



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC APPEAL NO. 13 OF 2016**

SYMON GICHOBI MARIA.....APPELLANT

VERSUS

PRISCILLAH MUTHONI GICHOBI.....RESPONDENT

***(BEING AN APPEAL FROM THE JUDGMENT DELIVERED ON 23<sup>RD</sup> MARCH, 2015 BY HON. Y.M. BARASA – R.M AT KERUGOYA CHIEF MAGISTRATE’S COURT CIVIL CASE NO. 192 OF 2014)***

**JUDGMENT**

The dispute between the parties herein, who were previously married under Kikuyu Customary Law in 1989 but solemnized their marriage at **A.C.K. RWAMBITI PARISH ON 30TH April 1994** before separating in 2006, appears to have started when the National Irrigation Board commenced the exercise of acquiring land and compensating the owners. Part of the land parcels being acquired by the said National Irrigation Board (hereinafter the Board) included land parcels No. KABARE/KIRITINE/312 and KABARE/KIRITINE/349. Land parcel No. KABARE/KIRITINE/312 (hereinafter the suit land) is registered in the names of one **MARIA NJAGI** while land parcel No. KABARE/KIRITINE/349 is registered in the names of one **NJAGI F.A MARIA** and one **ALPHAN MURIITHI MARIA**. The Respondent’s case in the subordinate Court was that the Appellant had secretly received compensation for development buildings, crops and trees from the Board in respect of parcel No. KABARE/KIRITINE/349 without disclosing the same to her and the children. The Appellant was in the process of receiving compensation for developments, buildings, crops and trees with respect to land parcel No. KABARE/KIRITINE/312. The Respondent therefore moved to the subordinate Court where she filed a suit against the Appellant (as 1st defendant) and the Board (as 2nd defendant) seeking the main order that she is entitled to half share of the compensation in respect to the development, buildings, crops and trees on land parcel No. KABARE/KIRITINE/312 which should be paid to her and an order of permanent injunction restraining the Appellant, his agents, servants and/or employees from receiving that compensation from the Board until payment is made. She also sought an order for costs.

The Appellant filed a defence admitting that the parties were married on 30th April 1994 but have not been living together since the year 2005 when the Respondent threw him out of the house they were living in at Mutige Secondary School and thereafter filed divorce proceedings at Karatina Court being Divorce Case No. 4 of 2011. The Appellant added that land parcel No. KABARE/KIRITINE/349 was registered in the names of his brothers **NJAGI F.A KARIA** and **ALPHAN MURIITHI MARIA** who are not parties to the suit while the suit land is ancestral land given to the late **MARIA NJAGI**. He pleaded therefore that the Respondent had no legal or equitable rights or interest over the suit land and neither has she even lived there and infact has her own properties being a parcel of land at Baragwe and a plot at Kagio Market. He therefore sought the dismissal of the Respondent’s suit with costs.

It is important at this stage to observe that the value of the compensation being paid in respect to the suit land was not disclosed in the plaint and neither was the subordinate Court's jurisdiction to handle the case disputed.

The case was heard by **HON. Y.M. BARASA** – Resident Magistrate who in a judgment delivered on 23rd March 2015 ordered that the Respondent is entitled to half share of the compensation in respect of the suit land which he proceeded to order the Board to deposit in an interest earning account jointly operated by the Appellant and the Respondent.

That judgment is the subject of this appeal in which the Appellant had raised the following grounds of appeal:

- 1. The learned magistrate erred in law and fact in presiding over a matter which he had no pecuniary jurisdiction.***
- 2. The learned trial magistrate erred in law and fact in making a finding that the suit was not about division of matrimonial property then proceed to make an order that the property (money) payable to the Appellant be divided equally between the Appellant and the Respondent as they are man and wife.***
- 3. The learned trial magistrate erred in law and fact in making a finding that the law clearly provides for division of the money payable to the Appellant between him (the Appellant) and the Respondent equally but failed to cite which law.***
- 4. The learned trial magistrate erred in law and fact in completely disregarding the fact that there was no iota of evidence to the effect that the Respondent contributed in the development of land parcel No. KABARE/KIRITINE/312 or that she has even lived there and proceeded to direct that she (Respondent) receives half of the money payable to the Appellant notwithstanding the evidence of the Appellant that since the marriage ended, the two (Appellant and Respondent) have never lived on the land and that the Respondent has never contributed in any way in the development of the land.***
- 5. The learned trial magistrate erred in law and fact in making a finding that property belonging to the husband also belongs to the wife as the same lacks legal basis and further, disregarded the fact that the suit land number KABARE/KIRITINE/312 did not belong to the Appellant but was ancestral/clan land given to the Appellant's late father MARIA NJAGI and therefore even if the Respondent had sought for division of matrimonial property, land parcel number KABARE/KIRITINE/312 or its proceeds was not available for distribution between the Appellant and the Respondent in view of Section 6 (2) of the Matrimonial Property Act.***
- 6. The learned trial magistrate erred in law and fact in making a finding that the Respondent had proved her case which finding was not supported by the evidence on record.***
- 7. The learned trial magistrate erred in law and in fact in disregarding the evidence of the Appellant that he was to receive the amount of compensation of Ksh. 14,881,625 on his own behalf and on behalf of his siblings and directed that the Respondent alone receives half of the money payable meaning that the remaining half was to be shared by the Appellant and his siblings, which finding would have been unfair and unjust even in a suit for division of matrimonial property.***

The Appellant therefore prayed for orders that this appeal be allowed and the order of the trial magistrate be set aside and be substituted with an order dismissing the suit with costs. He also sought the costs of this appeal.

The appeal was canvassed by way of written submissions which have been filed both by **MR. MAINA KAGIO** advocate for the Appellant and **MR. NGIGI GICHOYA** advocate for the Respondent.

I have considered the appeal and the submissions by counsel.

In my view, the determination of this appeal rests on whether or not **HON. Y.M. BARASA** – Resident Magistrate had the pecuniary jurisdiction to determine the suit before him.

Counsel for the Appellant has submitted on that ground that the trial magistrate lacked the pecuniary jurisdiction to determine the dispute because the amount payable in compensation with respect to the suit land was Ksh. 14, 881,625 yet at the time when the trial was conducted which was from September 2014 upto March 2015, the pecuniary jurisdiction of the Resident Magistrate was Ksh. 2,000,000 and even with the current enhancement, it is only Ksh. 5,000,000. Counsel for the Appellant has therefore relied on the case of **OWNERS OF MOTOR VEHICLE “LILLIAN S” VS CALTEX OIL KENYA LTD 1989 K.L.R 1**. Counsel for the Respondent has however submitted on that issue that nothing has been placed before me to suggest that the trial magistrate had no jurisdiction. In any case, it is submitted that the issue of jurisdiction is being brought up late in the day and was not raised at the trial.

As indicated earlier, in this judgment, the plaint in the subordinate Court did not indicate the amount of compensation being sought. The Court’s jurisdiction was also not denied nor even raised as a Preliminary Objection by the defendant. Both parties therefore appear to have proceeded on the assumption that the trial Court had the pecuniary jurisdiction. The trial Court cannot therefore be blamed for assuming jurisdiction over the dispute. The parties however knew the amount of compensation due and it was their responsibility to bring it to the attention of the magistrate.

However, on 3rd December 2014 when the plaintiff testified in chief, she produced as exhibit No. 5 the compensation Disclosure Certificate issued by the Board in the name of the Appellant indicating that the amount of compensation payable was Ksh. 14,881,625,00 (fourteen million, Eight hundred and eighty one thousand, Six hundred and twenty five only). At that point, and as was held in the case of **OWNERS OF MOTOR VEHICLE “LILLIAN S”** (supra), the trial magistrate should have downed his tools as the money being sought had now been disclosed to have been well beyond his pecuniary jurisdiction which was only recently enhanced to Ksh. 5,000,000. Even half of the compensation sum, which is what the Respondent was seeking, was still in excess of the pecuniary jurisdiction of the trial magistrate. The moment that information became available to the trial magistrate, the only prudent thing to do was to decline jurisdiction in the matter and direct that the case be placed before a Court with the requisite jurisdiction. The trial magistrate ought not to have proceeded any further than that.

Counsel for the Respondent has submitted that the issue of jurisdiction has been raised late in the day. That is true. Issues of jurisdiction must be raised at the earliest opportunity, indeed even as a Preliminary Objection so that they are decided right away before the commencement of the trial. However, an issue of jurisdiction can be raised at any time even on appeal. In **FLORICULTURE INTERNATIONAL LTD VS CENTRAL KENYA LTD & OTHERS 1995 e K.L.R**, the Court of Appeal stated that:

***“It has been held in the case of KENINDIA ASSURANCE CO. LTD VS OTIENDE 1989 2 K.A.R 162 that the normal rule that a party could not raise for the first time on appeal a point he has failed to raise in the High Court did not, and could not apply when the issue sought to be raised de novo on appeal went to jurisdiction”.***

In **DUBAI BANK KENYA LTD VS KWANZA ESTATES LTD C.A CIVIL APPEAL No. 37 of 2014 (2015 e K.L.R)** the Court stated as follows:

***“The reasoning is that even where the question of jurisdiction is not raised, that does not necessarily confer jurisdiction on the Court if it had none”***

Parties cannot confer jurisdiction on a Court even by mere acquiescence and while it was the duty of the parties to plead their cases with clarity so that the trial Court could determine at the earliest opportunity the amount of compensation in issue, once that evidence became available in the course of the trial, it should have been terminated at that point.

The ground of appeal questioning the trial magistrate's jurisdiction over this dispute is well merited and must succeed. That alone is sufficient to dispose of this appeal and I need not interrogate the other grounds.

Counsel for the Appellant has urged me to set aside the orders of the trial magistrate and substitute therewith an order dismissing the Respondent's suit with costs. As the trial magistrate had no jurisdiction, the appropriate order to make is to order for a re-trial in a Court with the requisite jurisdiction but not to dismiss the Respondent's suit in the subordinate Court.

Ultimately therefore and having considered this appeal, I make the following orders:

- 1. The appeal is allowed.*
- 2. The orders issued by the trial magistrate in his judgment dated 23rd March 2015 are set aside.*
- 3. The suit be placed before the Chief Magistrate on 24th July 2017 for taking dates for re-trial before him.*
- 4. Each party to meet their own costs of the appeal.*

**B.N. OLAO**

**JUDGE**

**14<sup>TH</sup> JULY, 2017**

**Judgment delivered, dated and signed in open Court this 14<sup>th</sup> day of July 2017**

Ms Nyagati for Mr. Kagio for Appellant present

Mr. Ngigi for Respondent present

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**14<sup>TH</sup> JULY, 2017**