



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CIVIL APPEAL NO. 100 OF 2011

JOSEPH KOOME.....APPLICANT

VERSUS

HUMPREY MURIRA.....RESPONDENT

JUDGMENT

BACKGROUND

(Appeal from the Judgment of Hon. M.T. Kariuki) P.M.C.C No. 14 of 2009 (Tigania) Delivered on 26th July 2011).

This is an appeal from the judgment of Hon. M.T. Kariuki (PM) delivered in Tigania Law Courts on 26th July, 201. The Respondent who was the plaintiff in PMCC NO. 140 of 2009 (Tigania) had sued the Appellant/Defendant over two parcels of land described as Parcel Nos. 849 and 934 within Mbeu 1 Adjudication Sections.

The plaintiff/Respondent in that suit contends that he has been in occupation and use of the two parcels of land until the Defendant who is the District Land Adjudication & Settlement Officer, Tigania West and Meru North District in collusion with the Appellant herein caused it to be transferred to him without any colour of right.

He therefore sought an order declaring him as the owner of the two parcels of land. The Respondent/Plaintiff also sought an order of Permanent Injunction restraining the 1st defendant/Appellant, his agents, servants, employee's assignees or anybody else claiming under him from inter-alia cultivating, changing boundaries, putting any and in any other way interfering with the plaintiff's parcels of land aforesaid.

The plaintiff/Respondent also asked for costs of the suit. In a statement of Defence dated 25th November, 2009 the defendant denied plaintiff's claim. In the contrary, the defendant averred that he is the owner of the said land having inherited the same from his late father one M'IBUATHU ASILU and it is where he has built his homestead and where he cultivates to earn a livelihood.

The defendant/appellant sought to have the suit dismissed with costs.

When the suit came up for hearing neither the defendant nor his advocate were present. After satisfying itself that service was properly effected the hearing was allowed to proceed ex parte in the absence of the defendant and his advocates.

However, the firm of M.K. KAUME & CO. ADVOCATES appearing for the Defendants/Appellant filed submissions. The trial magistrate delivered his judgment on 26/7/2011 which granted the orders prayed by the plaintiff/respondent. That decision aggrieved the defendant who filed this Appeal on the following grounds:-

- 1) THAT the learned Magistrate erred both in law and in fact by failing to find that the matter before him was subjudice.
- 2) THAT the learned magistrate erred both in law and in fact by failing to hold that the Appellant was not served with a hearing notice but a mention notice yet the matter proceeded for hearing in the absence of the Defendant.
- 3) The learned magistrate erred both in fact and in law by proceedings to hear the case in the absence of the Defendant when it was apparent that the Defendant had been denied his right to be heard.
- 4) THAT the learned trial Magistrate erred in law by failing to issue notice of delivery of judgment as is required.
- 5) The learned magistrate erred both in law and in fact by failing to find that mandatory rules of procedure and practice had been flawed by the Respondent.
- 6) That the learned Magistrate erred both in law and infact by failing to consider the Appellant defence thus the said judgment was against weight of evidence.

APPELLANT'S SUBMISSIONS

At the time the court reached to write this judgment, the Appellant had not complied with the directions of the court to file their submissions within the given time.

There is therefore no submissions filed and/or forwarded to me for consideration.

RESPONDENT'S SUBMISSION

The Respondent equally failed to file their written submissions within the stipulated period and forward to me for consideration as directed.

ANALYSIS EVALUATION AND DECISION

It is important to note that prior to filing the case before the PMCC court in Tigania being PMCC No. 140 of 2009, the dispute between the parties was a subject of an objection before the Land Adjudication and settlement Officer, Tigania Adjudication area within Tigania District.

Accordance to the judgment of the trial magistrate at page 18 and 19 stated as follows:

“In 1988 Land demarcation process began at Mbeu area. Land parcel No. 934 was recorded under the plaintiff's names while Land Parcel No. 849 was recorded under the Defendant's name although the plaintiff was the one utilizing it. The plaintiff sued the defendant regarding land parcel No. 849 while the defendant sued the plaintiff over Land parcel 934. After the land committee heard both cases, both parcels of land were recorded under the plaintiff's name. The defendant appealed against the Land Committee's decision and Land Parcel No. 849 was again recorded in his name.

..... In 2007 other cases cropped up in the Land Adjudication Office. After the cases were finalized both parcels Land were recorded in the plaintiff's names”

Before filing the case before the subordinate court, the plaintiff/respondent sought consent from the Land Adjudication Officer pursuant to Section 8(1) and 30 of the Land Consolidation Act and the Land Adjudication Act chapter 283 and 284 respectively. The nature of the consent contemplated under the two status is to challenge the procedural aspect of any Administrative Action the Land Adjudication officer was undertaking in identifying individual interest of persons within the adjudication section.

The consent contemplated is not to grant leave to an aggrieved to commence a concurrent adjudication process through Judicial Process. That could not have been the interest of Parliament. In my respective view the Judicial process contemplated under Section 8 (1) and 30 of the Land Consolidation Act and the Land Adjudication Act Chapter 283 and 284 of the Laws of Kenya is by way of Judicial Review under Order 53 as read with Section 8 & 9 of the Law Reform Act Cap 26 Laws of Kenya. Where the plaintiff/respondent filed PMCC NO. 140 of 2009 (Tigania) seeking to determine issues on merit pending before the Land Adjudication Officer, and if those orders are granted by the court through Judicial process, then such orders becomes a nulily as they were granted by the court without jurisdiction. That was the decision of this Superior Court in the case of MUNICIPAL COUNCIL OF MOMBASA VS REPUBLIC & UMOJA LTD.

Civil Appeal No. 185 of 2001 (unreported) where it was held that:-

“Judicial Review is complied with the decision making process not the merits of the decision, the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the person affected by the decision were heard before it was made and whether in making the decision, the decision maker took into account relevant matters or did take into account irrelevant matters..... the court should not act as a Court of Appeal over the decades which would involve going into the merits of the decision itself such as whether there was or there was no sufficient evidence to support the decision.”

I totally associate myself with the reason of the Judge in that decision and do apply the Mutatis Mutatis to this case. In the upshot, this Appeal succeeds Land of Jurisdiction by the leaned Magistrate for purporting to determine issues on merit when he lacked jurisdiction to do so.

Consequently I issue the following orders:

- 1) The Judgment issued on 26/7/2011 be and all consequential issues are hereby set aside.**
- 2) The issue is referred back to the appointed Adjudication Officer to conduct the process in strict compliance with the Law.**
- 3) The costs of the Appeal and the Magistrates Court to be born by each party.**

SIGNED AT GARISSA ELC COURT BY JUDGE E. C. CHERONO (MR)

DATED AND DELIVERED AT MERU ELC COURT THIS 7TH DAY OF DECEMBER, 2017 IN THE PRESENCE OF:-

Court Assistant: Janet

M.G Kaume for Appellant present

Kithinji H/B for Murango Mwenda for Respondent present

HON. L. N. MBUGUA

ELC JUDGE