



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

CIVIL APPEAL NO. 1499 OF 2014

(FORMERLY HCCA NO. 269 OF 2011)

ESTHER NYAMBURA WAWERU.....APPELLANT

VERSUS

ANDREW WAIGANJO MUIRURI.....RESPONDENT

(Appeal arising out of the Ruling of the Principal Magistrate, Hon Mrs Murage, delivered on 10th March 2011 in Limuru PMCC No. 171 of 2010)

J U D G M E N T

Background

1. This Appeal originates from Limuru Principal Magistrate Court Civil Case No. 171 of 2010 relating to a boundary dispute in relation to Parcel Number **Limuru/Kamirithu/2229** owned by the Appellant (hereinafter referred to as “**Parcel No. 2229**”) and Parcel Number **Limuru/Kamirithu/2137** owned by the Respondent (hereinafter referred to as “**Parcel No. 2137**”). Through a Plaint dated 18th May 2010, the Appellant (Plaintiff) sued the Respondent (Defendant) seeking the following prayers: (a) an order for the provincial land surveyor to correct the boundaries between Limuru/Kamirithu/2229 and Limuru/Kamirithu/2137; (b) the defendant be ordered to demolish any building or part thereof that shall be found to have encroached into the plaintiff’s land and to the access road between the plaintiff and the defendant’s land; and (c) costs of the suit.

2. In his statement of defence dated 9th June 2010 and subsequently amended on 4th October 2010, the Respondent stated that he was the registered proprietor of Parcel No. 2137 but denied the Plaintiff’s ownership of Parcel No. 2229. The Respondent further denied encroaching onto the Plaintiff’s property and stated that he had constructed a house which did not go beyond the confines of his plot. The Respondent contested the subordinate court’s jurisdiction to deal with the suit contending that the subject matter of the suit ran into millions of shillings. Further, the Respondent contended that the suit was time barred. Paragraph 8 of the Respondent’s Statement of Defence contained the following verbatim averments:-

“The jurisdiction of this court is not admitted in view of the value of the subject matter of this suit running into millions of shillings and the provisions of Section 159 of the Registered Land Act (Cap 300) and the Defendant shall raise a preliminary objection at the earliest opportunity.”

3. Subsequently, on 17/1/2011, the Respondent filed in the trial court a document titled “**Affidavit in Support of Defendant’s Preliminary Objection**”. Annexed to the said document was a valuation report

by M/s Pinnacle Valuers in which the value of Parcel No. 2137 was estimated at Kshs.12,500,000.

4. On 10/2/2011, the Respondent's counsel, Mr. Nyaga, orally moved the trial court and proceeded to argue what he described as **“a preliminary objection contained in Paragraph 8 of the statement of defence.”** In his brief oral submissions, counsel for the Respondent argued that the trial court lacked jurisdiction by dint of the fact that the value of Parcel No. 2137 was Kshs.12,500,000 as per the Valuation Report annexed to the Affidavit filed in court in support of the preliminary objection. He further contended that under Section 159 of the Registered Land Act (now repealed), only the high court had jurisdiction to deal with disputes relating to title or any interest in land. He contended that under Section 159 of the repealed Registered Land Act, the trial court did not have jurisdiction to deal with the dispute before it and urged the court to strike out the suit.

5. On his part, counsel for the Appellant, Mr Muriuki, argued that the preliminary issue raised by the Respondent did not meet the threshold of a preliminary objection. He contended that the issues raised by the respondent required production of evidence and cross examination by the rival party. He took issue with the affidavit filed in support of the preliminary objection. He contended that reliance on the affidavit without affording the appellant an opportunity to file an affidavit in reply thereto would occasion injustice upon the appellant. He further contended that the value of the respondent's property was irrelevant to the appellant's suit which sought ascertainment of the boundary between their respective properties.

6. On 10th March 2011, the trial court delivered a ruling upholding the preliminary objection. The court held that it lacked the requisite jurisdiction to determine the dispute before it and proceeded to strike out the suit with costs. The Ruling reads as follows:-

“I have considered the preliminary objection raised by defence in this case. It is based on the grounds that the court has no pecuniary jurisdiction to hear this case. Plaintiff in this case seeks correction of boundaries between plaintiff's and defendant's land. He also seeks demolition of any building or part thereof found to have encroached into the Plaintiff's land. I have no doubt the determination of Plaintiff's claim will have a bearing on the value of the property. In the event that the plaintiff's claim succeed, the demolition may go into millions of shillings which may be beyond the pecuniary jurisdiction of this court. The Plaintiff has not ascertained the value of the property he is seeking to be demolished but defendant has. The court cannot close its eyes to the valuation filed by the defendant. A claim by the plaintiff against part of defendant's portion is really a claim of title to that portion. This claim therefore should be determined under provisions of Section 159 Cap 300. I sustain the objection and find that the court has no jurisdiction to hear this case. I strike out the suit with costs.”

7. Aggrieved by the trial court's ruling, the Appellant filed this Appeal setting out the following six grounds of appeal:-

- 1) That the honourable magistrate erred in law by relying on matters of fact to rule on a preliminary objection.**
- 2) That the honourable magistrate erred in law by relying on an affidavit in support of a preliminary objection to rule on a preliminary objection.**
- 3) That the honourable magistrate erred in law in relying on an annexure introduced to the suit by the affidavit in support of a preliminary objection.**
- 4) That the honourable magistrate erred and misdirected herself by relying on an annexure, introduced to determine the pecuniary jurisdiction of the court where there was no mention of the subject matter in the appellant's pleadings.**
- 5) The honourable magistrate erred in law in purporting to amend the appellant's pleadings.**

6) The honourable magistrate erred in striking out the appellant's suit relying on a valuation report of a piece of land where the subject matter was only a boundary.

8. Through this Appeal, the Appellant seeks the following orders:-

(a) That the ruling dated 9th June 2011 (sic) be reversed and the Appellant's case in Limuru PMCC No. 171 of 2010 be reinstated for full hearing.

(b) Costs of this appeal be borne by the respondent.

9. Parties agreed to canvass the Appeal through written submissions. In his submissions dated 20th February 2017, counsel for the appellant contends that the trial court erred in law by relying on matters of fact to rule on a preliminary objection. Counsel argues that a preliminary objection should be based on pure points of law. He further contends, that a preliminary objection must raise points of law based on ascertained facts. Counsel further submits that by purporting to introduce an annexure in the form of a valuation report as evidence, the respondent misled the court by seeking to authenticate the preliminary objection by adducing evidence. Counsel submits that the issues raised in the preliminary objection raised questions of fact which both parties had disagreed on and which require the calling of evidence. Counsel contends that the preliminary objection did not meet the threshold set out in the case of **Mukisa Biscuits Manufacturing Company Ltd. vs. West End Distributors Ltd. (1969) E. A 696** and **Oraro vs. Mbaja (2005)1KLR 141**.

10. On his part, counsel for the respondent argues that the appellant's prayers in the suit before the trial court included an order for demolition of the respondent's property which may be found to have encroached onto the appellant's land and therefore the value of the property was an issue for determination by the trial court. Counsel submits that a valuation report placed the value of Parcel No. 2137 in the year 2010 at Kshs 12,500,000/- which the trial court noted was beyond its pecuniary jurisdiction. Counsel makes reference to the case of **Felista Ninga Ndimi vs. James Ndimi Thuku & another Nairobi HCCA No. 16 of 2009** where the court found that the trial court lacked the requisite pecuniary jurisdiction to deal with the matter. Counsel avers that the appeal herein lacks merit because the pecuniary jurisdiction of the trial court has not been disclosed.

11. Counsel for respondent relies on the case of **Mukisa Biscuits Manufacturing Company Ltd. vs. West End Distributors Ltd. (1969) E. A 696** and argues that the issue of jurisdiction has to be determined at the earliest opportunity and if the court finds that it has no jurisdiction, it should not go into the substance of the matter. Further reliance is placed on the case of **Joseph Njuguna Mwaura & others vs. Republic CA No. 5 of 2008** as cited in **Alice Mweru Ngai vs. Kenya Power & Lighting Co. Ltd Kerugoya ELC No. 287 of 2014** where the court held that jurisdiction is the first hurdle that a court must surmount before embarking on its decision making function.

Issues

12. The six grounds of appeal set out in the Memorandum of Appeal raise three broad issues for determination by this court. The first issue is whether or not the trial magistrate erred in law in admitting and relying on an affidavit filed in support of a preliminary objection. The second issue is whether or not the trial magistrate erred in law and misdirected herself in basing her pecuniary jurisdiction on the value of Land Title Number: Limuru/Kamirithu/2137 taking into account the fact that the relief sought by the Plaintiff was a determination of the boundary between Land Title Number Limuru/Kamirithu/2229 and Land Title Number Limuru/Kamirithu/2137 and removal of any encroaching structures. The third issue is whether or not the trial magistrate misdirected herself in finding that she was precluded by Section 159 of the repealed Registered Land Act from handling the suit. I will deal with the three issues chronologically.

Determination

13. The trial court was orally invited to hear and determine a preliminary objection raised in court by way of oral submissions by counsel for the respondent. The Respondent contended that the preliminary point

of law had been pleaded in paragraph 8 of the respondent's defence. The preliminary objection had two limbs. The first limb was that the trial court lacked jurisdiction by dint of the value of the subject matter which, in the opinion of the respondent, ran into millions of shillings. The second limb of the preliminary objection was that the trial court was divested of jurisdiction by dint of the provisions of Section 159 of the Registered Land Act (now repealed).

14. After filing his statement of defence, the respondent proceeded to file a document completely strange in Kenya's civil procedure practice. The document was titled "**Affidavit in support of Preliminary Objection**". This document consisted of a valuation report in respect of the entire parcel of land Title Number: Limuru/Kamirithu/2137 and the developments thereon. The valuation report estimated the value of the Respondent's land at Kshs.12,500,000. This is the value which partly informed the trial magistrate's determination to the effect that she lacked pecuniary jurisdiction to handle the dispute.

15. It would be important at this point to outline what constitutes a preliminary objection in our jurisprudence. Justice Law in the Court of Appeal case of **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696 at page 700** defined a preliminary objection as follows:

"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".

On his part, Justice Newbold P, in the same case, gave the following essential features of a preliminary objection:

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

The above jurisprudence on what constitutes a preliminary objection have withstood the test of time and prevail to date. Indeed, the Supreme Court of Kenya adopted and reiterated the above essential elements of a preliminary objection in **Kalpana Rawal & Others Vs Judicial Service Commission & Another (2016) eKLR**.

16. It is clear from the foregoing outline of the essential features of a preliminary objection that in any preliminary objection, there is no room for ascertainment of facts through affidavit evidence. Consequently, the trial magistrate erred in law in admitting and relying on affidavit evidence to dispose what was orally presented to the court as a preliminary objection. The emerging practice where litigants file or plead preliminary objections and proceed to swear and file affidavits in support of those preliminary objections is against the law and amounts to an abuse of the process of the court. It only serves to ambush and prejudice the opposing party. I would add that, a party seeking to raise a point of law which, if properly presented and supported by some form of affidavit evidence, may dispose the suit, has one forum to use. That party is obligated to move the court by way of a formal application raising the point of law. The formal application should be duly supported by an appropriate affidavit containing the necessary evidence in support of the point of law. The respondent would then have the opportunity to file a replying affidavit in opposition to the application, if he so desires.

17. The second limb of the preliminary objection was that the jurisdiction of the magistrate court was ousted by Section 159 of the Registered Land Act (now repealed). Section 159 of the Registered Land Act provided as follows:-

"159 Civil suits and proceedings relating to the title to, or the possession of land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease, charge, being an interest which is registered or registrable under this Act, or which is expressed by

this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court; or, where the dispute comes within the provisions of Section 3(1) of the Land Disputes Tribunals Act, in accordance with that Act."

18. The suit before the trial court sought the following prayers:-

(a) an order for the provincial land surveyor to correct the boundaries between Limuru/Kamirithu/2229 and Limuru/Kamirithu/2137;

(b) the defendant be ordered to demolish any building or part thereof that shall be found to have encroached into the plaintiff's land and to the access road between the plaintiff and the defendant's land; and

(c) costs of the suit.

19. Having carefully examined the Plaint, there is no doubt that the Appellant sought a determination of the boundary between Land Title Number: Limuru/Kamirithu/2229 and Land Title Number Limuru/Kamirithu/2137. The Appellant did not in any way contest or challenge or lay claim to the Respondent's title to Parcel Number 2137. The finding by the trial court to the effect that a claim seeking determination of boundary was in essence a claim of title to the Respondent's land had no basis and was, in my view, grossly erroneous.

20. Section 3(1) of the Land Disputes Tribunals Act (now repealed) conferred upon land disputes tribunals jurisdiction to hear and determine certain disputes. The Section provided as follow:-

"3(1) subject to this Act, all cases of a civil nature involving a dispute as to-

(a) the division of, or the determination of boundaries to land, including land held in common;

(b) a claim to occupy or work land; or

(c) trespass to land,

shall be heard and determined by a tribunal established under Section 4"

Section 3(9) of the Land Disputes Act precluded magistrate courts from handling disputes reserved for land disputes tribunals. It provided as follows:-

"3(9) Notwithstanding any other written law no Magistrate's court shall have or exercise jurisdiction or powers in cases involving any issues set out in paragraphs (a) to (c) of subsection (1)."

21. The jurisdiction of tribunals established under the repealed Land Disputes Tribunals Act was to be exercised only in relation to land covered by that particular Act. Section 2 of the Act defined land as follows:-

"land means "agricultural land" as defined in Section 2 of the Land Control Act, whether or not registered under the Registered Land Act but does not include land situated within an adjudication section declared under the Land Adjudication Act or the Land Consolidation Act or land which is the subject of determination by the Land Registration Court under the Land Titles Act".

The Land Control Act defined and still defines **"agricultural land"** as follows:-

“agricultural land means;-

(a) land that is not within

(i) a municipality or a township or

(ii) an area which was on or at any time after the 1st July 1952, a township under the Township Act; or

(iii) an area which was, on or at any time after the 1st July 1952, a trading center under the Trading Centers Act or

(iv) a market

(b) land in the Nairobi Area or in any municipality township or urban centre that is declared by the minister, by notice in the Gazette, to be agricultural land for the purpose of this Act.

22. From the foregoing legal framework specifying the category of land which was subject to the Land Disputes Tribunals Act, it is apparent that a question as to whether any dispute relating to determination of a boundary would be heard and determined by a land disputes tribunal depended on whether or not the subject land was agricultural land within the meaning of the two statutes – the Land Disputes Tribunals Act and the Land Control Act. Any land falling within any of the exemptions set out in Section 2 of the Land Disputes Tribunals Act and Section 2 of the Land Control Act was not subject to the jurisdiction of the land disputes tribunals. An example of such land would be land situated in a municipality or township.

23. Consequently, a determination as to whether Parcel No. 2229 and Parcel No. 2137 were subject to the jurisdiction of the land disputes tribunal required ascertainment of facts relating to their actual location and factual ascertainment of whether or not they fell within the purview of the Land Disputes Tribunals Act. This would entail production of evidence. In my view, the question as to whether the two parcels of land fell within the purview of the Land Disputes Tribunals Act was not one to be answered through a preliminary objection orally presented and canvassed by the objector. It called for a formal application supported by evidence. A formal application would have afforded the respondent the opportunity to put forth any controverting evidence.

24. The upshot of this Judgment is that, this Appeal wholly succeeds and is allowed as prayed. The order dated 10/3/2011 by the Hon M A Murage striking out Limuru SPMCC No. 171 of 2010 is hereby set aside and the said suit is hereby reinstated. The same shall be heard and determined within the prevailing legal framework. It shall in any event be heard by a court other than the Hon M A Murage.

Dated, signed and delivered at Nairobi on this 12th day of June 2017.

B M EBOSO

J U D G E

In the presence of:-

No appearance for the Plaintiff

No appearance for the Defendant

Halima- Court clerk