



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO.20 OF 2016

STEPHEN KONGAAPPELLANT

SYMON KIPRUTO ROP.....RESPONDENT

JUDGMENT ON APPEAL

(Land dispute filed in November 2012 in the magistrate's court; magistrate hearing the matter and pronouncing judgment; appeal that the magistrate's court did not have jurisdiction; as from 2nd May 2012 the magistrates courts could not receive a land dispute and therefore had no jurisdiction; entry of interlocutory judgment in land disputes also not maintainable; other procedural flaws in the manner in which the trial was conducted flagged; appeal allowed).

1. The dispute that has generated this appeal was commenced by the respondent against the appellant by way of a plaint which was filed on 1 November 2012 at the Principal Magistrate's Court at Eldama Ravine. It was averred in the plaint that the appellant resides on the land parcel Pokor/Kebe/Kures/53 whereas the respondent resides on the land parcel Pokor/Kebe/Kures/52 which two parcels of land abut each other. It was pleaded that when the two land parcels were allocated in the year 1965 to the fathers of the appellant and the respondent, that is Kiprop Kipchilat and Chepkong'a Chebet respectively (both deceased), a public road of access was created along the boundary between the appellant's land parcel No. 53 and the land parcel Pokor/Kebe/Kures/51 belonging to one Chelelgo Chebet (deceased), which road connected the respondent's land to the main murram road. It was averred that this road was documented and the same enabled the respondent's father and his family to access their farm. It was claimed that on several occasions, the appellant, without any lawful cause, blocked the access road on two points, thus preventing the respondent and his family from accessing their farm. It was pleaded that attempts to open the road have been met with resistance from the appellant and that the respondent has now been forced to request one of his neighbours to provide him with temporary passage to enable him access the main road. In the suit, the respondent asked for the following prayers :-

(a) *An order declaring that the access road passing between the appellant's parcel of land Pokor/Kebe/Kures/53 and the parcel of land Pokor/Kebe/Kures/51 connecting the respondent's land to the main road is a public road.*

(b) *An order for a permanent injunction restraining the appellant, by himself, his servants, agents, from claiming, or closing the road or preventing the respondent and his family members from accessing it (slightly paraphrased).*

(c) *Costs of the suit.*

(d) *Any other relief that the Honourable Court may deem fit to grant.*

2. The plaint was filed by the law firm of M/s W. Kigen & Company Advocates who were then acting on behalf of the respondent, although in this appeal, the respondent acts in person.

3. On 23 May 2013, the appellant entered appearance to the suit, through the law firm of M/s Arusei & Company Advocates but no Statement of Defence was filed. On 12 June 2012, the respondent filed a Request for Judgment for the reason that no Statement of Defence had been filed and on the same day, judgment was entered as requested. On 10 February 2014, a Notice of Entry of Judgement was filed by counsel for the respondent and the matter was fixed for formal proof on 13 February 2014. I have no evidence on record showing that M/s Arusei & Company Advocates, then on record for the appellant, were served with any hearing notice, but the respondent and two of his witnesses did testify on that date before Hon. J. Omwange, Resident Magistrate.

4. In his evidence, the respondent testified that there is a road of access which the appellant had blocked and he produced the Registered Index Map of the area. PW- 2 was one Nelson Otieno Odhiambo, the Land Registrar of Eldama Ravine. He testified that he received a complaint from the respondent over the access road, and he proceeded to the ground on 13 April 2011, after giving notice to the appellant and the owner of the land parcel No. 51. He stated that the Registry Index Map (RIM) did show that there is a road of access separating the land parcels No. 51 and 53 and giving access to the respondent's land parcel No. 52. PW- 3 was George K. Rotich, the District Surveyor of Koibatek District. He testified that on 8 June 2011, he and other officers went to open up the road of access but the owner of the parcel No. 53 (the appellant) could not allow them to do so. They sought reinforcements and did open up the road on 13 September 2011 with the assistance of the District Officer. Later, the respondent came to complain that the appellant has uprooted the beacons that had been placed. After these three persons had testified, the matter was adjourned to 4 March 2014, when PW-4 testified. He is the Chief of Emining Location. He testified of the complaint over the road of access and stated that after it was opened, the appellant closed it after about one week. The matter was then adjourned several times by which time Omwange J, was probably no longer in the station, as the matter was then taken up by Honourable M. Kasera, Acting Senior Principal Magistrate. The respondent closed his case on 5 February 2015 without calling any additional witness. The new trial Magistrate then appointed 9 April 2015 for defence hearing. On 4 March 2015, the respondent formally filed a Notice to Act in Person.

5. On 9 April 2015, the matter proceeded for defence hearing with the appellant being in court unrepresented. The appellant did testify that he has a map which shows that there is no access road as claimed by the respondent. He stated that he closed the road of access because the map that he has does not indicate that there is any road. DW- 2 was Kimtai Kiprotich, the son of the appellant. His evidence was that there was no road on the ground. DW- 3 was Kiprono Chelelgo, the owner of the land parcel No. 51. His evidence was also that there is no access road. The trial Magistrate then made a ruling suo motu, that since the appellant had produced a map which was not shown to the respondent and his witnesses, PW- 2 and PW-3 be recalled so as to be cross-examined by the appellant. It was said that they have been recalled under Section 150 of the Civil Procedure Rules. However, the persons who attended as PW- 2 and PW-3, on 1 December 2015, were not the original PW-2 and PW-3. Instead, they were Susan Imbili, who stated that she is the Land Registrar, Koibatek; and Kipkogei Langat, a Land Surveyor. Ms. Imbili stated in one line that she could not comment on the two maps since that was the domain of the Land Surveyor, and she was never cross-examined by the appellant. On his part Mr. Langat in his two lines of evidence and cross-examined by the appellant, said that the correct map is the one showing a road. The matter proceeded without the law firm of M/s Arusei & Company, still on record for the appellant, being present and no comment whatsoever was made about their absence.

6. Without asking whether the parties wished to make any submissions, the trial Magistrate pronounced that judgment would be delivered on 21 January 2016 and the same was duly delivered on the day.

7. In her judgment, the trial Magistrate reviewed the evidence and held that the correct map is the one showing a road. He therefore ordered that the access road be opened with the assistance of the D.O Emining, Sub- County Assistant Commissioner Emining, The District Surveyor and Land Registrar, Koibatek.

8. It is the above judgment which has provoked this appeal but prior to this appeal, the appellant on 28 January 2016, filed an application to set aside the judgment and for leave to file defence. That application was never heard and it appears that it was abandoned hence this appeal. The appeal herein has been filed by the law firm of M/s B.O Akang'o & Company Advocates, who now act for the appellant, having filed a Notice of Appointment of Advocates on 28 January 2016.

9. The following grounds of appeal have been listed, being :-

(i) *That the learned trial Magistrate erred in law and fact and misdirected herself in disregarding the evidence adduced in support of the appellant's case that the survey map adduced by the appellant was the original and authentic survey map.*

(ii) *That the learned trial Magistrate erred and misdirected herself in relying on the wrong principles of law by failing to appreciate that the preparation of the second survey map adduced by the respondent did not involve the participation of interested parties, and disregarded the legal processes for creation of survey maps and thus was a nullity in law.*

(iii) *That the learned trial Magistrate erred in law and fact and misdirected herself by granting orders that were neither pleaded nor prayed for in the plaint.*

(iv) *That the learned trial Magistrate erred and misdirected herself by adjudicating a boundary dispute without the requisite jurisdiction and thus usurped the powers vested by law in the Registrar of Land.*

(v) *That the learned trial Magistrate erred in law by adjudicating a dispute that involves ownership and user of land a jurisdiction that at the material (sic) was and/or is exclusively vested in the Environment and Land Court thus the trial Magistrate was not vested with requisite jurisdiction to hear and determine the dispute.*

(vi) *That the learned trial Magistrate erred in law and misdirected herself by conducting the trial proceedings in a manner that breached the Civil Procedure Act, the Civil Procedure Rules and other procedural laws thus rendering the trial a nullity.*

(vii) *That the learned trial Magistrate erred in law and fact in disregarding the evidence adduced in support of the appellant's case.*

10. The appellant has now asked that the judgment of the Magistrate's Court be set aside with costs.

11. In his submissions, Mr. Akang'o for the appellant, relied on the case, **Malindi Law Society vs Attorney General & 4 Others (2016) eKLR** to support his submission that the Magistrate's Court had no jurisdiction. Mr. Akang'o's view was that the matter was a boundary dispute and submitted that under Section 21 of the Registered Land Act (repealed) and Section 18 of the Land Registration Act, 2012, it is the Land Registrar who has power to fix boundaries to registered land and he referred me to the case of **Mwanahawa Anyona Chitayi & Another vs Musa Ndaliro Muchelule (2016) eKLR**. He further submitted that the court erred in disregarding the survey map of the appellant. He finally closed his submissions by stating that the trial process was laced with serious procedural missteps that rendered the trial process null and void and submitted that the Court ought to have advised the appellant to file his defence since he was acting in person.

12. On his part, the respondent submitted inter alia that this being a boundary dispute, the trial court had jurisdiction. It was submitted that there was no dispute relating to ownership of land and that the Land Registrar had already decreed that there is a road of access only that the appellant blocked it again. He also pointed out that the appellant, despite being served with the plaint, chose to keep away and that if he had any issue on the jurisdiction of the court, he ought to have filed defence and contested jurisdiction. He distinguished this matter from the case of **Mwanahawa Anyona Chitayi** (supra), cited by the appellant as in that case, the issue of jurisdiction had been raised. He also pointed out that the appellant chose not to

prosecute his application dated 26 January 2016 to set aside the judgment. He submitted that the Court was correct in accepting the evidence of the experts that there was a road of access and on the procedural issues, he submitted that it was not the business of the court to advise the appellant to file defence since he had counsel on record.

13. I have considered the matter alongside the submissions of both the appellant and the respondent. I think I need first to deal with the complaint that the Magistrates' Court did not have jurisdiction in the matter and ought not to have proceeded with it. If I uphold this ground of appeal, then I really need not consider the other matters raised.

14. I need not emphasise the point that if a court has no jurisdiction, then everything that it does is a nullity and ought to be set aside. The Supreme Court has had occasion to pronounce itself on the issue of jurisdiction in several cases including that of **Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others (2012) eKLR** where it held that a court cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law, and that jurisdiction is not a mere technicality but goes to the very heart of the matter. The court pronounced itself as follows :-

“(68) 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 to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that 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.”

15. There is no question that the dispute herein touches on land, in particular, as to whether or not a road of access exists, serving the land parcel Pokor/Keben/Kures/52 owned by the respondent. It is therefore a land dispute. The plaint was filed on 1 November 2012 at which time, the operative land statutes were the Land Registration Act, Act No. 3 of 2012, and the Land Act, Act No. 6 of 2012, both of which came into operation on 2 May 2012. As at the day that the suit was commenced, both the Land Registration Act, and the Land Act, provided that the Court with jurisdiction is the Environment and Land Court. The operative Section for the latter statute was (and still is) Section 101 whereas for the Land Act, it was (and still is) Section 150, which at the time (for there was an amendment which I will explain later) provided as follows :-

Land Registration Act , Section 101.

The Environment and Land Court established by the Environment and Land Court Act, 2011 No. 19 of 2011 has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.

Land Act, Section 150 Jurisdiction of Environment and Land Court.

The Environment and Land Court established in the Environment and Land Court Act is vested with exclusive jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.

16. There can only be one acceptable legal position regarding jurisdiction, over land governed by the Land Act, and Land Registration Act, and that is, that the court clothed with jurisdiction for all disputes commenced after these two statutes came into force, subject only to the transitional provisions contained in Section 30 of the Environment and Land Court Act, and Section 22 of Schedule 6 of the Constitution, is the Environment and Land Court.

17. I did mention that there was a proposed amendment in the year 2015, and I think I need to explain that. Given the provisions of Section 101 of the Land Registration Act, and Section 150 of the Land Act, which gave exclusive jurisdiction to the Environment and Land Court, some amendments were proposed

so as to donate jurisdiction to the Magistrates' Courts, so that these courts can also hear land disputes falling within their pecuniary jurisdiction. These amendments were contained in Section 2 of the Statutes Law (Miscellaneous Amendments) Act, 2015 which inter alia proposed to add subordinate courts (read Magistrates Courts) as among the courts having jurisdiction to hear land disputes alongside the Environment and Land Court. These provisions of the law were challenged in the case **Malindi Law Society vs AG** (Supra) as being contrary to the provisions of Article 162 (2) (b) of the Constitution which is the clause which mandated Parliament to establish a court with the status of the High Court, to hear and determine disputes over "the environment and the use and occupation of, and title to land." The Court in its judgment of 11 November 2016, allowed the Petition and held inter alia that "*Section 2 of the Statute Law (Miscellaneous Amendments) Act 2015, in relation to the jurisdiction of subordinate courts, in respect of matters relating to environment and use, occupation of and title to land is inconsistent with Article 162 (2) of the Constitution, and therefore null and void.*"

18. It follows from the above decision that the law reverts back to the original Section 101 of the Land Registration Act, and Section 150 of the Land Act, which means that the Court with jurisdiction to hear land disputes is the Environment and Land Court.

19. The decision in **Malindi Law Society vs Attorney General** (supra) affirms the jurisdiction of the Environment and Land Court as given in the Constitution in relation to matters touching on land and the environment. But actually, this case is not really affected by the said decision, for the decision was in relation to Statute Law Miscellaneous Amendment Act, of 2015, which had not been enacted when this case was instituted and indeed when it was heard and determined. At that time, there had not been any amendments to the Land Act or Land Registration Act, and the two statutes, as I have set out above, did provide that the court with jurisdiction is the Environment and Land Court.

20. The respondent therefore had no mandate to file a dispute over use of land, (for a road of access, relates to use and occupation of land) in the Magistrates Court as at 1 November 2012, when the Land Act and Land Registration Act were already in force. Between the period 2 May 2012, and the time that the Environment and Land Court became operative, which is 5 November 2012, when the first group of Judges of the Environment and Land Court were sworn into office, land matters were governed under the Transitional Provisions, contained in both the Constitution and the Environment and Land Court Act, Act No. 19 of 2011.

21. The operative provision of the Constitution is Section 22 of the Sixth Schedule which is drawn as follows :-

22. All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under this Constitution or as directed by the Chief Justice or the Registrar of the High Court.

22. And Section 30 of the Environment and Land Court Act, which provides as follows :-

30. (1) All proceedings relating to the environment or to the use and occupation and title to land pending before any Court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.

23. The above provisions of the law related to pending matters before the courts which were present before the Environment and Land Court came into being. Generally, land cases were filed in the High Court, but where the dispute was over land registered under the Registered Land Act, (repealed by the Land Registration Act, 2012) and was of a value that was not more than Kshs. 500,000/= (following the provisions of Section 159 of the Registered Land Act) the dispute could be heard before the Magistrates' Court. It will be observed that jurisdiction to hear land disputes was given to Magistrates by the Registered Land Act, and once the Registered Land Act was repealed by the Land Registration Act (see Section 109 and the Schedule to the Act) the jurisdiction given to Magistrates to hear certain land disputes as given by the Registered Land Act ceased, and this is from 2 May 2012, which is the commencement date of

the Land Registration Act. From 2 May 2012, it was wrong for a land matter to be filed before the Magistrates' Courts for the Magistrates' Courts no longer had jurisdiction. Magistrates Courts could only proceed to hear and dispose of the cases that had been filed before them prior to this date (See the case of **Peter Yegon Kipkulei vs Sarah Teriki Kissem & 6 Others, Nakuru ELC Miscelanous Case No. 361 of 2015 (2016 eKLR)** which gives a good explanation) but could not take in fresh matters after this date.

24. This case was filed on 1 November 2012, a date after 2 May 2012, when Magistrates' Courts had no jurisdiction to hear any fresh case touching on land, and therefore the case was filed in a court without jurisdiction. I therefore uphold the ground of appeal which argued that the Magistrate had no jurisdiction in this matter. The judgment of 21 January 2016, was made without jurisdiction and is a nullity in law. For that sole reason, this appeal automatically succeeds.

25. I should leave it at that, but there are, as has been raised by the appellant, some serious procedural flaws in the manner in which the trial was conducted, which I feel compelled to address.

26. First, the entry of interlocutory judgment was erroneous. The dispute at hand was whether or not a road of access exists which is not the sort of dispute where interlocutory judgment may be entered. The claim was neither a liquidated claim nor a claim for general damages. If it were a liquidated claim, and no defence was filed, Order 10 Rule 4 would apply. The same provides as follows:-

4. Judgment upon a liquidated demand [Order 10, rule 4.]

(1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.

(2) Where the plaintiff makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.

27. If it were a claim for general damages, Order 10 Rule 6 would apply and interlocutory judgment could be entered. The said provision is drawn as follows :-

6. Interlocutory judgment [Order 10, rule 6.]

Where the plaintiff is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.

28. But the claim in our case was neither a liquidated claim nor a claim for general damages and therefore did not fall into the category of cases where interlocutory judgment could be entered. The issue is well addressed in the case of **Chairman, Secretary and Treasurer, School Management Committee of Sir Ali Salim Primary School & Another vs Francis Bahati Diwani & 2 Others, Malindi ELC Case No. 28 of 2012 (2014) eKLR**. 29. It will be seen therefore, that the claim in our case, being a claim for access to certain land, does not qualify for entry of interlocutory judgment. It was wrong for the Magistrates' Court to proceed and enter interlocutory judgment in this case. What ought to have happened was the case to be listed for hearing, and the defendant (appellant) to be served with a hearing notice.

30. Secondly, I see no basis for the trial Magistrate asking the appellant to avail evidence. On what pleadings was the appellant going to tender evidence, yet he had no defence? At most, the appellant could only be allowed to cross-examine the respondent and his witnesses, but could not take the stand to

testify, for he had no defence and no pleadings upon which he could give evidence.

31. Thirdly, the matter proceeded as if the appellant was acting in person, which he was not. The appellant was actually represented by the law firm of M/s Arusei & Company Advocates, who were on record all along, until the law firm of M/s B.O Akang'o & Co. Advocates took over the matter on behalf of the appellant. I have absolutely no record that the law firm of M/s Arusei & Company Advocates were ever served with any hearing notice which was a huge procedural lapse.

32. Finally, the trial Magistrate made to recall the witnesses who had testified as PW-2 and PW-3 purportedly under Section 150 of the Civil Procedure Rules. There is of course no such law. There was also no basis to recall the witnesses to be cross-examined further by the appellant for he had cross-examined them before and he never asked for them to be recalled. He could not get the benefit of cross-examining them on a document (a new map) which he could not produce in evidence in the first place as he had no defence. Even then, the persons who appeared were new witnesses who had not earlier testified.

33. In short, forgetting for a moment that the court had no jurisdiction, the manner in which the trial was conducted, leaves a lot to be desired.

34. I would not wish to go into the merits of the case, that is, whether or not a road of access exists, for that will have to await a hearing before the proper court.

35. My core finding is that the Magistrates' Court had no jurisdiction and it is for that reason that this appeal is allowed.

36. Costs are in the discretion of the court and in my view, considering all circumstances, and the general conduct of the parties, I make no orders as to costs in respect of the case before the lower court and on this appeal.

37. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 27th day of September 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :-

Mr. Khobe holding brief for Mr. B O Akang'o for the appellant.

Respondent present acting in person

Court assistant: Toroitich

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU