



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPEAL NO. 103 OF 2016

BETWEEN

JAMAL SALIM (as administrator of  
the Estate of SAID SALIM (deceased)).....APPELLANT

AND

YUSUF ABDULAH ABDI.....1ST RESPONDENT

ALI SALADO ABDI.....2ND RESPONDENT

*(An appeal from the Judgment of the Environment and Land Court at Malindi (Angote, J.) dated 20th February, 2015*

in

**ELC Appeal No. 13 of 2013)**

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**JUDGMENT OF THE COURT**

1. This is a second appeal against the decision of the Environment and Land Court (ELC) revolving around the tort of trespass. **Yusuf Abdulahi Abdi** (the 1st respondent) and **Ali Salado Abdi** (the 2nd respondent) jointly instituted a suit in the Chief Magistrate's Court at Malindi being Civil Suit No. 97 of 2008 against Said Salim (deceased) whose estate is represented by **Jamal Salim** (the appellant). They sought *inter alia*:-

***A permanent injunction to restrain the defendant (deceased) by himself, his agents, servants and/or employees and/or in any other manner whatsoever from trespassing into, developing and/or in any other manner interfering with the plaintiffs plot numbers TRCC/MINJILA/C/39 and TRCC/MINIJILA/C/40.***

2. Their claim was premised on grounds that the 1st and 2nd respondents were the owners of Plot Nos. TRCC/MINJILA/C/39 (Plot No. 39) and TRCC/MINIJILA/C/40 (Plot No. 40) respectively vested in the County Council of Tana River (the County Council). The 1st respondent had purchased Plot No. 39 from Ester Kabute Ezekiel while the 2nd respondent had purchased Plot No. 40 from Omar Said Awadh. Thereafter, they had made applications for change of names in the County Council's register to reflect that position. The County Council as mirrored by the minutes of meetings held on 26th October, 2005 and 7th August, 2008 approved the said change. Towards the end of the year 2007 the deceased encroached on the respondent's plot and begun putting up a petrol station. The deceased refused to stop trespassing despite demand to do so.

3. In his statement of defence, the deceased denied trespassing and averred that construction of a petrol station was ongoing on Plot No. 84 which was allocated to him by the County Council for that very purpose. He also challenged the respondents' locus to institute the suit on account that the County Council had confirmed by a letter dated 9th May, 2008 that they did not own any plots within the Minijila Section.

4. Mohamed Ali Mwatunza (PW4), then a clerk at the County Council gave evidence in support of the respondents' claim. We must state that his evidence in respect of the plots in issue was not clear. At one point he testified that Plots Nos. 39, 40 and 84 exist; at another, he stated that Plot Nos. 39 and 40 were consolidated and gave rise to Plot No. 84 which was allocated to the deceased. He admitted that there was no documentary evidence of the consolidation. He also confirmed that the County Council had approved the change of names in respect of ownership of Plot Nos. 39 and 40. However, the said changes had not been effected.

5. With the foregoing evidence, the trial magistrate (L.W Gitari, Chief Magistrate, as she then was) dismissed the respondents' claim by a judgment dated 21st April, 2010 for the reasons that the respondents had not demonstrated that the deceased was constructing the petrol station on Plot Nos. 39 & 40. She also found that the respondents had not established ownership of the plots in issue hence, they lacked *locus standi* to institute the suit.

6. Apparently, the respondents filed an application seeking review of the judgment dated 21st April, 2010 on the ground that there was an error apparent on the face of the record. The error being that there was confusion on the distinction between the plots. They contended that during the hearing the appellant had engaged its employees to guard Plot Nos. 39 & 40 rendering them inaccessible. It was only after the delivery of the judgment that they were able to access the plots and enlist the services of a Surveyor, Mr. Okoth Walter Mbogo to identify the location of the plots in issue. Mr. Okoth prepared a report detailing his findings. In his report he indicated that Plot Nos. 39, 40 & 84 were distinct; Plot 84 was on the opposite side of the respondents' plots. There was a petrol station being put up in the respondents' plots as well as the deceased's plot. It is worth noting that his evidence was in contrast to the evidence given by Mr. Mohamed (PW4).

7. Be that as it may, the trial magistrate allowed the application by a ruling dated 11th May, 2011 and even seemed to have a change of heart by finding that the respondents had the requisite *locus standi*. She allowed a retrial only to the extent of the evidence of the said surveyor and an additional witness by the appellant, one Robert Makeyo Kidadia, the then District Surveyor in charge of Tana River.

8. Mr. Kidadia disagreed with Mr. Okoth's report and in particular, the actual position of Plot No. 84. It was his evidence that a petrol station was being erected on Plot No. 84. He also mentioned that he was able to locate Plot Nos. 39 & 40. We also cannot help but note that his evidence was equally unclear on the actual position of the plots. He went on to give evidence in respect of other plots namely, Plot No. 93, 77 and 86 without setting out the nexus with the plots in issue.

9. Nonetheless, the trial magistrate in her judgment dated 27th February, 2013 maintained her earlier judgment and dismissed the respondents' claim. Aggrieved with that decision, the respondents preferred an appeal to the ELC wherein the learned Judge (Angote, J.) by a judgment dated 20th February, 2015 set aside the trial court's decision and allowed the respondents' claim. It is that decision that is the subject of this second appeal.

10. In a nutshell, the appellant complains that the learned Judge erred in law by-

a) **Allowing the appeal without paying regard to the fact the trial court lacked jurisdiction to entertain the suit.**

b) **Failing to address his mind on the standing of the respondents to file the suit.**

c) **Accepting inadmissible evidence of a private surveyor who undertook survey work on the suit land after the initial judgment was delivered on 21st April, 2010.**

11. The appeal was disposed by way of written submissions and oral highlights. Mr. Kimani, learned counsel for the appellant, begun by submitting that a party could not be barred from raising an issue of jurisdiction even where it was being raised for the first time in a second appeal and/or after the party had initially admitted to the said jurisdiction, as in the appellant's case. Making reference to the case of **Desai vs. Warsame [1967] EA 351** he argued that jurisdiction is a matter of fact which cannot be assumed.

12. Elaborating on why the trial court lacked jurisdiction, counsel contended that pursuant to the **Magistrate's Court Act, Chapter 10 (repealed)** which was in force then, the said court could not entertain a claim in respect of trespass. Such a claim could only be entertained by the High Court as delineated under **Section 2** of the **Registration of Titles Act**. As far as he was concerned, **Section 159** of the **Registered Land Act** (repealed) was not applicable. Secondly, the values of the plots in issue were not disclosed therefore it was impossible to determine whether they fell within the pecuniary jurisdiction of the trial court. We also understood counsel to submit that the trial court erred in not first inquiring if it had jurisdiction.

13. Counsel for the appellant further submitted that even if the trial court had jurisdiction, it could not enforce an illegality because it was clear that the respondent had not paid stamp duty with respect of the purchase of the said plots. Furthermore, the sale agreements had not been reduced into writing as required under **Section 3(3)** of the **Law of Contract Act**. More importantly, the respondents had failed to establish ownership let alone possession of the plots which is integral to a claim of trespass.

14. We have noted with concern that the appellant in its written submissions seems to be challenging the trial court ruling dated 11th May, 2011 which allowed review of the initial judgment. Without delving into the specifics of the challenge, we are alive to the fact the jurisdiction of this Court to entertain an appeal is derived from the Notice of Appeal. See this Court's decision in **Pepco Construction Company Limited versus Carter & Sons Limited- Nairobi Civil Appeal No. 80 of 1979 (unreported)**. The Notice of Appeal herein was in respect of the High Court's decision which overturned the trial court's judgment dated 27th February, 2013 and not the ruling allowing the review. As such, we have no jurisdiction to consider any issue with regard to the review.

15. In opposing the appeal, Mr. Kilonzo, learned counsel for the respondents, supported the learned Judge's decision which he believed was incapable of being faulted on any ground. Citing the case of **Achola & Another vs. Hongo & Another [2004] KLR 462**, counsel urged that the appellant ought to have raised the issue of jurisdiction at the earliest opportunity. He submitted that the suit was filed within the provisions of **Section 12** of the **Civil Procedure Act** which empowers the subordinate court to determine issues relating to immovable property. Moreover, the plots were registrable under the **Registered Land Act** hence by virtue of **Section 159** of that Act, the trial court had jurisdiction to handle the matter.

16. As this Court has noted time and time again, jurisdiction is what clothes a court with the power to entertain and render a decision in a dispute before it. Without it a court acts in vain. The significance of jurisdiction was spelt out in the often cited case of **Motor Vessel M.V. Lillians vs. Caltex Oil (Kenya) Limited 1989 KLR 1** wherein Nyarangi, J.A, as he then was stated:-

**“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter or commission under which the court is constituted and may be extended or restricted by the like mean... If the jurisdiction of an inferior court or tribunal including an arbitrator depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction but except where the court or tribunal has been given power to determine conclusively whether the fact exists where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision a merit to nothing..”**

17. Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in *Adero & Another vs. Ulinzi Sacco Society Limited* [2002] 1 KLR 577, as follows;

“

1) ...

2) *The jurisdiction either exists or does not ab initio ...*

3) *Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.*

4) *Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.”*

18. It follows that even where a party initially admits to jurisdiction, as in this case, the same does not clothe a court with jurisdiction it did not have to begin with. Similarly, an objection to jurisdiction can be raised at any stage. Nonetheless, such an objection ideally should be raised at the earliest opportunity.

19. Therefore, did the trial court have jurisdiction to entertain the respondents' claim? In determining the answer, we must consider the evidence that was before the trial court. It is immaterial whether the evidence is scanty or limited. See *Words & Phrases Legally Defined, Vol. 3: I – N at pg. 113 & Motor Vessel M.V. Lillians vs. Caltex Oil (Kenya) Limited (supra)*.

