



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL APPEAL NO. 27 OF 2013

*(Being an Appeal from the Judgment of Hon. Obura Principal Magistrate, delivered on 10th June, 2013
in SRMCC. No. 115 of 2013)*

KAHINDI KAMBI.....APPELLANT

=VERSUS=

PETER KARISA CHARO.....RESPONDENT

J U D G M E N T

Introduction:

1. On 10th June, 2013, the lower court delivered its Judgment by allowing the Plaintiff's claim. The learned Magistrate concluded her judgment by directing the Defendant not to bury his grandson on a property that he does not own.
2. In his appeal, the Appellant raised 17 grounds which can be compressed as follows:
 - a. *THAT the learned Honourable Magistrate erred in law and in fact by ordering that Kilifi/Mtondia/156 belongs to the Plaintiff.*
 - b. *THAT the learned Magistrate erred in law and in fact when she failed to consider the Defendant's evidence.*
 - c. *THAT the learned Magistrate had no jurisdiction to entertain the claim.*
 - d. *THAT the learned Magistrate erred in law and in fact by entertaining the evidence of Pw2 when she lied that the Appellant left the suit property in 1978 and returned after 7 years and that the learned Magistrate failed and or disregarded the evidence on record.*
3. The parties agreed to dispose of the Appeal by way of written submissions.

The Appellant's submissions:

4. The Appellants advocate submitted that the Magistrate completely disregarded the Appellants Defence. According to counsel, the basis of the Respondent's case in the lower court was a sale agreement made on 6th May, 1978 which was for only trees standing on a ¼ of an acre on plot number 540D.
5. According to Appellant, if it was true that he sold the entire land to the Respondent, who was the

- Plaintiff in the lower court, then he would have moved out of the land.
6. The Appellant's advocate submitted at length, why, on the basis of the evidence that was placed before the Magistrate, he should be allowed to bury his grandson on the suit premises. I will not re-evaluate the said evidence for the reasons that I shall shortly give.

Respondent's submissions

7. The Respondent's advocate submitted that the Respondent produced a Title Deed which showed that the suit property was registered in his name.
3. According to counsel, the Title Deed relates to 12 acres, and the fact that the Appellant currently occupies a portion thereof does not mean that they share boundaries.
4. Counsel further submitted that evidence was produced to show that the suit property was acquired by the Respondent's father; that the transfer documents were executed by the Appellant and that the consent of the Board was obtained.
5. The Respondent's counsel further submitted that the trial court found that there was a judgment in civil case number 168 of 2001 which was in favour of the Respondent's father.
6. On the issue of jurisdiction, counsel submitted that the issue of ownership was not in issue since the same had already been determined in favour of the Respondent in Land case number 2 of 1998 and that the only issue which was before the court was whether the Appellant could bury his kin on the suit property.

Analysis and findings:

7. I will first address the issue of whether the trial court had jurisdiction to entertain the claim. I say so because it has been held over and over that jurisdiction is everything and without it, a court has no power to make one more step. (See Motor Vessel **"Lillian S" Vs Caltex Oil (Kenya) Ltd (1989) KLR 1.**)
8. The claim that was before the lower court can be ascertained from the Plaintiff.
9. The Plaintiff (Respondent) pleaded at paragraph 3 of the Plaintiff that he was the registered owner of land known as plot number Kilifi/Mtondia 156 having inherited it from his father. However, on 27th May, 2013, the Defendant, without any permission from the Plaintiff dug a grave in the Plaintiff's plot with a view of burying the remains of his grandchild. The Plaintiff then prayed for permanent injunction to issue against the Defendant.
10. In his defence the Defendant (Appellant) averred that the Plaintiff (Respondent) is not the owner of the parcel of land; that the Plaintiff was only allowed to bury his late father on ¼ an acre of the Defendant's land and that the agreement he entered into with the Plaintiff's father was only for crops on plot No. 540 D, which crops were only on a ¼ of an acre of the Defendants' parcel of land. The Defendant sought for a declaration that the suit property was his.
11. The Plaintiff (Respondent) produced in evidence a title deed as PEXB4 to prove that the entire land belongs to him.
12. From the pleadings and evidence, it is obvious that both the Appellant and the Respondent were claiming to be the proprietors of Kilifi/Mtondia/156.
13. In her Judgment, the Magistrate referred to two previous suits in respect to the suit property filed in Kilifi. In CMCC no. 168 of 2011, the Appellant sued the Respondent to stop him from burying his father in the suit property. The learned Magistrate, after perusing the Ruling of the court in CMCC No. 168 of 2011, held that the court had allowed the burial to take place on the ¼ acre which the Appellant had admitted having sold to the Respondent's father.
14. The trial court further found that in Land Dispute case No. 20 of 1998 the court had ordered the Appellant to vacate the entire land. After perusing the Rulings in the two files, the learned Magistrate held as follows:

“As far as this court is concerned, the issue of ownership is now not for adjudication before me. This court became factus officio after the decision of the Tribunal was adopted by Hon. Obulutsa and he subsequently directed that the Defendant herein vacates the land. There are no orders of execution from any court. There is further

no decisions from a superior court declaring the title issued to the Plaintiff (Appellant) or his late father as null and void and fraudulently obtained..... The annexure “PLCC 2” to the Plaintiff’s Chamber Summons application shows that subsequently, there was an Appeal case No. 129 of 2000 pending before the Provincial Appeals Committee.”

15. The trial Magistrate further quoted the Practice Directions which were issued by the Chief Justice in which the CJ directed that all appeals from the Magistrate courts and Tribunals were to be heard and determined by this court. On that basis, the learned Magistrate concluded by stating that she could not delve into the validity of the Plaintiff’s title. She however proceeded to give an order of injunction based on her observations that the court (Tribunal) had already dealt with the issue of ownership.
16. It is not in dispute that the suit property was registered under the repealed Registered Land Act. According to the Title Deed that was produced in the lower court, the suit property was registered as Kilifi/Mtondia/156 on 19th January, 2005 in the Plaintiff’s (Respondent’s) name.
17. According to the provisions of section 159 of the repealed Registered Land Act, which is applicable to this case, all civil suit and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under the Act shall be tried by the High Court (now the Environment and land court) and where the value of the land in question does not exceed Kshs. 500,000, by the Resident Magistrate’s Court. The same section also allowed the defunct Land Dispute Tribunal to deal with disputes in respect to land registered under the Act where the disputes come within the provisions of section 3(1) of the Land Disputes Tribunal Act (repealed).
18. The Magistrates courts therefore have jurisdiction to deal with a dispute involving title to land registered under the repealed Registered Land Act if the value of the land is less than kshs. 500,000. The Land Disputes Tribunal could also deal with parcels of land registered under the Act subject to the limitation of their jurisdiction as stipulated under section 3(1) of the Land Disputes Tribunal Act.
19. The trial Magistrate in this matter did not deal with the issue of ownership having found that that issue had been dealt with by the Land Disputes Tribunal and whose decision had been appealed against by the current Appellant. The learned Magistrate only granted to the Plaintiff (Respondent) an order of injunction based on the already existing Ruling of the Tribunal.
20. In the circumstances, the learned Magistrate was entitled not to consider the evidence that was presented before her by the parties save for the Rulings in Kilifi SRMCC No. 168 of 2001 and Land Dispute No. 20 of 1998.
21. This court will also not consider the evidence that was given in the lower court, but which was never considered, to determine the ownership of the suit property. I say so because, firstly, the learned Magistrate, and rightfully so, did not consider at all the said evidence and secondly, the issue of who owns the suit property prior to registration was determined by the Tribunal and an appeal was or should have been filed.
22. Indeed, it is this court that is supposed to hear and determine all the appeals that were filed and are pending before the Provincial Appeals Committee and any pronouncement on the jurisdiction or otherwise of Land Disputes Tribunal or on the title that is presently held by the Respondent would be prejudicial and unprocedural. The Appellant out to prosecute his appeal against the decision of the Tribunal or alternatively challenge the Respondents title appropriately.
23. In the circumstances, and for the reasons I have given above, I dismiss the Appellant’s Appeal with costs to the Respondent.

Dated and delivered in Malindi this 6th day of June, 2014.

O. A. Angote

Judge