IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, KIAGE & ODEK, JJ.A)

CIVIL APPEAL NO. 73 OF 2016

BETWEEN

PETER OKORE ONDU

Substituted by MATHEW OBUNGA OKORE.....APPELLANT

AND

PIUS ONDU

Substituted by MONICA MUGOYA ..... 1ST RESPONDENT

JOSEPH MBOYA ..... 2ND RESPONDENT

SIMON ONDU.....3RD RESPONDENT

LAND REGISTRAR KAKAMEGA.....4TH RESPONDENT

THE ATTORNEY GENERA.....5TH RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kakamega (Chitembwe, J), dated 31st May 2016

in

HCCC No. 45 of 2005)

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JUDGMENT OF KIAGE, JA

The original appellant, **Peter Okore Ondu** died and was substituted by his son. Similarly the 1st respondent Pius Ondu died and was substituted by his wife and children. The deceased parties were brothers who had inherited part of their ancestral land from their late father. The appellant averred in his Plaint filed in the High Court in Kakamega that the respondent, had fraudulently excised approximately 4 acres (the disputed portion) from parcel number South Kabras/Shamberere/1148 (the appellant's parcel) and apportioned it to his property Kabras/Shamberere/1233 (the 1st respondent's parcel). The particulars of fraud were that the 1st respondent conspired with the surveyors to unlawfully alter the original boundary between their respective parcels of land as was initially established by their deceased father before his demise.

The disputed portion, on which the appellant's homestead was built had unlawfully been made part of the 1st respondent parcel by encroachment on the appellant's parcel. The appellant accordingly prayed for judgment against the 1st respondent in the following terms;

a) A declaration that the present boundary between the plaintiff and the one registered in the names of PIUS DIN ONDU(deceased)i.elandparcelNo.South/Kabras/Shamberere/1233 and South

Kabras/Shamberere/1148 be declared illegal and the land registrar be ordered to cancel it and fix the correct one.

b) Cancellation of the defendant's land certificate South/Kabras/Shamberere/1233 to reflect the correct physical position on the ground, and adjustment to the plaintiff's land certificate No. South Kabras/Shamberere/1148 be made accordingly.

The 1st respondent filed his defence and denied the averments by the appellant and prayed that the suit be dismissed. Likewise the 4th and 5th respondents filed a joint defence and denied all the allegations contained in the Plaint in totality.

Somehow, the appellant filed another suit by way of Originating Summons in the same court and sought the following orders;

a) The plaintiff be declared to have become entitled by adverse possession over 12 years to a portion of land South/Kabras/Shamberere/1233 measuring 4 acres registered in the names of the defendants.

b) The plaintiff be registered as the sole proprietor of the portion of land measuring 4 acres in place of PIUS DIN ONDU.

c) An order that the defendants or upon his refusal or default the Deputy Registrar of this Honourable court do execute and sign all necessary documents to vest title of that portion of land measuring 4 acres to the plaintiff.

By an order of the court, the two matters were consolidated on 9th May 2008 with **HCCC No. 45 of 2005** as the lead file.

The learned Chitembwe. J concluded the hearing of the matter after F.A Ochieng, J and then Kimaru, J had partly heard the same. He held that the plaintiff had failed to prove his case on a balance of probabilities and so dismissed the suit.

The appellant was dissatisfied with that judgment and therefore preferred an appeal to this Court raising ten (10) grounds of complaint condensed as, the learned judge erred in law and in fact by;

(a) Holding that the appellant was not entitled to the suit property by way of adverse possession.

(b)Arriving at a decision not based on facts but rather on assumptions.

(c) Giving an unclear and ambiguous judgment.

The 1st, 2nd and 3rd respondents filed a cross-appeal on the following grounds;

(a) The appellant and his family continue to occupy the disputed portion of land with impunity even after the delivery of the judgment by the court.

(b) There was no proper reason given by the court in denying the respondents costs.

They prayed for orders of vacant possession of the disputed portion and for costs of the suit in the High Court and of this appeal.

When the appeal was listed for hearing, before us, learned Counsel **Mr Ojuro** appeared for the appellant, while learned Counsel **Mr Mwamu** appeared for the 1st, 2nd and 3rd respondents. There was no appearance for the 4th and 5th respondents. Both parties had filed written submissions and both Counsel opted not to highlight the same.

It was submitted that the appellant acquired the disputed parcel of land through adverse possession since he had been in occupation of the same since 1957, when he entered, settled and built a homestead with the knowledge of the 1st respondent. He had been in occupation of the same without interruption until 2005 when he realised that the said portion was registered in the name of the 1st respondent. He had been in occupation of the disputed portion for over 40 years and hence the learned judge erred in holding that he was not an adverse possessor.

In reply to the cross-appeal, it was indicated that the respondents did not raise the issue of vacant possession at the High Court and were therefore estopped from raising the same before this Court. On the issue of costs, the learned judge did not err in not granting the same since the parties were family members.

It was detailed that the learned judge erred by failing to apply the rules of adverse possession and relied on extraneous issues instead of determining the matter on merit. The appellant prayed that the judgment of the High Court be set aside and judgment be entered in his favour with costs.

It was indicated by the 1st, 2nd and 3rd respondent's Counsel in opposition to the appeal that a claim for adverse possession has two concepts, of possession and discontinuance of possession. One has to prove that the possession of the title by the adverse possessor invariably dispossessed the title holder for the statutory period. Further, the said possession must be continuous for 12

years, open and notorious to the knowledge of the owner. However that was not case in the matter since the appellant and the 1st respondent were brothers and the disputed portion was part of their ancestral land bequeathed to them by their late father.

They were bequeathed the parcels prior to adjudication. Upon adjudication, it was discovered that the appellant was occupying part of the 1st respondent's portion of land. Further his possession was not undisturbed as the 1st respondent interrupted it as he asserted his ownership over the same. It was prayed that the appeal be dismissed with costs to the respondents.

I have carefully read and considered the competing submissions in light of the entire record in discharge of the mandate reposed on us me a first appellate court. However, before I delve into the merits of the matter before Court, I discern a jurisdictional question as this is a land dispute as it concerns the ancestral land of the appellant and of the 1st respondent. The matter was filed in the High Court in 2005 and the judgment which was dated 31st March 2016 was delivered on 15th June 2016. This was almost 6 years after the promulgation of the **Constitution** which created a specialized court to deal with land matters under

Article 162(2) (b);

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

> ***(b) the environment and the use and occupation of, and title to, land.***

Further, the **Environment and Land Court Act** which commenced on 30th August 2011, provides in **Section 13(1)**;

> ***The Court shall have <u>original</u> and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.***

The issue of jurisdiction is so critical that it calls for a decision in *limine* whether or not parties to proceedings have raised it. The Court must be satisfied that it is possessed of jurisdiction and so has an obligation to raise and determine the issue *suo motu* as is the case herein where parties fail to do so. As was held in **<u>OWNERS OF THE MOTOR VESSEL "LILLIAN S" V CALTEX OIL (KENYA) LTD</u> [1989] eKLR;** jurisdiction is fundamental, indeed it is everything and so;

> ***"It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court."***

From the record, it is clear that as the time the **Constitution** was promulgated and when the **Environment and Land Act** was enacted, the matter was part heard in the High Court in Kakamega. To be specific from the proceedings, only PW1 and PW2 testified, with PW3, PW4 and DW1 yet to take the stand. Therefore, the jurisdiction to hear and determine disputes on land had effectively been stripped from the High Court and given to the Environment and Land Court. We echo the holding by the Supreme Court in

<u>REPUBLIC V KARISA CHENGO & 2 OTHERS</u> [2017] eKLR that**;**

> ***"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."***

It is therefore safe to state that the High Court in Kamega continued to hear and determine a land dispute in violation of the law with total disregard to the express terms in the **Constitution** in

Article 165(5) that;

> ***The High Court shall not have jurisdiction in respect of matters—***
>
> ***(b)falling within the jurisdiction of the courts contemplated in Article 162 (2).***

This position was recognized by this Court sitting in Nairobi in

<u>LAW SOCIETY OF KENYA NAIROBI BRANCH V MALINDI LAW</u>

<u>SOCIETY & 6 OTHERS</u> [2017] eKLR;

> ***"However, as already stated, Article 165 (5) is clear that the High Court has no jurisdiction in respect of matters falling within the jurisdiction of the specialized courts."***

I take judicial notice that practice directions were issued by the Chief Justice via GAZETTE NOTICE NO. 5178 dated 25th July, 2014. The

directions were to the effect that part-heard matters were to be heard to conclusion by the High Court and I venture to assume that the said Gazette Notice may have given the High Court herein the comfort and boldness to proceed with the matter instead of transferring it to the Environment and Land Court. Whether or not that was the case, this Court has held that practice directions of that kind cannot confer jurisdiction that is expressly denied by the Constitution. As was stated in **LAWRENCE MUSANGO OKETCH & 2 OTHERS V KAREN ENTERPRISES LIMITED [2019] eKLR**;

> ***"The fundamental question to ask is whether practice directions could confer jurisdiction and the answer is an emphatic no. The confusion seems to stem from the words "….as may be directed by the***
>
> ***Chief Justice…". The confusion, to our mind, is***
>
> ***more apparent that real. The Chief Justice could not direct that the High Court exercise a jurisdiction it did not have. All that the transitional clause did was allow him to direct otherwise than the continued hearing of the matters pending in the hiatus between the promulgation of the Constitution and the coming into operation of the Environment and Land Court. That direction could foreseeably take the form of some or all of the cases being held in abeyance until that Court was operationalized. Once it was operational, however, the Chief Justice had no further role."***

Thus, no matter how well-intentioned, or otherwise inclined, the High Court was duty bound to down its tools otherwise everything after that becomes a nullity. This was famously pronounced by Nyarangi JA in **OWNERS OF THE MOTOR VESSEL**

"LILLIAN S" V CALTEX OIL (KENYA) LTD (Supra);

> ***"A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

It is clear to me that the learned judge erred in proceeding with this matter in light of the establishment of the exclusive jurisdiction of the Environment and Land Court. The proceedings subsequent to the promulgation of the **Constitution** and consequent enactment of the **Environmental and Land Act**, and the judgement delivered were a nullity.

The upshot is that the Judgment of the High Court is set aside in entirety, it and the proceedings before that Court after the promulgation of the Constitution being a nullity.

That is the unfortunate but inescapable effect of proceeding without jurisdiction. It is expensive to the parties but in the eyes of the law no other result is contemplated. I would however order that each party do bear its own costs.

I would order that the file be remitted to the Environment and Land Court in Kakamega for expedited disposal. To this end there shall be a mention of the matter before that Court within **fourteen (14) days** hereof.

As Asike Makhandia, JA agrees, it is so ordered.

This judgment is delivered under **Rule 32(3)** of the Court of Appeal Rules, our learned brother Odek JA having died before signing it.

DATED and delivered at Nairobi this 3rd day of April, 2020.

P. O. KIAGE

…….……

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

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JUDGMENT OF ASIKE-MAKHANDIA, J.A

I have had the benefit of reading in draft the Judgment of Kiage, J.A. I wholly agree and concur with the contents. I have nothing useful to add.

Dated and delivered at Nairobi this 3rd day of April, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL