



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELCA NO. 91 OF 2014

(Formerly Nyeri HCCA NO. 120 OF 2011)

JONAH NGANGA MWAURA.....APPELLANT

-VERSUS-

MWANGI MWAURA.....RESPONDENT

(Being an appeal from the ruling of EJ OSORO (SRM) in Muranga SRMCC No. 15 of 2006 delivered on 27th July, 2011)

JUDGMENT

Introduction

1. This appeal is in respect of the order of EJ Osoo Senior Resident Magistrate in Muranga SRMCC No. 15 of 2006 in which the learned magistrate declined jurisdiction to conclude, by way of writing judgment in that matter, when it had been heard and concluded.
2. The order appealed from was to the effect that the court lacked pecuniary jurisdiction to hear and determine the dispute preferred before it.
3. The learned Magistrate in exercise of the powers conferred on her by **Order 4 Rule 9** of the Civil Procedure Rules, returned the pleadings to the parties for the purpose of presentation to this court (read the High Court).
4. Aggrieved by the said order, the appellant appealed to this court on the grounds that the learned Magistrate erred by:
 - a) **returning the pleadings to the parties after the parties had presented their respective cases, in that way occasioning an injustice to the parties;**
 - b) **Sitting on appeal on the issue of the jurisdiction of the court to hear and determine the dispute preferred before it when the issue had been heard and determined by a court of concurrent jurisdiction.**
 - c) **Considering a valuation report which was not called for and which was irregularly**

introduced in the proceedings.

d) Failing to appreciate that the matter before her concerned customary trust in respect of which the issue of pecuniary jurisdiction did not apply.

5. As can be discerned from the pleadings filed before the lower court, the appellant sought orders that:-

1. A trust exists between him and the respondent over the suit property (Loc.2 Mariira/703) for his benefit;

2. Respondent breached the said trust upon sale of the said land

3. Defendant to transfer 1.09 hectares from the suit property and costs of the suit be paid by the defendant.

6. In his statement of defence, the respondent opposed the suit on the grounds that the court lacked territorial jurisdiction to hear and determine the matter. The respondent also contended that the suit was time barred.

7. The respondent also raised a counter-claim in which he conceded that the court had jurisdiction to hear and determine the matter. Vide that counterclaim, the respondent maintained that he did not hold the suit property in trust for the appellant. The respondent urged the court to order the removal of the caution the appellant had filed against his title and to dismiss the suit with costs to him.

8. When the matter came up for hearing, the appellant reiterated that the respondent held the suit property in trust for him. In support of his case, he availed 3 witnesses who all testified in support of his case.

9. In his testimony, the respondent reiterated the contention that he did not hold the suit property in trust for the appellant. The respondent availed one witness who testified in support of his case.

10. The court record shows that during trial of the suit, the respondent had sought to have the case struck out on the ground that the trial court lacked jurisdiction to hear and determine the suit.

11. The trial court had upon considering the case presented before it, dismissed that application on among other grounds that the respondent who had admitted the jurisdiction of the court to hear and determine the suit, should not be allowed to deny it during trial by tendering a valuation report done without involving the appellant.

12. Although from the court record it is not clear the circumstances under which the court declined jurisdiction to conclude the matter, it is clear from the court record that, the trial court vide an order made on 27th July, 2011 declined jurisdiction to conclude the proceedings began before it on what appears from the order appealed from to be want of jurisdiction to hear and determine the dispute preferred before it.

13. The foregoing were the circumstances that led to filing of the instant appeal.

14. The appeal was disposed of by way of written submissions.

Appellant's submissions

15. In the submissions filed on behalf of the appellant, it is submitted that the trial court lacked jurisdiction to transfer the suit preferred before it to this court.

16. Maintaining that the lower court had jurisdiction to hear and determine the suit, the appellant urges the court to return the file to the lower court with directions that it determines the case on the basis of the proceedings conducted before it.

Respondent's submissions

17. On behalf of the respondent, reference is made to the provisions of **Order 4 Rule 9** of the Civil Procedure Rules and submitted that the trial court had power to return the pleadings to the parties upon declining jurisdiction.

18. Based on the valuation report produced before the lower court, which the appellant did not challenge, it is submitted that there is overwhelming probability that the land in issue had a value exceeding the trial court's pecuniary limit.

19. Maintaining that the court was justified in returning the plaint to the appellant, the respondent urges the court to find the appeal herein lacking in merits and dismiss it with costs to him.

Analysis and determination

20. As pointed out herein above, the parties in this case had argued their respective cases and even filed their written submissions before the respondent presented before the trial court a valuation report showing that the value of the suit property was way beyond its pecuniary jurisdiction under **Section 159** of the Registered Land Act.

21. As pointed out herein above, the issue of the court's jurisdiction to hear and determine the case had previously been raised before the same court and on the basis of the said evidence. The trial Magistrate considered that issue and refused to decline jurisdiction, on among other grounds, that the respondent had admitted the court's jurisdiction. The learned Magistrate also refused to decline jurisdiction on the ground that the valuation report had been prepared without involving the appellant and the court.

22. Because the trial court had considered the issue of jurisdiction, the question that arises is whether it was justified to resile from its previous decision on that issue in the absence of an application for review or without according the parties an opportunity to be heard on that issue?

23. In answering this question, I make reference to the provisions of **Section 7** of the Civil Procedure Act, Cap 21 Laws of Kenya which provides;

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

24. Being of the view that the issue of the court's jurisdiction had been raised previously and determined by the trial court, which I find to have been competent to hear and determine that issue, I find and hold that by dint of the provisions of **Section 7** of the Civil Procedure Act, the trial court was prohibited from entertaining that issue.

25. In my view, the only way the trial court could lawfully revisit the issue is in an application for review, under **Section 80** of the Civil Procedure Act or under **Order 45** of the Civil Procedure Rules.

26. Even though the trial Magistrate had legitimate concerns concerning her mandate to hear and determine the matter, the manner in which she handled the matter was, in my view, prejudicial to the appellant who had legitimate expectation that he would be given an opportunity to be heard before any decision with the potential of affecting his rights was made.

27. As pointed out herein above, it is not clear what prompted the change of mind of the court.

28. It is noteworthy that from the order appealed from, the learned trial Magistrate appears to lay blame on the appellant for having failed to lead evidence capable of countering the valuation report filed by the

respondent, which report she had declined to rely on previously in determining the question of its jurisdiction to hear and determine the dispute preferred before her. Having refused to accede to the respondent's contention that the court lacked jurisdiction to hear and determine the dispute preferred before it, the trial Magistrate was not justified to resile from that position without being prompted by the parties and, most importantly, without giving the parties an opportunity to be heard on that issue.

29. Whereas the trial Magistrate had power to return the pleadings to the parties under **Order 4 Rule 9**, I find the exercise of that power under the circumstances of this case to have been unjustified.

30. For the foregoing reasons, I find the appeal herein to be merited and allow it as prayed.

Dated, signed and delivered at Nyeri this 2nd day of November, 2016.

L N WAITHAKA

JUDGE.

In the presence of:

Mr. Machira h/b for Ms Muthoni Muhoro for respondent

N/A for appellant

Court assistant - Lydia