



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJA)

CIVIL APPEAL NO. 83 OF 2015

BETWEEN

NELLIE WANJALA OPEMBE.....APPELLANT

AND

FIBI USITA AURA.....RESPONDENT

THE ATTORNEY GENERAL.....INTERESTED PARTY

*(Appeal from the judgment and decree of the High Court of Kenya at Kakamega, Chacha Mwita, J.)
dated 16th December 2014 in Kakamega Misc. Application. NO. 54 of 2013)*

JUDGMENT OF THE COURT

This is an appeal from a judgment of Chacha Mwita, J. where the learned judge found that the entire proceedings and the award of the **Butere Land Disputes Tribunal in Claim No. 113 of 2000** and adopted by the Chief Magistrate's Court, Kakamega, in respect of the subdivision and transfer to the appellant of two acres of **Land parcel Kisa/Wambulische/1549** subsequently registered as **Land parcel Kisa/Wambulische/2024** (*the disputed portion*) to be unconstitutional, unlawful, null and void.

The genesis of the suit was that sometime in 1971, the late Jesse Eshikhathi Opembe (deceased) purchased two acres of land being a portion of Land Parcel No. Kisa/Wambulische/1549 from the respondent's husband, the late Gabriel Eshikumo Aura, (deceased). The disputed portion was not at the time set apart from Land Parcel No. Kisa/Wambulische/1549. Sometime in 2000, the appellant, **Nellie Wanjala Opembe**, a widow of the late Jesse Opembe, filed **Claim No. 113 of 2000** with the Butere Land Disputes Tribunal (*Tribunal*) against the respondent whom she claimed intended to dispose of the disputed portion. The Tribunal found in favour of the appellant, and awarded her the disputed portion and further ordered that a survey be done to determine the exact boundary.

The Tribunal award was adopted as an order of the Chief Magistrate's Court, Kakamega, in **Miscellaneous Award No. 7 of 2001** on 17th April. Subsequently thereto, Land Parcel No. Kisa/Wambulische/1549 was surveyed and subdivided in 2013, and the disputed portion was registered in the appellant's name as Land Parcel No. Kisa/Wambulische/2024.

Being aggrieved by the decision of the Tribunal, the respondent filed **Miscellaneous Application No. 54**

of 2013 as an Originating Notice of Motion brought under **Articles 23, 50, 159, and 258** of the **Constitution of Kenya, section 19 of the sixth schedule of the Constitution** and **The Constitution of Kenya (Supervisory, Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006 (the Gicheru Rules)** (Legal Notice No. 6 of 17th February 2006).

According to the Notice of Motion, the respondent sought declarations that:

i) This Honourable Court do find and declare that the proceedings and award of the Butere Land Disputes Tribunal in claim No. 13 of 2000 regarding the land parcel Kisa/ Wambulishe/1549 was unconstitutional, unlawful, null and void for all purposes.

ii) This Honourable Court do find that the whole proceedings before the Chief Magistrates Court Kakamega in Misc. Award No. 7 of 2001 between Nellie Wanjala Opembe and Phoebe Eshikumo Aura undertaken for the purposes of adoption as a judgment of the court of the award of the Butere Land Disputes Tribunal over land parcel Kisa/ Wambulishe/1549 was unconstitutional, unlawful and an infringement of the rights of the registered proprietor of the subject land and to that extent null and void.

iii) The Honourable Court do find and declare to be unlawful, null and void and of no legal effect the order or decree by the Chief Magistrates court dated and issued on the 17th April, 2009 adopting as its judgment the award of Butere Land Disputes Tribunal over land parcel Kisa/Wambulishe/1549 and or any entries at the Lands Registry made pursuant to such a decree or order.

Also prayed for was an injunction order permanently restraining the Chief Magistrate's Court, Kakamega, the District Surveyor Kakamega, the Land Registrar Kakamega, from proceeding or further proceeding with the execution of the decree or order arising from the subject proceedings being Kakamega Chief Magistrate's Court Award No. 7 of 2011.

The respondent's case was that the Tribunal lacked jurisdiction to entertain the claim over the disputed portion; that the award reached by the Tribunal was a gross violation of the law and the rights of the registered proprietor of the land; that the proceedings were premised on a fatal and incurable irregularity whereby the respondent was improperly joined in the proceedings and lacked *locus standi*; that the claim by the appellant was founded on illegalities, and that the order of the Chief Magistrates Court made in Miscellaneous Award No. 7 of 2001 in execution of the Tribunal's award amounted to perpetuation of an illegality and was a violation of the respondent's Constitutional rights.

In her affidavit in support of the Motion, the respondent deponed that she was the widow of Gabriel Eshikumo Aura who died on 22nd December 1992, and who was the registered owner of the disputed portion which had been awarded to the appellant by the Tribunal.

In response, the appellant deponed that following the award by the Tribunal which had been adopted as an order of the Chief Magistrate's Court, the disputed portion was surveyed and subdivided, resulting to Land Parcel No. Kisa/Wambulishe/2024, and therefore Land Parcel No. Kisa/Wambulishe/1549 had ceased to exist. It was also deponed that the respondent had no capacity to institute these proceedings since she was not the legal representative of the late Gabriel Eshikumo Aura (deceased).

The High Court found that the Tribunal's finding that the late Jese Opembe (deceased) had purchased the disputed portion from the late Gabriel Aura was unconstitutional, null and void and of no effect, as it was not a matter that was within the Tribunal's jurisdiction to determine.

The court further found that the Tribunal's award which was adopted by the Chief Magistrates Court as a judgment was unlawful and of no legal effect since it was a product of an unlawful process.

The court consequently ordered the cancellation at the Land Registry of the entries relating to subdivision

of the Land Parcel No. Kisa/Wambulishe/1549 which resulted in the disputed portion, the cancellation of the transfer and registration of the appellant as the proprietor of the disputed portion, and that the two acres revert to the Land Parcel No. Kisa/Wambulishe/1549 registered in the name of Gabriel Aura (deceased) to await succession proceedings in accordance with the applicable law.

Being dissatisfied by the decision of the High Court, the appellant has brought this appeal specifying 6 grounds of appeal which in summary are that, the learned judge had no jurisdiction to determine the proceedings under the Land and Environment Division of the High Court; that the learned judge erred in holding that the proceedings and award of the Tribunal were unconstitutional, null and void; that the learned judge erred in finding that the award of the Tribunal that was adopted by the Chief Magistrate's Court was unconstitutional, unlawful and also of no legal effect; that the learned judge went beyond his mandate in ordering the cancellation of entries in the Lands register.

Mr. Kasamani, learned counsel for the appellant, submitted on two issues, namely, the competence of the suit and the competence of Mwita, J. to hear and determine the suit.

On the first issue, counsel contended that the matter concerned a constitutional claim which should have been commenced by way of a petition; that there was no provision for a miscellaneous application to be converted into a suit, and there were no pleadings that would have enabled the court to grant the orders sought.

On the competence of the High Court to hear and determine the suit, counsel contended that the dispute concerned land. On 22nd September 2014, Mrima, J. a judge of the High Court, had declined to hear it, and ordered that it be transferred to the Environment and Land Court. The suit went before Mwita, J, also a judge of the High Court, who then heard and determined it, despite the order of Mrima, J. Counsel submitted that Mwita, J. ought to have done likewise, and in failing to do so rendered the decision invalid and of no effect for want of jurisdiction. Counsel urged us to remit the suit back to the Environment and Land Court to review the decision of the High Court.

Furthermore, counsel submitted that, if the respondent was dissatisfied with the decision of the Tribunal and the Chief Magistrate's court, she ought to have challenged the decision by way of appeal to the Provincial Appeals Tribunal or by way of Judicial Review. Since the decision was not at any time challenged or appealed, it remained an order of the court.

Mr. Musiega, learned counsel for the respondent, opposed the appeal. Counsel submitted that the original dispute was by way of an application or a petition, which goes to the matter of form. That during that period, constitutional violations were being brought to court pursuant to the Gicheru Rules that were the applicable rules at the time. Counsel argued that the title of the application was inconsequential, and that under the Gicheru Rules, it was possible for a matter of this nature to have been brought either by way of a petition, or by way of an Originating Notice of Motion, provided that the issues raised amounted to constitutional violations. In his view, the pleadings were competent and proper.

With regard to the whether Mwita, J. was competent to hear and determine the suit, counsel posited that even if this was a Land and Environment Court matter, the High Court had jurisdiction to hear all constitutional matters. It therefore followed that since the issues canvassed were constitutional in nature, being a High Court judge, Mwita, J. had jurisdiction to hear the suit, and rejected the presumption that the pending Supreme Court decision on this very issue of jurisdiction had a bearing on this appeal.

Counsel continued that the case raises serious constitutional issues. It concerned the administration of the deceased's estate which was governed by the Law of Succession Act, where the respondent was sued as the registered owner, yet the land belonged to the deceased. Despite this fact, the trial court adopted the Tribunal's order as a decision of the court, and the Deputy Registrar was ordered to sign the land transfers on behalf of the deceased, thereby fraudulently transferring title of the disputed portion to the appellant.

We have considered the record of appeal and the submissions of counsel. As this is a first appeal, it is our duty to analyze and re-evaluate the evidence on record and reach our own conclusions. (See ***Selle vs***

Associated Motor Boat Co. [1968] EA 123; Jabane vs Olenja, [1986] KLR 661, 664; Ephantus Mwangi vs Duncan Mwangi Wambugu (1982-88) 1 KAR 278 and Mwanasokoni vs Kenya Bus Services (1982-88) 1 KAR 870).

There are two issues for our determination, which are, whether the suit was competent, and whether the learned judge had jurisdiction to determine the Motion.

On the competence of the suit, Mr. Kasamani's assertion is that since the suit was constitutional in nature, it ought to have been commenced by way of a constitutional petition, and not as a miscellaneous application. Furthermore, the Originating Notice of Motion did not specify the fundamental rights violations committed against the respondent, or the orders sought, which must have been capable of being granted by the court to redress the violations alleged.

The respondent filed a miscellaneous application under **Article 50** claiming that her right to a fair hearing had been violated. The procedures that governed such claims at the time the suit was filed were set out in the **Gicheru Rules, rules 11, 12 and 13** which stipulated, *inter alia*, that:

“11. Where a contravention of any fundamental rights and freedoms of an individual under sections 70 to 83 (inclusive) of the Constitution is alleged or is apprehended an application shall be made directly to the High Court.

12. An application under rule 11 shall be made by way of a petition as set out in Form D in the Schedule to these Rules.

13. The petition under rule 12 shall be supported by an affidavit.”

Therefore to lodge a constitutional petition, a petitioner was required to specify those provisions of the Constitution that were allegedly violated, the allegations to be relied upon, and the precise orders sought.

This petition was brought by way of an Originating Notice of Motion where the petitioner was the respondent, Fibi Aura, and the appellant was Nellie Opembe. Also joined as a party was the Attorney General, though there is no indication of the capacity in which the latter was sued.

The provisions of the Constitution that were alleged to have been violated were **Articles 23, 50, 159, and 258** of the **Constitution**. The allegations made were that the appellant, the Tribunal and the Chief Magistrate's Court had violated the rights of the deceased, Gabriel Aura, by depriving him of his land. Declaratory orders were sought against the appellant, the Tribunal and the Chief Magistrate's Court, to declare the decisions of the Tribunal and the Chief Magistrate's Court unconstitutional.

The suit was commenced by way of an Originating Notice of Motion instead of by petition. An examination of the Motion shows that all the essential elements stipulated in the **Gicheru Rules** were present and point to the existence of a constitutional petition. That it was referred to as an Originating Notice of Motion goes to the form of the pleadings, and in paying deference to the Constitution, our preference is to dispense justice on the substance of the Motion rather than to pay undue regard to its form. This being the position, we are satisfied that the requirements of a constitutional petition were adequately met by the Motion, and we consider it to have been competent and properly before the court. Indeed, an originating motion is a recognized form of initiating an action. See **Odinga & 3 Others v. Chesoni & another [1992] KLR 662**. As a consequence this ground fails.

The complaint in the second limb was that Mwita, J. being a judge of the High Court had no jurisdiction to hear and determine matters domiciled within the premise of the Environment and Land Court.

In **The matter of the Interim Independent Electoral Commission, Constitutional Application No. 2 of 2011** (unreported) The Supreme Court succinctly addressed the question of jurisdiction thus,

“29. Assumption of jurisdiction by courts in Kenya is a subject regulated by the Constitution; by

statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel “Lilian S’ vs. Caltex Oil (Kenya) Limited (1989) KLR 1, which bears the following passage (Nyarangi, JA at page 14.):-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step.”

“30. The Lilian ‘S’ case establishes that jurisdiction flows from the law, and the recipient – Court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”

The jurisdiction of the courts in question is clearly defined by the Constitution and by legislation, and we find it expedient to set out the relevant constitutional provisions and concerned legislation herein below.

In this regard **Article 162** of the **Constitution** provides as follows:-

“(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

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

(a)employment and labour relations; and

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

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

(4)...”

Article 165 of the **Constitution** stipulates that there shall be established the High Court, which shall have;

“(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(4) ...

(5) The High Court shall not have jurisdiction in respect of matters—

(a) 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).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

*(7) For purposes of clause (6) the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”
(emphasis ours)*

Pursuant to the constitutional mandate granted under **Article 162 (2)** of the **Constitution**, Parliament enacted the **Environment and Land Act, Chapter 12A** of the **Laws of Kenya** wherein **section 13** stipulates as follows:-

“(1) 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 written law relating to environment and land.

(2) In exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes relating to environment and land, including disputes-

(a) relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to the environment and land under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5) Deleted by Act No. 12 of 2012, Sch.

(6) Deleted by Act No. 12 of 2012, Sch”. (emphasis ours)

This Court has pronounced itself in similar instances, on the question of whether the Employment and Labour Court has jurisdiction to consider constitutional issues. In the case of County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] eKLR it was posited that the Constitution does not establish a stand-alone constitutional court with exclusive jurisdiction to adjudicate upon constitutional issues.

Similarly, in the case of Prof. Daniel N. Mugendi v. Kenyatta University & Others [2013] eKLR, which was concerned with the question of whether or not the Industrial Court had jurisdiction to determine issues concerned with the of violation of constitutional rights, this Court cited with approval the decision of Majanja, J. in United States International University (USIU) v. The Attorney General & Others [2013] eKLR where the learned judge in adopting the position of the Gcaba v. Minister of Safety and Security & Others CCT 64/08(2009) ZACC 26 observed thus;

“Since the court is of the same status of the High Court, it must have jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the Constitution and fundamental rights and freedoms is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce, not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within the matter before it.”

In furtherance of this position, of which we are in agreement, the same Court in the case of Daniel N Mugendi vs Kenyatta University & 3 others (supra) observed thus;

“In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects.” (Emphasis added).

Having set out the ambits of the courts’ respective jurisdiction, the issue in this case turns on the question of whether the dispute was one of environment and land, or was essentially of a constitutional nature.

We return to the facts to ascertain the basic tenets of the case. The respondent brought this application before the High Court on the grounds that the Tribunal lacked jurisdiction to entertain the dispute over the disputed portion, where the proceedings were said to have been conducted in violation of the law, and the rights of the registered proprietor of the Land Parcel No. Kisa/Wambulisho/1549, the late Gabriel Arua. The process was alleged to have been incurably irregular in that the respondent was improperly joined in the proceedings, as she lacked the *locus standi* so to do.

The Tribunal awarded the appellant two acres, which award was adopted as an order of the court. On these grounds the court was entreated to exercise its supervisory jurisdiction under the Constitution to determine whether the processes and procedures by which the appellant acquired the disputed portion were in accordance with the law.

The pleadings shows that the dispute was predominantly one of land and concerned the alleged violation of rights and fundamental freedom on account of the irregular processes and procedures adopted that culminated in orders leading to the subdivision and registration in the appellant’s name of two acres of land belonging to the late Gabriel Aura. This being the case, it ought to have been heard and determined by a judge of the Environment and Land Court, and we find that Mwita, J, a judge of the High Court, wrongly determined the suit when Mrima, J, had properly ordered that it be transferred to the

Environment and Land Court.

In sum, we find that on account of the misdirection on the part of the learned judge, that we must interfere with the decision of the High Court, allow the appeal in part, and set aside the judgment of 16th December 2014. We order that the suit be remitted back to the Environment and Land Court for determination by a judge of that court. We order that each party bears their own costs both in this Court, as well as in the High Court.

It is so ordered.

Dated and delivered at Kisumu this 29th day of July, 2016.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR