



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, SICHALE & KANTAL, J.J.A)

CIVIL APPEAL NO. 219 OF 2016

BETWEEN

SEBASTIAN KAWETO KALOVWE

STEPHEN WAMBUA KALOVWE

(Appealing as the legal representatives of the estate of

BENEDICT KALOVWE KAWETO (deceased).....APPELLANTS

AND

PATRICK MULEVU KAWETO.....RESPONDENT

(Being an appeal from the judgment of the High Court at Machakos (G. Dulu J) dated 10th July 2013

in

Machakos HCCA No. 62 of 2001)

JUDGMENT OF THE COURT

[1] This is as second appeal from the judgment of the High Court at Machakos (Dulu, J.) dated 10th July 2013. That being so **Section 72 (1)** of the **Civil Procedure Act** restricts this Court to consideration of matters of law only. A brief outline of the matters that have escalated to this appeal begun when **Benedict Kalovwe Kaweto** (now deceased) but represented in this appeal by the appellants'; **Sebastian Kaweto Kalovwe** and **Stephen Wambua Kalovwe** as the legal representatives of the estate of the deceased was sued by **Patrick Mulevu Kaweto** (respondent). The suit was filed before the Principal Magistrate's Court at Kitui in June, 2001. In the said suit, it was alleged that the deceased had refused/neglected to subdivide to the respondent two parcels of land; **Kyangwithya/Mutune/861** and **Kyangwithya/Mutune/495** (hereinafter referred as parcels 861 & 495 respectively).

[2] The respondent's prayers before the subordinate court was a declaration that the suit lands were ancestral lands held in trust by the deceased on behalf of the respondent; that both parcels be subdivided in equal shares between the deceased and the respondent. The subordinate court granted the prayers and ordered the deceased to subdivide both parcels in equal shares between himself and the respondent, failing which the Executive Officer of the court was authorized to sign all necessary documents to effect the said transfers.

[3] Aggrieved by the said orders the deceased appealed to the High Court (Dulu, J.) challenging the findings by the trial court that there was an existing trust, and also the jurisdiction of the court while positing that the suit should have been heard by the **District Land Tribunal**. The learned Judge identified two issues for determination as follows;

(i) Whether a trust existed with regard to the suit land; and

(ii) whether the subordinate court had the jurisdiction to determine the suit.

On the first issue, while relying on the ratio in the case of **Muthuita vs. Wanoe [1982] KLR 166** where it was held that a registration does

not extinguish a trust in land; that a trust can exist even without a note in the register stating the existence of such trust; and on Jurisdiction, it was held that the trial court had the mandate to declare the existence of a trust as also the **Muthiuta case** (supra) settled the issue of jurisdiction.

[4] The appeal was therefore dismissed and in doing so the Judge expressed himself in a pertinent portion of the judgment as follows:-

“In my view, faced with two conflicting positions between the appellant and the respondent, the court had to make its findings on credibility. With the evidence of the respondent (who was plaintiff) and his witnesses Stephen Ngui Sisi (PW1), Musyoka Musavia (PW2) and the Land Registrar David Kilungu (PW3), the trial court was convinced that the two parcels of land were ancestral land. In my view, the evidence of the appellant was contradictory. He also did not bring any evidence at the trial, either oral from witnesses or written to show that he purchased the land. I observe that at the time he alleged to have purchased the land for Ksh.300,000 or Ksh. 500,000 in 1970’s or 1980’s that was a lot of money. Even today I do not see a person paying that amount of money for land and not getting written acknowledgement for the payment, even if such acknowledgment is given in the local language. No such documentary evidence on purchase was tendered by the appellant. I agree with the learned magistrate when he found that both parcels of land were ancestral land. In my view, on the balance of probabilities, and from the evidence on record, that finding was sound. The next issue relates to existence of a trust. Since parcel 861 is in the sole registered name of the appellant on first registration, could there be the existence of a trust? In addition, did the learned magistrate have jurisdiction to so decide?.....Section 159 of the

Registered Land Act (Cap 300) still exists but with a jurisdictional limit of the land value of pounds 25,000 for the Resident Magistrate. Since no evidence on the value of the land has been brought to the attention of the court, whether at the trial or on this appeal, I hold that the subject land herein must have been within the value jurisdiction of the learned magistrate, taking into account that the case in the subordinate court was determined in 2002. In my view, the decision in the Muthiuta case (above) clearly clarifies the position of a finding of existence of a trust, where land is registered in a sole name without any note in the register of the existence of such trust. It also settles the issue of jurisdiction of the magistrate herein to determine the existence of a trust...I am of the view that the magistrate had jurisdiction in the matter. I agree with the findings of the learned trial magistrate on the existence of a trust. I am also satisfied that the order on sharing of costs in the subordinate court proceedings was based on sound reasoning....”

[5] The deceased passed away on 20th January, 2015 and after the appellants were granted letters of administration dated 29th January, 2015 they applied for and were granted leave to appear as parties to the present appeal on 8th September, 2016. In the Memorandum of Appeal they have raised five (5) grounds to wit; - that the learned Judge erred in that he;

(i) failed to consider, evaluate and analyze the deceased’s evidence put before the trial magistrate;

(ii) failed to consider, evaluate and analyze the deceased’s submissions before the High Court;

(iii) failed to appreciate that the dispute involved property subject of determination in Mutune Adjudication Proceedings No 6 of 1973;

(iv) failed to consider that the trial magistrate lacked jurisdiction to hear and determine the suit; and

(v) shifted the burden of proof to the deceased.”

[6] During the hearing of the appeal, **Mr. Kamwendwa** learned counsel for the appellant, in his submissions appreciated that this being a second appeal, he was confined to matters of law only so he abandoned grounds 1, 2 and 3, and urged only grounds 4 &5. On the issue of an existing customary trust, learned counsel argued that the respondent had not produced evidence that a customary trust existed over parcel 495. On the issue of jurisdiction, learned counsel asserted that according to the provisions of **section 159** of the **Registered Land Act** the trial magistrate had no pecuniary jurisdiction to make declaratory orders where the value of the subject matter in dispute exceeds 25,000 pounds; that the learned Judge had no basis on which to declare the value of the suit land to be within the pecuniary jurisdiction of the trial magistrate; and that it was the respondent’s duty to prove that the value was within the jurisdiction of the magistrate’s court.

[7] Opposing the appeal was **Mr. Mwalimu**, learned counsel for the respondent, who submitted that the question of jurisdiction was not pleaded before the trial court and was raised before the High court as an afterthought; that in any case, 25,000 pounds translated to Kshs. 500,000 at the exchange rate of the time which was Kshs.20 and fell within the trial magistrates pecuniary jurisdiction when the matter was heard in 2002. Furthermore, the respondent had proved his claim of a customary trust when he called three (3) witnesses and two of them knew the suit land well as they were involved in the adjudication of the same during the demarcation; that the appellant had admitted before the adjudication committee that the suit land was ancestral land; that the trial court had considered all these facts and did not shift the burden of proof as the appellant alleged. Counsel urged the Court to dismiss the appeal.

[8] In a brief rejoinder, **Mr. Kamwendwa** learned counsel insisted that parties cannot confer jurisdiction to a court which was a legal issue that can be raised at any time.

[9] We have considered the grounds of appeal, deliberated on the submissions of both counsel as well as their respective lists of authorities. As stated in the opening paragraph, our jurisdiction is confined to a consideration of questions of law only, unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See **Kenya Breweries Limited vs. Godfrey Odoyo Civil Appeal No. 127 of 2007** where it was stated:-

“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This

Court on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse”.

[10] Having said that, we hasten to add that a question of existence of a customary law as governing a matter in dispute, is deemed a question of fact and therefore, this Court will not interfere with the finding of the two courts below regarding the existence of a customary trust over the suit land. The appellant’s contention is that the learned Judge shifted the burden of proof from the respondent who was claiming that a trust existed. For reasons which will become clear, we agree with the findings by the learned Judge that the deceased’s claim, that the suit property had been purchased for value was not substantiated with documentary evidence. Also the evidence had extensive contradictions and this is borne out of the verbatim extract from the evidence of the deceased where he stated:-

“In page 3 of the proceedings, I said that I had disagreed with the plaintiff. I said that the land belonged to Munyasia and Muli my grandfather. Munyasia is my father. I got the land from Muli. I lied in the proceedings. I lied on oath. I did not lie. The land did not belong to Muli or Munyasia”

This evidence undoubtedly shows that the deceased was not a truthful witness and his evidence contained material contradictions. It is settled law that in civil cases, a party who wishes a court to give a judgment or to declare any legal right dependent on a particular fact or set of facts, that party has a legal obligation to provide evidence as proof of the existence of those facts.

[1] Section 107 of the Evidence Act states that;

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

[11] On the other hand, the respondent discharged his burden by demonstrating his claim that the suit lands were ancestral property by calling two witnesses including the Land Registrar who had first-hand knowledge of the adjudication process that resulted in the deceased being registered as sole proprietor of parcel 861. Regarding parcel 495, the respondent showed that the property was registered in both his and the deceased’s names. It is therefore clear to us that the findings by the two courts below were based on cogent evidence adduced before the trial court. Moreover, it is the trial court that had the advantage of assessing the credibility of the witnesses. The evidence patently demonstrated that the deceased who was the father of the appellants was also the elder brother of the respondent; that the deceased pursued a dispute over the suit property on behalf of their late father but that he clandestinely registered himself as the sole proprietor. When the respondent discovered in May, 2001 that the deceased was trying to sell it, he filed suit that has given rise to this appeal.

[12] Having found the suit land was ancestral land and found the circumstances surrounding the registration of the deceased as proprietor of the suit land was suspect, the two courts below were correct in concluding that a trust existed in favor of the respondent. This Court has, on many occasions, validated the concept of customary trusts as in the case of Mbui Mukangu vs. Gerald Mutwiri Mbui [2004] eKLR where, in a similar situation, the court was approached to decide whether a claim under customary law was extinguished upon registration of the land. The Court held that **Sections 27 and 28 of the Registered Land Act** does not confer such rights on the proprietor as will entitle him to evict a claimant from occupation and possession of the land. This position was also recently affirmed by the Supreme Court in the case of Issac M’Inanga Kiebia vs. Isaaya Theuri M’Lintari & Anor. [2018] eKLR where it was held that a customary trust, as long as it is proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor is subject under the proviso to **Section 28**; that evidence of a trust can take several forms including that the registered land was always reserved for family or clan uses such as burials or other traditional rites, or that it was reserved for future uses like building houses by subsequent generations; and that it is for the courts to make a determination on the merits of each case and the quality of evidence as to whether a trust subsists as to bind the registered proprietor.

[13] The appellants’ second issue is a challenge of the trial court’s jurisdiction to hear and determine the dispute. Counsel for the appellant made reference to **Section 159 of the Registered Land Act** (now repealed) which restricts the jurisdiction of the Magistrate’s court to matters where the value of the subject matter in dispute does not exceed 25,000 pounds. It was the appellant’s contention that he had bought parcels 861 and 495 at Kshs. 300,000 and Kshs. 500,254 respectively and therefore the appellants argued that the court lacked pecuniary jurisdiction thus the learned Judge erred by affirming the jurisdiction of the learned Magistrate to make declaratory orders regarding the two parcels of land. It is trite that if a court has no jurisdiction over a subject matter of litigation, its judgments and orders, however precisely certain and technically correct, are mere nullities and not only voidable, but also void and have no effect and may be set aside or declared void at any time by every court in which they may be presented - See Sir Ali Bin Salim vs. Shariff Mohammed Sharry 1938 KLR and also the oft’ cited case of The Owners of the Motor Vessel Lilian ‘S’ v. Caltex Kenya Limited (1989) KLR 1;

[14] In the instant case, the learned Judge cautiously considered the issue of jurisdiction of the trial magistrate to make a determination regarding existing interests over the suit lands. He noted that no evidence on the value of the land had been produced before the trial court or even during the hearing of the appeal other than the deceased’s assertion that he had purchased the two parcels for Kshs.300,000 and Kshs.500,000 respectively. If that was the only available evidence, the appellant’s did not say that the value exceeded the jurisdiction of the trial court. On our part, we find that there was no evidence adduced before the trial magistrate in regard to the value of the suit property, as the dispute revolved around the question of existence, or otherwise, of a customary trust over the suit property. Furthermore **Section 2** of the repealed **Magistrates Courts Act Cap 10** as read together with **Section 3(2)** of the **Judicature Act** vests jurisdiction on the Magistrates court to determine ‘claims under customary law’. The said **Section 2** of the **Magistrates Act** states that:

“In this Act, unless the context otherwise requires – ‘claim under customary law’ means a claim concerning any of the following matters under African Customary Law-

(a) Land held under customary tenure;

(b)”

In addition **Section 7(3)** of the **Magistrates Courts Act No 26 of 2015**, which replaced the previous **Magistrates Courts Act Cap 10**, makes provision for Magistrates courts to handle customary law matters as follows;

7. (3) “A magistrates court shall have jurisdiction in proceedings of a civil nature concerning any of the following matters under African customary law-

(a) land held under customary tenure;

(b) ...”

[15] The entirety of the evidence produced before the trial magistrate was in support of the respondent’s claim under customary law. We see no reason why the issue of pecuniary jurisdiction was not addressed at the trial court and was raised in the appeals except as a last ditch attempt by the appellants to confuse the issue before the Court. In any case, challenge of a court or tribunal’s jurisdiction to handle a matter before it is a matter of law and ought to have been raised at the earliest opportunity during the trial as stated in the celebrated case of **Owners of the Motor Vessel ‘Lilian S’ (supra)**.

[16] The foregoing being our findings, this appeal lacks merit and it is accordingly dismissed with costs to the respondents.

Dated and delivered at Nairobi this 22nd day of November, 2019.

M. K. KOOME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR