IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE MAKHANDIA, P. KIAGE & OTIENO-ODEK, JJ.A)

CIVIL APPEAL NO. 105 OF 2017

BETWEEN

LAWRENCE MUSANGO OKETCH.....1ST APPELLANT

PETER OPIYO.....2ND APPELLANT

JOYCE WANJAWA.....3RD APPELLANT

AND

KAREN ENTERPRISES LIMITED.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya

at Kisumu ***(Majanja, J),*** *dated 23rd May, 2017*

in

HCCC No. 59 of 2005)

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JUDGMENT OF THE COURT

This appeal turns on whether a Court that is expressly divested of jurisdiction by Constitutional and Statutory fiat in a particular matter may nonetheless, for the noblest, most salutary reasons of expeditious justice, party autonomy and consent or such other well-intentioned and pragmatic reasons, go ahead to hear and determine such a matter.

By a Plaint filed way back on 27th May 2005, Karen Enterprises Limited (the respondent) who is the registered proprietor over a parcel of land Reference 16345 (the land) within Kisumu Town, alleged that the appellants had without any colour of right whatsoever trespassed on the land some time in 2004; within a span of 3 years, the appellants had erected structures on the land; the 1st appellant had constructed a semi-permanent house from mud and stone and excavated soil from the land; the 2nd appellant similarly constructed a semi-permanent house and several others for rental purposes; and the 3rd appellant had constructed a semi-permanent structure which operated as a school under the name 'Brilliant Academy' and a pit latrine.

As a result of the appellants' occupation and continued trespass, the respondent was deprived of use and enjoyment of it's of land. The respondent therefore sought among others, the following orders;

a) Possession of the suit land

b) An order compelling the defendants to immediately demolish and remove at their cost all and any structure, buildings and/or material constructed and/or brought and/or left on the suit land failing which the demolition and removal of structures, buildings and/or material be effected by the plaintiff with the assistance of the court bailiff and law enforcement officers at the expense of the defendants.

c) An order of injunction permanently restraining them, their employees, servants, agents, licensees and/or assigns from entering

upon, taking possession of, trespassing on, carrying out any construction thereon or excavation therefrom and from alienating or interfering, by any other means howsoever, with the suit land or any part thereof.

In protection of their interests, the appellants filed a defence. It was their assertion that the land in question was their ancestral land that had been in their family for many years. It was their conviction that the respondent could not enforce any right over the original occupants of the land. Moreover, since the land was yet to be adjudicated it was still un-demarcated and un-surveyed, therefore any title held by the respondent was a forgery. The appellants further pleaded specifically as far as this appeal goes, that the court lacked jurisdiction to determine the suit.

The pleadings having closed and an application for summary judgment by the respondent having been dismissed by Warsame, J (as he was then), the matter proceeded to full hearing partly before Mwera J (as he was then), who took the respondent's evidence. After procedural skirmishes, it proceeded further before Aroni J who heard two of the appellants' witnesses. The suit was eventually transferred to the Environment and Land Court in June 2013.

After several adjournments before that Court, the suit was listed before Kaniaru J on 29th September 2014 with the same counsel before us appearing for their respective clients. It is Mr. Mwamu who is recorded as having addressed the Court on how the matter ought to proceed. The record is as follows;

29/9/2014

Before - A.K. Kaniamu - J

Court Clerk - G. Dianga

Interpretation - English/Kiswahili

Parties - absent

Okero for plaintiff

Mwamu for the defendant

Mwamu - This matter is part-heard before the High Court. The plaintiffs' case is closed. Can it continue to be heard there?

Court - Practice Direction No. 4 requires such a move to be taken. Let the matter be heard by the High Court. Mention at High Court on 29th October 2014.

That is how the suit found itself back at the High Court and before Majanja, J. After a couple of adjournments, the appellants indicated that they had closed their case. Whereupon the learned Judge, after directing that the parties file and exchange submissions, delivered the impugned judgment on 23rd May, 2017.

The appellants were dissatisfied with that judgment preferred an appeal to this Court. The memorandum of appeal comprised three (3) grounds complaining that the learned Judge erred in law and in fact by;

· **Delivering a judgment in total disregard that it lacked jurisdiction to hear the matter.**

· **Failing to appreciate the provision of section 13(1) and (2) of the Environment and Land Act and Article 162(2)(b) of the Constitution.**

· **Failing to tackle all the issues conclusively.**

When the appeal was listed for hearing, **Mr Mwamu** appeared for the appellants, while **Mr Okero** appeared for the respondent as they had done all through the long history of this matter. Both parties had filed written submissions.

Mr. Mwamu submitted on behalf of the appellants that jurisdiction is everything and when the question arises, the court seized of the matter must as a matter of prudence enquire into it before doing anything concerning the matter in respect of which it is raised. It is quite obvious that the subject matter herein is land and therefore the court seized with jurisdiction is the Environment and Land Court. That the jurisdiction has been conferred by **Article 162(2)(b)** of the Constitution and enforced by **Section 13** of the **Environment** and **Land Court Act**. He emphasized that since the court did not have jurisdiction then everything it did was a nullity and ought to be set aside.

In rebuttal, Mr. Okero submitted that the suit was filed at the High Court five (5) years before the promulgation of the current Constitution and six (6) years before the commencement of the Environment and Land Court Act. That by the time the momentous changes took effect the suit was part-heard pending the hearing of the defence case, hence subject to the transitional provisions in **Section 30** of the **Environment** and **Land Act**. Additionally the former Chief Justice of Kenya, Dr Willy Mutunga, gave practice directions on three occasions, two of which directed that all matters that were part-heard before other courts as at the time of the creation of the Environment and Land Court continue to be heard and determined by the same courts. He urged that this ground must fail as the appellants consented to the High Court dealing with the suit and fully participated in this matter which demonstrated their acknowledgement of, and submission to the jurisdiction of the High Court.

We have carefully read and considered those rival submissions in light of the entire record and have determined that the issue before us is one of first importance; whether or not the High Court had jurisdiction to hear and determine this suit. It is *trite law* jurisdiction is so critical it calls for decision in *limine*. This has been well elucidated in the case that is synonymous with matters jurisdiction, that is ***OWNERS OF THE MOTOR VESSEL "LILLIAN S" V CALTEX OIL (KENYA) LTD [1989] eKLR;***

> ***"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. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court."***

It was argued by the appellants that the High Court lacked jurisdiction by virtue of the promulgation of the current Constitution which set up the Environment and Land Court as a specialized court 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.***

In response to the obligation placed on it by the Constitution, Parliament enforced the aforementioned provision and enacted the **Environment** and **Land Court Act** which commenced on 30th August 2011. **Section 13(1)** of it provides;

> ***The Court shall have original 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.***

From the foregoing, it is clear that the Environment and Land Court has original jurisdiction to hear all matters pertaining to the environment and to the use and occupation of land. We cannot disregard the supremacy of our Constitution whence all other laws flow and must be consistent with. It confers powers to various institutions of Government including the Judiciary. We are also aware of our responsibility to interpret the Constitution as per the dictates of **Article 259(a)** in the promotion of its purposes, values and principles. **Article 2(2)** is crystal clear that no person may claim or exercise State authority except as authorized under the Constitution. The Supreme Court emphasized on this in relation to authority conferred to the courts in ***REPUBLIC V KARISA CHENGO & 2 OTHERS [2017] eKLR;***

> ***"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."***

The respondent submitted that since the High Court had conduct of the matter before the promulgation of the Constitution and the consequent introduction of the Land and Environment Court, then it still had jurisdiction by virtue of a transitional clause in **Section 30** of the **Environment** and **Land Act**;

> ***(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.***
>
> ***(2) The Chief Justice may, after the Court is established, refer part-heard cases, where appropriate, to the Court.***

The respondent based their submission on the part where the Act states that ***as may be directed by the Chief Justice or the Chief Registrar***. Counsel quoted practice directions by the former Chief Justice via GAZETTE NOTICE NO. 5178 dated 25th July, 2014 which stated;

> ***"PRACTICE DIRECTIONS ON PROCEEDINGS IN THE ENVIRONMENT AND LAND COURTS, AND ON PROCEEDINGS RELATING TO THE ENVIRONMENT AND THE USE AND OCCUPATION OF, AND TITLE TO LAND AND PROCEEDINGS IN OTHER COURTS.***
>
> ***The Overriding Objective of Proceedings in the Environment and Land Court***
>
> **……**
>
> ***4. All part-heard cases relating to the environment and the use and occupation of, and title to land pending before the High Court shall continue to be heard and determined by the same court."***

On perusal of the record, it is clear that as at the time when the Gazzette Notice was published the suit was part heard with the appellant's defence case still ongoing. Therefore the practice directions purported to invest the High Court with authority to conduct the matter until its conclusion. This may explain the casual manner in which the learned Judge handled the issue of jurisdiction when he took for granted there having been no objection and the parties having agreed to it;

> ***"In June 2013, this matter was transferred to the Environment and Land Court but in view of the fact that it was already part-heard Kaniaru J, ordered that it be referred back to the High Court for hearing and disposal"***

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.

It has long been established that jurisdiction is everything and without it the Court must down its tools otherwise everything after that becomes a nullity. Nyarangi J famously made the point 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."***

As stated above, the Environment and Land Court is a specialized court conferred with specific jurisdiction on land matters. The text and intent of the Constitution is plain and obvious when it speaks in express exclusionary terms 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 acknowledged by this Court sitting in Nairobi in ***LAW SOCIETY OF KENYA NAIROBI BRANCH V MALINDI LAW SOCIETY & 6 OTHERS [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."***

The Supreme Court added its binding voice to the judicial chorus of exclusion in ***REPUBLIC V KARISA CHENGO & 2 OTHERS [2017] eKLR;***

> ***"It follows from the above analysis that, although the High Court and the specialized Courts are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. From a reading of the statutes regulating the specialized Courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from Article 165(5) of the Constitution, which prohibits the High Court from exercising jurisdiction in respect of matters "reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the Courts contemplated in Article 162(2)".***

Given that we have held on the gist of jurisdiction, it is patently clear that the learned judge erred in proceeding to determine the matter. The judgment is a nullity and is set aside in its entirety. This is the unfortunate but inevitable consequence of proceeding without jurisdiction. It takes the parties back in time as all that transpired amounts to nil.

We direct that the file be forthwith remitted to the Environment and Land Court for expeditious hearing and determination by a Judge of the Court other than Kaniaru J.

As the appellants were equally to blame in enthusiastically urging that the case proceeds to completion before the High Court, the same whose jurisdiction they now successfully impeached, as is their right to, we think they are underserving of costs of this appeal as therefore make no order thereon.

DATED and delivered at Kisumu this 21st day of May, 2019.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR