follows;

“I think 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 on 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.”

By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority in this case your Lordship is squarely under the the Land Adjudication Act, Cap 284 and Land Consolidation Act Cap 283 Laws of Kenya.As was stated by the Supreme Court in *Samuel Kamau Macharia & Another -v- Kenya Commercial Bank Ltd & 2Others (2012) e KLR*,

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.....The issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.....where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the Constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within this authority to prescribe the jurisdiction of such a Court or tribunal by state law.”

Your Lordship whereas it is not disputed that n adjudication area pursuant to the Land **Parcel 543 Chiakariga** is under Adjudication ,the appellant had annexed a consent as required by Law to institute the civil proceedings from Land Adjudication Officer Tharaka District. The court entertained the matter upto the stage of delivering its Judgment when it pronounced itself of having no Jurisdiction. Despite being an afterthought it is not premised on any legal provision since the material acts confers the Court Jurisdiction upon procurement of the relevant Consent from the relevant Land Adjudication Officer.

Your Lordship as discussed hereinabove, it is clear that the court had jurisdiction to entertain this matter as the requisite consent was obtained prior to its being filed.

WHETHER CONSENT RECORDED IN COURT AMOUNTED TO ADMISSION OF FACTS BY THE DEFENDANTS COUNSEL.

Your Lordship the position that once a consent by parties is adopted by court it becomes a court Order as clearly set out in *Setton on Judgments and Orders (7th Edn), Vol.1 pg 124* as he states that Prima Facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement.

This passage Lordship was followed by the court of appeal in *Brooke Bond Liebig Ltd V Mallya [1975] EA 266 at 269* in which Law Ag P said:

“A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”

Your Lordship the Court of Appeal in *Kenya Commercial Bank Limited vs Benjoh Amalgamated Limited & Another Civil Appeal NO. 276 OF 1997 [1998] eKLR* the Court held that

"It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.”

Your Lordship by applying the principles of law cited above in facts of this case, the appellant’s case is that consent was entered between the parties concerned the court ordered that the Officer in-charge of Chiakariga Adjudication section do visit the Locus in quo Land parcels 543 and 544 Chiakariga Adjudication Section and do determine boundaries and to file a report in court within 30 days from the date of service .

This was done your Lordship and vide a letter 22nd July 2015 S.K THIONG’O the Land Adjudication and Settlement Officer Tharaka North and subcounties filed a report in Court. In a nutshell the report indicated that P/NO was recorded in the name of the Plaintiff Peter Ndirangu Muciemi whileas P/NO 545 was recorded in the name of the Defendant Anselimo Ndatho Marengi.The report also indicated that when the officer went to the ground with intention of remarking the boundary the defendant Ndatho Marengi refused claiming that a portion of land approximately two acres to be his.The Land Adjudication and Settlement Officer Tharaka North and subcounties hence concluded that the issue was of Land Claim but not an issue of boundary.

Your Lordship it is after this report that the court pronounced it had no Jurisdiction .Your Lordship the issue on ownership was catered for by the report.The only challenge was only remarking of boundary which was stopped by the defendant.**Your Lordship,was the court mandated in interest of Justice to order that the security be provided for to the Land adjudication officer to remark the boundary or the court to fold its hands and state it had no jurisdiction?**

Your Lordship the consent dated 19th March 2015 was after the detailed negotiation by parties. It was not an admission to liability as construed by the Court but an out of court settlement as advocated by the Supreme Law of the Land under Article 159 and hence when it was adopted by the Court they became Court Orders. Hence Your Lordship, the Lower Court your Lordship was to ensure compliance with its court order.

PROCEEDINGS AT THE LOWER COURT.

To begin with Your Lordship there is no doubt or dispute that the subject matter herein your lordship is under adjudication and the Plaintiff has complied with provisions of relevant Law as discussed below by obtaining requisite consent before filing the suit.

Your Lordship, **section 8 of the Land Consolidation Act Cap 283**, laws of Kenya provides inter alia that:

“Subject to the provisions of this section, no person shall institute and no court whatever shall take cognizance of, or proceed with or continue to hear and determine, any proceedings in which the ownership or the existence under native law and custom of any right or interest whatsoever in, to or over any land in any adjudication area is called in question or is alleged to be in dispute unless the prior consent in writing of the adjudication officer to the institution or continuance of such proceedings have been given. No officer of any court whatever shall issue any plaint or other legal process for the institution or continuance of any proceedings which by virtue of the provisions of subsection (1) of this section are for the time being prohibited, except upon being satisfied that the consent required by those provisions has been given. Nothing in the foregoing provisions of this section shall prevent the enforcement or execution of any final order or decision given or made in any proceedings in respect of any land in any an adjudication area, where such order or decision is not the subject of a pending appeal at the time of the application of this Act to such land. A certificate signed by an adjudication officer certifying any parcel of land to be, or to have become on a specified date, land within an adjudication area shall be conclusive evidence that the land is such land. Every certificate purporting to be signed by an adjudication officer shall be received in evidence and be deemed to be so signed without further proof, unless the contrary is shown.”

Further your lordship, **Section 30 (1) of the Land Adjudication Act, Cap 284** Laws of Kenya provides as follows:-

“Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.”

Your Lordship it is trite Law that no person is to institute civil proceedings, except with the consent of the adjudication officer, concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final. If a person is aggrieved by the refusal of the adjudication officer to give consent, he may appeal against the refusal within 28 after the refusal, in writing to the Minister, whose decision shall be final.

Your Lordship the parameter for instituting civil Suits in regards to Land under Adjudication is well set under the Act. It is a well regulated process in which the Land adjudication Officer only grants leave to only deserving cases. This was done by **Land Adjudication Officer Tharaka District** as evidenced by a letter **dated 17th October 2013** and hence your Lordship Civil suit No.6 of 2013 was properly before court

Your Lordship the effect of **Section 30** is to remove that determination from the jurisdiction of the court, so that the court does not determine any conflicts touching on interest over the land without the party aggrieved first seeking the permission of the Adjudication Officer. But where the Adjudication Officer has already granted his/ her consent , there is no bar to a person filing a claim in court, alleging an interference in the property.

To buttress my assertion that this suit did not deserve dismissal your Lordship, I highlight the opinion of Obaga J in **Nicholas Tukei versus Chepochekatug Loyeruk & 2 others, Kitale HCCC 90 of 2012 [2013] eKLR** where the learned Judge states as follows:-

“By virtue of section 30(1) of the Land Adjudication Act, the plaintiff was under obligation to seek consent of the adjudication officer before bringing the suit. It is conceded by the plaintiff that he did not seek the consent of the adjudication officer before filing this suit. The plaintiff urges the court to disregard this citing the provisions of Article 159(2)(d) of the Constitution which provides that justice shall be administered without undue regard to procedural technicalities. The object of the Land Adjudication Act states that it is an Act of parliament to provide for ascertainment and recording of rights and interests in Trust Land, and for purposes connected therewith and purposes incidental thereto. The marginal notes under section 30 of the Land Adjudication Act are “Staying of Land Adjudication Suits”. It is clear from the provisions of Section 30 of the Land Adjudication Act as read with the marginal notes and the objects of the Act that the legislature wanted ascertainment of interests in land ascertained in an orderly manner without interruptions by suits. This is why it was deemed necessary for consent to be sought from the adjudication officer who will then give consent for the suit to proceed or deny consent depending on the nature of the suit. This was a very important requirement which cannot amount to just procedural technicality which the court can ignore. I therefore find that the Preliminary Objection is well founded. The same is hereby upheld with the result that the suit herein is struck out with costs to the defendants.”

Your lordship it is blatantly clear that the Plaintiff met all the Legal provisions. He sought consent of the Land Adjudication Officer. He instituted the suit and served the Defendant. The Defendant attended court in its advance stages, during consent and even for delivery of the judgment however he did not file any statement of defence to counter the Plaintiff's/appellant's claim. It is apparent from the court record that a notice was served on him. It was hence improper for the judgment not to be entered in favour of the Plaintiff as provided for under Order 10 Rule 11 of Civil Procedure Rules. Hence Your Lordship the Learned Magistrate ought to have considered **Article 159 of the**

Constitution of the Republic of Kenya which provides that justice shall be administered without undue regard to procedural technicalities by ordering the full implementation of the consent order to its full effect and consequently enter Judgement in accordance with the Plaintiff .

CONCLUSION.

Your Lordship as stated in the case of *Nilesh Premchand Mulji Shah & another t/a Ketan Emporium v M.D. Popat and others & another [2016] eKLR* the act of dismissing a suit is a draconian measure which should be exercised cautiously as it drives the party away from the judgment seat of justice. Hence your Lordship we do humbly pray that the appeal be allowed in total and ,the Judgment read on 10th May 2018 be set aside and a judgment be entered in favor of the Plaintiff in accordance with the Plaintiff dated 24th October 2013 plus the costs of this appeal and Lower court.

DATED AT MERU THISDAY OF.....2018

LEONARD K. ONDARI & CO

ADV. FOR THE APPELLANT

6. The respondent refused and/or failed to put in his written submissions.

7. Having perused the apposite pleadings, I note that the respondent did not file any defence. There was also consent by the District Land and Adjudication officer allowing the appellant to institute the suit in the lower court. There were 2 letters from the Ministry of Interior telling the respondent to maintain the status quo.

8. I note that when the District Land and Settlement Officer went to the ground to fix the disputed boundaries the exercise aborted because the respondent opposed that exercise. The DLASO reported as follows: ***“The defendant Anselimo Ndatho is claiming a portion of approximately two acres. Therefore it is not an issue of boundary but a land claim”.***

9. I opine that the resistance by a party to the fixing of boundaries does not transform a boundary dispute into a claim for land. I, therefore, uphold all the grounds relied upon by the appellant.

10. Having considered all the facts and circumstances in this case, including the authorities proffered by the appellant, I hereby set aside the judgment of the lower court delivered at Marimanti Law Courts. I, however, find that this court has no evidential basis for entering judgment in favour of the plaintiff and in particular for granting an order for permanent mandatory injunction to restrain the respondent from entering the suit land or in any way interfering with it.

11. I enter judgment in the following terms:

- a) The judgment delivered by Hon. Mesa L. N, SRM, at Marimanti on 10th May, 2018 is hereby set aside.
- b) The suit is remitted back to Marimanti Law Courts for hearing and determination.
- c) The lower court should order the District Land and Adjudication Officer, CHIAKARIGA ‘A’ ADJUDICATION SECTION to fix the disputed boundaries and also order that adequate security be availed to him on the day the said boundaries will be fixed.
- d) Costs for this appeal ONLY are awarded to the Appellant with costs of the proceedings in the lower court remaining at the judicial discretion of the lower court.

12. Orders accordingly.

Delivered in open Court at Chuka this **18th day of December, 2018** in the presence of:

CA: Ndegwa

Miss Hayata h/b Ondari for the Appellant

Otieno C Absent for the Respondent

Osiemo Ndatho – Respondent - Absent

P.M. NJOROGE

JUDGE