20. It is not in dispute that the plots in question were unregistered and it is also not clear whether they were registrable under the *Registered Land Act* or the *Registration of Titles Act*. As a result, they did not fall under the said Acts. It is correct that *Section 9A(1)* of the *Magistrates' Courts Act, Chapter 10 (repealed)* limited the jurisdiction of the Magistrates' Courts in certain disputes concerning land. It deprived those courts of jurisdiction in cases of a civil nature involving the beneficial ownership of land; the division of, or the determination of boundaries to land; a claim to occupy or work land; and trespass to land. However, the particular provision was repealed by *Section 11* of the *Land Disputes Tribunals Act, 1990 (repealed)*, which came into force on 1st July, 1993 by Legal Notice No 91 of 1993 prior to the dispute. Consequently, it was inapplicable to this particular case.

21. On the other hand, the Land Disputes Tribunal's jurisdiction as was set out under *Section 3 (1)* of the *Land Disputes Tribunal Act* related to:-

**“3. (1) Subject to this Act, all cases of a civil nature involving a dispute as to -**

**(a) the division of, or the determination of boundaries to land, including land held in common;**

**(b) a claim to occupy or work land; or**

**(c) trespass to land.”**

However, the land which was subject to the said jurisdiction was agricultural land. See *Section 2* of that Act. It is common ground that the plots in question were not agricultural but commercial. Therefore, the dispute did not fall under the said Tribunal.

22. We are of the view that there was nothing to suggest that the value of the plots in question exceeded the pecuniary jurisdiction of the trial magistrate, who was then holding the rank of a Chief Magistrate. As at then the pecuniary jurisdiction was set out under *Section 5(a)* of

*Magistrate's Court Act (repealed)* as follows:-

**“5. The Magistrates' Courts shall have and exercise jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter in dispute does not exceed—**

**(a) Seven million shillings for a Chief Magistrate;...”**

Consequently, we find that the trial court had the requisite jurisdiction to entertain the claim before it.

23. In the text *Clerk & Lindsell on Torts, Sweet & Maxwell, 18th Edition, at page 923*, trespass to land is defined as follows :-

***"Trespass to land consists of any unjustifiable intrusion by one person upon land in the possession of another.***

At page 927 of the same text discusses who may sue for trespass and it states as follows:-

***"Trespass is actionable at the suit of the person in possession of land, who can claim damages or injunction, or both... Similarly, a person in possession can sue although he is neither owner nor derives title from the owner, and indeed may be in possession adverse to the owner."***

It is therefore not necessary for one to establish ownership of land to sustain a claim for trespass. It is enough that the person suing is in possession.

24. In this case, it is not in dispute that Ester and Omar sold Plot Nos. 39 and 40 to the 1st and 2nd respondents. It is also common ground that the respective applications to change name in the City Council's register to reflect that position had been approved. From those circumstances, it can be deemed that the respondents were in possession of the said plots. The fact that the change of names had not been effected in the register did not derogate that they were in possession.

25. Whether or not the respondents had paid the requisite stamp duty or the sale agreement conformed to **Section 3(3)** of the **Law of Contract** was neither here nor there. What was in issue was not enforcement of the sale agreement but whether the appellant had trespassed on the respondents plots. Having established possession, the respondent had the requisite locus to institute the suit. Our position is reinforced by this Court's sentiments in **Charles Ogejo Ochieng vs. Geoffrey Okumu [1995] eKLR** that:

***"Trespass is an injury to a possessory right, and therefore the proper plaintiff in an action of trespass to land is the person who has title to it, or a person who is deemed to have been in possession at the time of the trespass."***

See also **Halsbury's Laws of England 3rd Edition Volume 38 at page 744.**

26. The next issue that falls for consideration is whether trespass was proved. Having considered the evidence on record and taking note of the lack of clarity as to the actual position of the plots in issue, we believe that the tort of trespass as against the appellant had not been proved. We say so, because from the totality of the evidence it is uncertain whether Plot Nos. 39 & 40 had been consolidated to give rise to Plot 84 or whether the three plots were distinct or whether the construction of the said petrol station was on the respondents' plots. We, unlike, the learned Judge find that the letter dated 24th March, 2009 which alluded to the fact that the Minjila Section had been re-planned, did not establish that there was a consolidation of the respondents plots or that the alleged consolidation gave rise to Plot 84.

27. In the end, we find that the respondents had not established their claim. In **Re B(children) (FC) UKHL 35** Lord Hoffman observed that:

***"If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule than one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."***

28. Accordingly, the learned Judge erred in setting aside the trial court's judgment and allowing the respondents' claim. We hereby find that the appeal has merit and is hereby allowed with costs. We set aside the learned Judge's judgment and substitute the same with an order dismissing the appeal before the ELRC with costs.

**Dated and delivered at Mombasa this 19th day of April, 2018.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

.....

**JUDGE OF APPEAL**

*I certify that this is a  
true copy of the original.*

**DEPUTY REGISTRAR**