IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 59 OF 2015

BETWEEN

ESTHER RITA MWELU KYENDO ……. 1ST APPELLANT

FRANZ SEEHUBER …….. 2ND APPELLANT

AND

KAZUNGU NGARI ……..…… RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Malindi (Meoli, J.) dated 2nd December 2011 in H.C.C. App. No. 30 of 2011)

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JUDGMENT OF THE COURT

In the year 1994 the respondent, **Kazungu Ngari** sold to one **Judith Aoko Okola** land parcel No. **LR KILIFI/MTWAPA/1084** (*the suit property*) which shared a boundary with **LR NO. KILIFI/MTWAPA/1083** (No. 1083) registered in the respondent's name and occupied by him and his family. The said Judith Aoko Okola, in turn sold the suit property to the appellants, **Esther Rita Mwelu Kyendo** and **Franz Seehuber** in 2004. A dispute arose after the suit property was transferred to the appellants regarding its extent *vis a' vis* the respondent's parcel No. 1083, prompting the parties to appear before the Land Registrar, Kilifi and Malindi Districts on 22nd December 2005 pursuant to **section 22** of the Registered Land Act (now repealed). The appellants contended before the Registrar that the respondent had encroached on the suit property and put up structures without their authority. The Land Registrar (**Mrs. E.N. Thoya)** who was assisted by a surveyor found that the mutation drawn by a private surveyor in relation to the two parcels had serious discrepancies. It reflected both plots as larger than their actual size on the ground. For instance the mutation reflected the size of the suit property to be 0.3 Ha while on the ground it was 0.21 Ha (more by 0.09 Ha). No. 1083, according to mutation was 0.51 Ha while on the ground it was measuring 0.34 Ha (excess by 0.17 Ha);

That the respondent, being illiterate relied more on the physical features on the parcels and not the actual measurements when he sold the suit property; that after selling the suit property he retained No. 1083, and lived side by side as neighbours with the appellants for over 10 years; and that given the discrepancies regarding the sizes of the two parcels on the ground and in the mutation forms, it would be impractical to adjust the sizes of the parcel on the ground, considering the developments made by the owners on them. The option of demolition would therefore disrupt the tranquility that had existed between the parties. In

view of these observations the Registrar concluded that;

> ***"It appears that the ground position gives the true reflection of how the original owner wished his land to be subdivided since the boundaries have not been disputed for many years…. I rule that the status quo be maintained. The boundaries which have been used since 1994 should be accepted as the true boundaries and that the mutation and R.I.M. be amended accordingly."***(Emphasis supplied***)***

Two months after this decision, on 21stFebruary 2006 another Land Registrar, Kilifi/Malindi (**Mr. R. K. Kalama**) once more in the company of the same surveyor, Mr. Osiemo convened another session with the parties, neighbours and the local chief where, after visiting the locus in quo and hearing the parties and their witnesses on the dispute, he came to the following conclusion;

> ***"Boundaries of parcel number KILIFI/MTWAPA 1083 and 1084 which were in dispute were marked out and beacons were fixed between the boundary of the two plots & a fence put separating the two parcels of land. The surveyor, Mr. Osiemo marked the boundaries for both plots and the boundary dispute between Esther Rita & Mzee Kazungu Ngari was resolved NOTE***
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> ***This proceedings (sic) supercede (sic) the previous one conducted by Mrs. Elizabeth Thoya."***(our emphasis).

It is recorded that the respondent undertook to vacate the dispute portion but asked for time to do so. This was confirmed by a subsequent letter written on 6th April 2006 by Mr. Kalama to the District Officer, Kikambala Division reminding the latter of the respondent's undertaking to vacate and asking him (the District Officer) to proceed to issue the respondent with the notice of demolition of his structures erected on the suit property. One year after this determination and the undertaking, it would appear the dispute was not resolved either way and the structures remained on the land. The appellants moved the Senior Resident Magistrate at Kilifi by a plaint in **Civil Suit No. 88 of 2007** claiming that the respondent, his sons or agents had encroached on the suit property; that there was uncertainty and/or dispute regarding the boundary between the two contegous properties; that the respondent sought the intervention of the Land Registrar who made a determination in 2005; that subsequently another Land Registrar visited the disputed boundaries in 2006 and after ascertaining the position fixed the beacons on the boundary; that even after this the respondent continued to wrongfully occupy part of the suit property; and that the respondent, or his sons continued to waste and degrade the suit property by constructing temporary structures.

For the foregoing reasons the appellant prayed for an order of permanent injunction to restrain the respondent or his agents or assigns from interfering with the appellants' ownership, possession and quiet enjoyment of the suit property, and an order of mandatory injunction directing the respondent to pull down the temporary structures erected by him or his sons on the suit property. The respondent denied these averments and maintained that the boundary dispute was determined by the Land Registrar in the ruling rendered on 22nd December 2005; and that the subsequent purported determination by another Registrar in 2006 was null and void. The respondent also denied the jurisdiction of the trial court.

The learned trial magistrate heard the case in which parties maintained their respective positions as summarized above, the appellants leading evidence that the respondent had encroached on the suit property, with the respondent maintaining that the boundary has never been interfered with and ought to remain as was directed by the first Registrar. The trial court visited the disputed boundary and upon concluding hearing the parties and their witnesses, the learned magistrate, in a judgment rendered on 25th June 2009 held, on the question of jurisdiction, that the court had the power to entertain the dispute although involving trespass and boundary; and that the second Registrar having fixed the boundaries on 10th February 2006, the court by **section 21(2)** of the repealed Registered Land Act, had jurisdiction to entertain the dispute. Secondly, in terms of pecuniary jurisdiction, the learned magistrate opined that given the value of the suit property as disclosed in the plaint as Kshs.700,000/-, he had jurisdiction of

Kshs.800,000/- and above. He dismissed, as a misconception the contention that the dispute ought to have been filed before the Land Disputes Tribunal. In his view, since the suit property was registered under the Registered Land Act, the Tribunal had no jurisdiction. The learned magistrate, in addition found, based on his first hand visit to the *locus in quo* that, as a matter of fact the respondent had encroached on the suit property by some 0.0877 acres. That being the position, the court entered judgment effectively declaring that there was trespass and that there would be permanent and mandatory injunctions as prayed. It is that decision that was challenged by the respondent in the High Court.

After hearing arguments of counsel both in support and in opposition of the appeal, the learned Judge (**Meoli, J.**) appreciated the centrality of the question of jurisdiction in the appeal before her and held that the learned trial magistrate had no jurisdiction to hear and determine the dispute involving the questions of boundary and trespass to land; that the dispute, by virtue of **section 3** of the Land Disputes Tribunal Act (repealed) ought to have been instituted in the Land Disputes Tribunal which was in existence until September 2011when the statute creating it was repealed; and that the magistrate erred in assuming, without proof, the value of the suit property in order to cloth himself with jurisdiction. Consequently the appeal was allowed, and the proceedings before the magistrate declared a nullity *ab initio* for want of jurisdiction.

The shoe was now on the other foot for the appellants. It was their turn to protest this decision by lodging this appeal. Although the memorandum of appeal contains eight grounds, in our judgment only one broad question is raised in it, whether the learned trial magistrate had or had no jurisdiction to try the dispute.

We entertain no doubt that indeed, from the pleadings and evidence, the grievance was in relation to the correct boundaries of the suit property, and this being a second appeal, the jurisdiction of this Court is limited only to matters of law. **See Maina v Mugiria (1993) KLR 79**. The issue of law in the appeal being whether or not the trial court had jurisdiction to entertain the action. The suit property, as indicated earlier was registered under the Registered Land Act (Cap 300), repealed upon the passage of the **Land Registration Act, 2012**. At the time this dispute was instituted, both the Registered Land Act, and the Land Disputes Tribunal Act made provisions for resolution of boundary and trespass disputes. Part II, of the former was dedicated to boundaries and related matters. Under that Part the Registrar had enormous power with regard to boundaries. For instance, the Registrar with or without the Director of Survey could correct the line or position of any boundary. In addition, and of relevance to this appeal, **Section 21(2)** stipulated that;

> ***"21(2). Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary.***
>
> **……**

Section 159, on the other hand vested in the High Court and the Resident Magistrates' court the power to entertain any civil suit relating to title to, or possession of land or any other interest in land, subject only to the limitation that in respect of Resident Magistrate's Court, that power would be exercised "***where the value of the subject matter in dispute does not exceed twenty five thousand pounds***." It provided;

> ***"159. Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court, or, where the dispute comes within the provisions of section 3 (1) of the Land Disputes Tribunals Act in accordance with that Act. "***(Emphasis supplied)

Where the dispute came within the provisions of **section 3(1)** of the Land Disputes Tribunals Act the dispute was to be resolved by the Land Dispute Tribunal in accordance with that Act.

The Land Disputes Tribunal Act, before it was repealed by Environment & Land Court Act, established the Land Dispute Tribunal with the power to hear cases of civil nature involving:-

> ***"(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."***

The decision of the Tribunal would be filed and entered in the magistrate's court as a judgment. Appeals from the Tribunal lay to the Provincial Appeals Committee and thereafter to the High Court only on points of law. The Land Disputes Tribunal Act amended **section 159** of the Registered Land Act by expressly recognizing the jurisdiction of the Tribunal in matters enumerated under **section 3(1)** aforesaid.

It must follow from this that neither the Registrar nor the learned trial magistrate had jurisdiction, as was rightly determined by the learned Judge, to entertain the action. **Section 159** that the trial court relied on to cloth itself with jurisdiction did not vest any such powers in that court in disputes relating to boundary and or trespass to land. The mischief that the enactment of the Land Disputes Tribunal Act was intended to cure was well stated in its preamble thus;

> ***"An Act of Parliament to limit the jurisdiction of magistrates' courts in certain cases related to land; …."***

Section 3 (9) was equally explicit that;

> ***"(9) Notwithstanding any other written law no magistrate's court shall have or exercise jurisdiction or powers in cases involving any issues set out in paragraph (a) to (c) of subsection (1)."***

The role of the magistrate's court was restricted to entry of judgment upon receipt of the Tribunal's decision. The magistrate could not entertain arguments or hear any application of any form beyond the entry of the judgment and drawing of the decree.

At the same time the powers relating to boundary determination vested in the Registrar by the Registered Land Act was to be read with the amendments to **section 159** of the Act in mind. The determination of boundary disputes having expressly been divested from the courts and the Registrar and vested in the Tribunal by a later legislation could only be entertained by the Tribunal. In **Vauxhall Estates Ltd** v **Liverpool Corporation** (1932) IKB 733, this principle was stated thus;-

> ***"If it is once admitted that Parliament, in spite of those words of the sub-section has power by a later Act expressly to repeal or expressly to amend the provisions of the sub-section and to introduce provisions inconsistent with them, I am unable to understand why Parliament should not have power impliedly to repeal or impliedly to amend these provisions by the mere enactment of provisions completely inconsistent with them."*** (Per Avory, J.)

Of course the Tribunal in adjudicating upon any of the questions it was empowered to inquire into by the Act, could under **section 3 (10)** be assisted by the Registrar.

From this analysis of the law, it should be clear that, we are, with respect, in agreement with the learned Judge's conclusion that the dispute ought to have been heard by the Tribunal. Jurisdiction is everything. It has been said many times before, and that, without it a court has no powers to make one more step, irrespective of the strength and nature of evidence in the parties' possession.

We, for these reasons find no merit in this appeal which we accordingly dismiss with no orders as to costs.

Dated and delivered at Malindi this 15th day of July, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

……

JUDGE OF APPEAL

K. M'INOTI

… ……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR