REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 16 OF 2015

KAMAU MUITE…………………………….................APPELLANT

VERSUS

WILSON MWANGI GAKUYA……………………......RESPONDENT

(BEING AN APPEAL FROM THE RULING DELIVERED ON 18TH JUNE, 2015 BY HON. A. MWANGI – S.R.M AT KIGUMO SENIOR PRINCIPAL MAGISTRATE'S COURT CIVIL CASE NO. 52 OF 2011)

RULING

Prior to its repeal in **MAY 2012** with the commencement of the ***Land Registration Act No. 3 of 2012,*** the then ***Registered Land Act*** provided as follows under ***Section 159:***

> ***"Civil suits and proceedings relating to the title to, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or 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 provision of Section 3 (1) of the Land Disputes Tribunal Act in accordance with that Act".***

Similarly, prior to its repeal in **AUGUST 2011** with the commencement of the ***Environment and Land Court Act, Section 3 (1) of the then Land Disputes Tribunal Act*** provided as follows:

"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".***

Relying on the above provisions of the repealed laws, the trial magistrate **HON. A. MWANGI –** Senior Resident Magistrate, up-held the Respondent's Preliminary Objection and declined jurisdiction in the dispute before the Court on the basis that firstly, the value of the land was Ksh. 900,000 which was beyond the Resident Magistrate's pecuniary jurisdiction of Ksh. 500,000 as per ***Section 159 of the repealed Registered Land Act***. Secondly, that the dispute involved trespass to land and by virtue of the provisions of ***Section 3 (1) of the repealed Land Disputes Tribunal Act,*** the Court had no jurisdiction over the matter. The trial Court then proceeded to strike out the Appellant's suit in the subordinate Court

with costs to the Respondent. That ruling which was delivered by the **HON. A. MWANGI – SENIOR RESIDENT MAGISTRATE** on 18th June 2015 is the subject of this appeal.

The Appellant has put forth the following grounds of appeal:

> ***1. The learned Resident Magistrate erred in law in dismissing a suit basing it on a repealed law and therefore made a wrong decision.***
>
> ***2. The learned Resident Magistrate erred in law and in fact in failing to appreciate that the Appellant's suit in the lower Court had four (4) prayers and only one was challenged by the Respondent and therefore made the wrong decision.***
>
> ***3. The learned Resident Magistrate erred in law in failing to appreciate that the dispute involved between (sic) the parties was not restricted to trespass but also there was a factious claim and therefore made the wrong decision.***
>
> ***4. The learned Resident Magistrate erred in law and in fact in failing to take cognizance of the reasons behind and the importance of the various Practice Notice issued by the Honourable Chief Justice in respect to Environment and Land matters and therefore made the wrong decision.***
>
> ***5. The learned Resident Magistrate erred in law and in fact in delving into extraneous matters not raised by the Respondent in his Preliminary Objection and therefore made the wrong decision.***
>
> ***6. The learned Resident Magistrate erred in law and in fact in failing to appreciate that the dispute in the suit was one of trespass and mesne profits and the value of the property was not part of the subject matter and therefore made the wrong decision.***
>
> ***7. The learned Resident Magistrate erred in law and in fact in failing to appreciate the ramifications of Article 159 (2) (d) of the Constitution in respect to procedural vis-à-vis substantive justice and therefore made the wrong decision.***
>
> ***8. The learned Resident Magistrate erred in law and in fact in striking out and/or dismissing the plaintiff's suit with costs.***

The appeal was canvassed by way of written submissions which have been filed only by **JESSEE KARIUKI & CO**. Advocate for the Appellant. The firm of **T.M. NJOROGE & CO**. Advocates for the Respondent did not file any.

I have considered the appeal and the submissions by counsel.

Before I interrogate this appeal, it is important to point out that according to the record herein, **HON. A.M. MWANGI** was a Senior Resident Magistrate and not a Resident Magistrate, as at 18th June 2015 when the ruling subject of this appeal was delivered. That clarification is important for purposes of this appeal.

It is of course correct that by the time the suit was filed in the subordinate Court on 26th May 2011, both the ***Land Disputes Tribunal Act*** and the ***Registered Land Act*** were still in force. However, by the time the ruling subject of this appeal was delivered on 18th June 2015, both those laws had been repealed following the commencement of the ***Environment and Land Court Act*** (on 30th August 2011) and the ***Land Registration Act*** (on 2nd May 2012). It is on that basis that counsel for the Respondent submitted in the trial Court, which up-held that submission, that by the time the suit was filed, the ***Land Disputes Tribunal Act*** was operational and therefore the jurisdiction lay with the Tribunal established under that Act, and not the trial Court. The trial magistrate was of the view that since at the time the suit was filed the operational law was the ***Land Disputes Tribunal Act***, the trial Court had no jurisdiction. The trial

magistrate then proceeded to cite the following passage in the case of ***PETER GICHUKI KINGARA VS I.E.B.C AND OTHERS C.A CIVIL APPEAL No. 23 of 2013 (NYERI***) where the Court said:

> "***It is our considered view that the passage or lapse of time does not and cannot confer jurisdiction: Jurisdiction is a continuum, jurisdiction cannot lack today and by passage or lapse of time exist tomorrow. Jurisdiction is either present ab-initio or absent forever"***

The trial magistrate then proceeded to state as follows:

> ***"From the foregoing, in as much as the Court to-day has jurisdiction to entertain this suit, the fact that it lacked jurisdiction ab-initio means that it is absent forever. I concur with Mr. Njoroge's arguments that no amount of changes in legislation can confer to the Court what it didn't have from the beginning. The Preliminary Objection is up-held. The plaintiff's suit is struck out with costs to the defendant"***

The trial magistrate clearly misapprehended the decision in the ***KINGARA*** case (supra) where the Court was referring to passage or lapse of time. The Court of Appeal in that case was certainly not referring to a situation such as was before the trial Court where there is passage not of time, but rather passage of new laws that can confer jurisdiction that did not previously exist. Indeed it is abundantly clear under ***Section 23 (3) of the Interpretation and General Provisions Act*** that the corollary is the position where a law is repealed either in whole or part by another law. ***Section 23 (3)*** of that Act provides that:

> ***"Where a written law repeals in whole or in part another written law, then unless a contrary intention appears, the repeal shall not –***
>
> ***(a) -***
>
> ***(b) -***
>
> ***(c) -***
>
> ***(d) -***
>
> ***(e) affect an investigation legal proceedings or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid and any such investigation, legal proceeding, or remedy may be instituted, continued or aforesaid, and any such penalty forfeiture or punishment may be imposed as if the repealed written law had not been made".***

The trial magistrate having herself made a finding that at the time of the ruling she had the requisite jurisdiction to determine the dispute before her, she erred in law when she struck out the proceedings before her by wrongly construing the ratio decidendi, in the ***KINGARA*** case (supra). The changes in the law, and not lapse or passage of time, took away the suit from the jurisdiction of the then Land Disputes Tribunal and reposed the same in the trial Court.

Further, it is clear from the plaint as filed in the subordinate Court that the Appellant's claim was not only confined to trespass. He also sought damages for conversion and user of the land in dispute in addition to a declaration that the Appellant is the legal owner of the suit land and a permanent injunction to restrain the Respondent from entering, cultivating or committing any acts of wastage thereon. All those remedies were clearly not within the jurisdiction of a Tribunal established under ***Section 4 of the repealed Land Disputes Tribunal Act*** even assuming that that was the applicable law. In addition to that, at the time of the impugned ruling, **HON. A. MWANGI** was a Senior Resident Magistrate. ***Section 159 of the Repealed Registered Land Act*** which specified the jurisdiction of a Resident Magistrate's Court could not take away her jurisdiction in handling a dispute where the subject value of the land was Ksh. 900,000. It is instructive to note that the trial magistrate declined jurisdiction not on account of the new ***Land Laws*** or the establishment of the ***Environment and Land Court***, but rather on the basis of the ***repealed Land Disputes Tribunal Act*** and the ***Registered Land Act***. In doing so, the trial magistrate

erred both in law and in fact and I must therefore up-hold grounds 1, 2 and 3 of the appeal.

Ground 4 of the appeal takes issue with the fact that the trial magistrate failed to take cognizance of the ***Practise Directions*** issued by the ***Chief Justice*** in respect to ***Environment and Land*** matters and therefore made the wrong decision. I think there is merit in that ground. As I have already found above, the trial magistrate, and rightly so, did not decline jurisdiction in this matter on the basis of the establishment of the ***Environment and Land Court*** or the promulgation of the new ***Land Laws.*** Rather, she based her decisions on the provisions of the ***repealed Land Disputes Tribunal Act*** and also the ***Registered Land Act.*** However, following the establishment of the ***Environment and Land Court***, the ***Chief Justice***, as is mandated by law, issued ***Practice Directions*** on 9th February 2012 which were superseded by those issued on 20th September 2012 and later by those issued on 9th November 2012. Practice Direction No. 7 thereof is relevant to this appeal and it reads:

> ***"Magistrates Courts shall continue to hear and determine all cases relating to the environment and the use and occupation of, and title to land (whether pending or new) in which the Courts have the requisite pecuniary jurisdiction"***

If the trial magistrate had taken cognizance of the said ***Practise Directions,*** she would have concluded that notwithstanding the repeal of the ***Land Disputes Act***, the ***Chief Justice*** had invoked his powers under ***Section 24 of the Environment and Land Court Act*** and issued ***Practise Directions*** to govern the conduct of cases pending in the Magistrates Courts. Similarly, as a Senior Resident Magistrate, the value of the suit land was well within her pecuniary Jurisdiction which now stands at Ksh. 7,000,000. That ground therefore succeeds.

Grounds 5 and 6 of the appeal states that the trial magistrate erred in law and in fact by delving in extraneous matters not raised by the Respondent in his Preliminary Objection such as value of the subject matter. I see no merit in that ground. The trial magistrate confined herself squarely on the issues raised and an issue as to the value of the subject matter of the land is clearly an issue of jurisdiction that can be raised as a Preliminary Objection. Those grounds must fail.

Ground 7 raises the issue that the trial magistrate erred in law and in fact in failing to appreciate the rectifications of and effect of ***Article 159 (2) (d) of the Constitution*** in respect to procedural vis-à-vis substantive justice and therefore made the wrong decision. If I understand that ground of appeal well, and I think I do, the Appellant is stating that the trial magistrate ought to have heard the case before her and therefore serve substantive justice rather than being bogged down by procedural technicalities. The Preliminary Objection raised by the Respondent touched on the jurisdiction of the trial magistrate to determine the dispute before her. An issue of jurisdiction is so key in litigation and if it is raised, it must be determined at the earliest opportunity. Indeed an issue of jurisdiction is a point of law that the trial Court can even raise it suo motto. That is because, as was held in the case of ***THE OWNERS OF MOTOR VESSEL 'LILIAN S' VS CALTEX OIL KENYA LTD 1989 K.L.R 1:***

> ***"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"***

The Preliminary Objection raised before the trial magistrate touched on the Court's jurisdiction. That cannot be a mere technicality as envisaged under ***Article 159 (2) (d) of the Constitution*** which provides that:

> "***Justice shall be administered without undue regard to procedural technicalities…."***

The issue of jurisdiction having been raised by the Respondent, the trial magistrate was enjoined to determine it which she did. Substantive justice cannot be administered by a Court unless it has the requisite jurisdiction to determine the issue before it. That ground of appeal therefore fails.

Finally in ground 8, the Appellant raises the issue that the trial magistrate erred in fact an in law by

striking out and/or dismissing the Appellant's suit with costs. Striking out a suit is a draconian remedy to be exercised sparingly and only in deserving cases – ***D.T DOBIE & CO. LTD VS JOSEPH MUCHINA 1980 e K.L.R.*** Even if the trial magistrate had no jurisdiction to handle the dispute, the remedy should have been to "***lay down her tools***" and have the matter mentioned before another magistrate with the requisite jurisdiction. Alternatively, if there is no other magistrate at that Court with jurisdiction, then parties should be advised to have it transferred to a competent Court. The order by the trial magistrate striking out the Appellant's suit and ordering him to meet the costs thereof was clearly harsh in the circumstances and this Court must set it aside which I hereby do.

In the circumstances therefore, I am satisfied that this appeal is merited. I allow it in the following terms:

1. ***The order striking out the Appellant's suit is set aside and substituted therewith, an order reinstating the suit which should proceed to hearing on its merits.***

2. ***The Appellant shall have the costs of this appeal.***

B. N. OLAO

JUDGE

14TH JULY, 2017

Ruling delivered, dated and signed in open Court this 14th day of July 2017

Mr. Ngigi for Mr. Kariuki for Appellant present

Mr. Njoroge for Respondent absent.

B. N. OLAO

JUDGE

14TH JULY, 2017