



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 35 OF 2015

BETWEEN

MWANAHAWA ANYONA CHITAYI 1ST APPELLANT

JOEL NAMBANDE CHITAYI 2ND APPELLANT

VERSUS

MUSA NDALIRO MUCHELULE RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Kakamega, (Chitembwe, J.) dated 30th September, 2013

in

H.C.C. NO. 130 OF 2007)

JUDGMENT OF THE COURT

1. This second appeal raises the question whether the lower courts had jurisdiction over a boundary dispute relating to land registered under the repealed Registered Land Act.

Background

2. On 13th October 2005, the respondent filed civil suit number 136 of 2005, before the Senior Resident Magistrate's Court at Butere. He pleaded that he was the registered proprietor of the property known as Title Number S/Wanga/Lureko/2712 measuring 3.05 Ha; that the appellants uprooted boundary markings between his said property and a property known as S/Wanga/Lureko/172; and that the appellants had encroached and trespassed upon his said property. He accordingly prayed for an order of eviction and an order directing the surveyor to resurvey the suit land.

3. In their defence, the appellants, who are mother and son, contested the respondent's claim. They asserted that the respondent "purchased a piece of land next to [theirs]... and did not disclose...that he was also to occupy [their] ancestral land through fraud...". The appellants also pleaded in their defence that "this Honourable court lacks jurisdiction to hear and determine any matter pertaining to a registered land."

4. The suit was heard before the Magistrate's Court. In a judgment delivered on 19th October 2007, that court found that the appellants' family had "lived on that portion of the land in dispute undisturbed" "for twenty years". The court determined that the appellants had made out a claim for adverse possession and dismissed the respondent's suit. The court did not stop there. It went on to order the District Surveyor to survey, with the assistance of elders and the chief, the area on which the appellants "have lived and buried their deceased in the portion in dispute."; that the area should be hived off and the respondent should be free to register the portion remaining while the respondents' portion is established. Wondering how the respondent may have "acquired title without the land control board consent", the court further ordered that the Land Registrar should recall the title deed acquired by the respondent over the property Title Number S/Wanga/Lureko/2712.

5. The trial court did not address itself to the plea in the appellants' defence that it did not have jurisdiction to hear and determine any matter pertaining to a registered land.

6. Aggrieved by the judgment of the trial court, the appellant lodged Civil Appeal No. 130 of 2007 before the High Court complaining, among other things, that the trial court erred in dismissing his suit; that the trial magistrate was wrong to find as it did when the correct boundary between the respondent's property and that of the appellants had not been established; and that the finding on adverse possession was baseless.

7. The High Court (Said J. Chitembwe, J.), heard that appeal and delivered the impugned judgment on 30th September 2013. In allowing the appeal, the High Court stated:

"I do find that the suit land is registered under the now repealed Registered Land Act. The trial court lacked jurisdiction to order that the respondents [the appellants herein] had acquired title by way of adverse possession."

8. The court went on to say that the trial court further erred in granting orders which had not been sought. The High Court concluded its judgment thus:

"In the end, I do find that the trial court exceeded its powers and arrived at the wrong conclusion. The appeal is merited and the same is allowed. The appellant's prayer was for an eviction order and an order directing the surveyor to re-survey the suit land. I do order that the Kakamega Land Registrar and surveyor visit plot numbers S. WANGA/LUREKO/2712 and 172 and fix the boundaries. An eviction order is hereby granted in favour of the appellant against the respondents to the extent of the portion encroached by the respondents. Parties have litigated for long and I do order that each party meet his/her own costs."

9. Dissatisfied, the appellants lodged the present appeal.

The appeal and submissions by counsel

10. The appellants set out nine grounds of appeal in their memorandum of appeal the principal one being that the trial court had no jurisdiction. They also complained that the High Court entertained a matter that wrongfully discharged an award of a Land Disputes Tribunal; that the court failed to identify the proper parties; and that the High Court should have invoked its inherent jurisdiction to determine whether the appellants had indeed acquired the property by adverse possession.

11. Learned counsel for the appellants, Mr. Martin Oloo, took us through the background to the matter pointing out that the dispute was the subject of proceedings under the Land Disputes Tribunals Act that resulted in awards that recognized the appellants' interest in the property. Acknowledging that the trial court had no jurisdiction over the matter, learned counsel in a somewhat confounding argument, submitted that the High Court should have nonetheless, on appeal, invoked its inherent jurisdiction to determine whether the appellants had acquired title over the property by adverse possession. He concluded his submissions by urging us to make orders as prayed in the memorandum of appeal, namely that:

“a) The respondent/agent be restrained from entering into the land, the subject of this appeal, and to restrict any sale, transfer or conveyance on the suit title pending the full hearing and determination of this appeal.

b) The decision of the Honourable judge delivered on 30th September, 2013 and the eviction orders be set aside.

c) The Honourable court does determine for the appellants herein as per the finding in the tribunal.

d) The Honourable court does determine that the appellants had acquired ownership through adverse possession.

e) The Honourable Court does determine that the suit land belongs to the appellants herein.”

12. Opposing the appeal learned counsel, Mr. Odhiambo, holding brief for Mr. Osundwa, for the respondent, submitted that the property claimed by the respondent is a separate title from the one claimed by the appellants; that the respondent was not privy to the proceedings before the tribunal; that under Section 159 of the Registered Land Act, the trial court had jurisdiction to deal with the matter as the issue in controversy was one of ownership as the respondent purchased the property; and that the High Court possessed and properly exercised jurisdiction in making the orders that it did. With that counsel urged us to dismiss the appeal with costs.

Determination

13. As already indicated, the issue of jurisdiction of the trial court was pleaded by the appellants in their defence. The trial court did not address it. The dispute between the parties as pleaded before the trial court related to the boundaries of the properties Number S/Wanga/Lureko/2712 and S/Wanga/Lureko/172 both of which were registered under the now repealed Registered Land Act. Section 21(4) of that Act provided that no court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in that section. The boundary between the respondent’s property and the property claimed by the appellants had not been determined in accordance with Section 21 of the repealed Registered Land Act.

14. The same issue arose in **Wamutu v Kiarie [1982] KLR 480**. In that case, this Court held that by reason of section 21 (4) of the Registered Land Act the court had no jurisdiction to hear a matter relating to boundary disputes of registered land, unless the boundaries have first been determined by the Land Registrar. The Court, was also clear in that case that the High Court did not have “inherent power to hear and determine” the suit because Section 21(4) of the Registered Land Act deprived it of jurisdiction. This Court went further to say that even though the defendants in that case had not applied to strike out the plaint, the court was bound to take note of the provisions of Section 21(4) of the Registered Land Act and strike out the suit of its' own motion. That case also stands for the proposition that an order made without jurisdiction is a nullity.

15. In **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**, the Supreme Court of Kenya held that a court of law can only exercise jurisdiction as conferred by law and cannot arrogate to itself jurisdiction exceeding that which is conferred upon it, and that the issue of jurisdiction is not a mere technicality as it goes to the very heart of the matter “for without jurisdiction the court cannot entertain any proceedings.”

16. The trial court did not have jurisdiction to entertain the matter. It should have upheld the plea by the appellants to that effect and should have struck out the suit. The subsequent appeal to the High Court was therefore devoid of substratum. Having correctly found that the trial court did not have jurisdiction on the matter, it should itself have stopped there. It could not in law go ahead to issue orders, as it did, for the eviction of the appellants and for the re-survey of the property. We accordingly uphold ground 3 in the appellants’ memorandum of appeal that “the learned judge erred in law by failing to consider that jurisdiction is everything and by dint of the lower court determining the suit which it had no jurisdiction

over, it follows that the High Court had no appellate jurisdiction over the case.”

17. The result is that the appeal succeeds to the extent that we order that the Judgment of the High Court delivered on 30th September 2013 is hereby set aside in its entirety. We substitute therewith an order striking out the respondent’s suit in the Magistrate’s Court in Butere in civil suit No. 136 of 2005. Each party shall bear its own costs of this appeal, and of the proceedings before the High Court and before the Magistrate’s court.

Orders accordingly.

Dated and delivered at Kisumu this 7th day of October, 2016

D. K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

.....

DEPUTY REGISTRAR