



REPUBLIC OF KENYA



KENYA LAW
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**Mbochi v Obara & 4 others (Environment and Land Appeal
E021 of 2022) [2024] KEELC 4848 (KLR) (18 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4848 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL E021 OF 2022**

M SILA, J

JUNE 18, 2024

BETWEEN

JESSE NG'ANG'A MBOCHI APPELLANT

AND

JOYCE KEMUNTO OBARA 1ST RESPONDENT

ROSEMARY MORAA OBARA 2ND RESPONDENT

KENNEDY ONDIMU OBARA 3RD RESPONDENT

KISII JUMBO HARDWARE LIMITED 4TH RESPONDENT

COUNTY LAND REGISTRAR, KISII 5TH RESPONDENT

JUDGMENT

(Appeal against refusal of Magistrates' Court to review its judgment; pecuniary value of the subject matter of the case being Kshs. 12,500,000/=; turning out that the matter was heard and judgment delivered by a Principal Magistrate whose pecuniary jurisdiction is capped at Kshs. 10,000,000/=; trial court could not have had the requisite jurisdiction to hear the case; the trial and judgment are set aside as being a nullity; with the setting aside of the judgment the application for review has nothing upon which to stand on and is basically spent; appeal dismissed on that basis)

1. The subject matter in dispute is the land parcel Kisii Municipality/Block IIII/614. This land parcel originated from a subdivision of the land parcel Kisii Municipality/Block III/97 whose history is rather chequered. Four persons, namely Laban Aunga Nyamokeri, Moreka Ondimu, Willam Obara and Tabitha Bwari Obara were registered as proprietors of the land parcel Kisii Municipality/Block III/96 in equal shares. They had a dispute which led to Laban filing the suit Kisii HCCC No. 44 of 1982 against his co-proprietors. This suit appears to have been settled by a consent dated 6 May 1998 where it was agreed that they would subdivide the land into two equal portions, described as 'A' and 'B',



with Laban keeping the portion 'B' and the other three proprietors keeping the portion 'A'. It however turned out that whatever land they were occupying was actually not the Plot No. 16 but the plot Kisii Municipality/Block III/17. Arising out of this erroneous occupation, another suit, being the case Kisii HCCC No. 31B of 2003 ensued. This suit pitted the owners of the land parcel No. 17 and the co-proprietors of the land parcel No. 16. Yet again, this dispute was settled by consent on 9 December 2004. It was agreed that the owners would switch ownership of their plots so that the occupation on the ground is not disturbed. The consent was executed and that is how Laban Aunga, Moreka Ondimu, William Obara and Tabitha Obara got registered as proprietors of the land parcel Kisii Municipality/Block III/97 on 24 April 2007.

2. It will be recalled that they had agreed to split this plot into two equal halves with Laban Aunga keeping half the plot. This half share of Laban Aunga was purchased by the appellant. He also purchased the share of Moreka Ondimu, which, I believe, would be a 1/3rd share of the half that remained for co-ownership by the other three proprietors. The appellant applied to subdivide the plot No. 97 so that he can get a separate title of what he owns. The manner in which he wished to subdivide the plot and the share that he was entitled to brought about another suit, being the case Kisii ELC No. E005 of 2016, wherein Rosemay Moraa Obara, one of the administrators of the estate of the Obaras (who had since died) sued him. The defence of the appellant in that case was that he had already subdivided the Plot No. 97 to bring about the Plots No. 613 and No. 614. His explanation was that the Plot No. 613 was the original share of Laban Aunga and he was thus fully entitled to the whole of this plot. He also averred that he was entitled to a 1/3 share together with the Obaras out of the Plot No. 614. In the course of that suit, on 15 July 2016, Mutungi J issued an order of inhibition. He directed the Land Registrar, Kisii, to place an inhibition in the register of the land parcel No. 97 and/or against any subtitles resulting from any subdivisions of the same, inhibiting the registration of any dealings until the suit was heard and determined.
3. Somehow, and in my view, contrary to the orders of inhibition above, on 9 August 2018, the appellant and Joyce Kemunto Obara and Rosemary Moraa Obara (administrators of the estate of the Obaras) obtained registration of the Plot No. 614 in their names and a title was issued to them. Prior to the issuance of title, the share of the Obaras was sold to Kisii Jumbo Hardware Limited on 7 October 2017, for the sum of Kshs. 12, 500,000/=. The appellant was not happy with this sale and through a plaint filed on 25 January 2019 at the Magistrates' Court at Kisii, he respectively sued Joyce Kemunto Obara, Rosemary Moraa Obara, Kennedy Ondimu Obara, Kisii Jumbo Hardware Limited, and the Land Registrar Kisii seeking the following orders :
 - a. A declaration that the transfer of plot No. Kisii Municipality/Block III/614 on 22 October 2018 in the names of Jesse Nganga Mbochi and Kisii Jumbo Hardware Limited be cancelled and/or revoked as being illegal, fraudulent and improper.
 - b. A further declaration that Plot No. Kisii Municipality/Block III/614 belongs to Jesse Nganga Mbochi and Joyce Kemunto Obara, Rosemary Moraa Obara and Kennedy Ondimu Obara as tenants in common whereby the plaintiff holds 1/3 share and Joyce Kemunto Obara, Rosemary Moraa Obara and Kennedy Ondimu Obara holds 2/3 share.
 - c. Costs of this suit.
 - d. Any order this court may deem fit and just to grant.
4. The Obaras and Kisii Jumbo Hardware Limited (1st – 4th defendants in the suit) filed a joint statement of defence and counterclaim. They saw no issue with the sale of the Obaras share to the 4th defendant/respondent. In the counterclaim they sought the following orders :



- a. The plaintiff's suit as against the defendants be dismissed with costs.
 - b. An order of partition and/or subdivision be issued, of and respecting the property Kisii Municipality/Block III/614, into two parcels, respectively comprising one third and two thirds portions, and the subsequent issuance of the respective Certificates of Lease or Title documents.
 - c. In the alternative to (b) above, a declaration that the subdivision carried out at the plaintiff's instance, of the title Kisii Municipality/Block III/97, into land titles Kisii Municipality/Block III/613 and Kisii Municipality/Block III/614 is illegal, unprocedural, and null and void, and consequently for an order to cancel the said subdivided titles and to revert the suit land to its original state.
 - d. Costs of the counterclaim to be awarded to the defendants.
 - e. Any other or further relief as the Honourable Court may deem fit to be granted to the defendants.
5. The suit was heard by E.M Obina, who held the status of Principal Magistrate, and he delivered judgment on 23 October 2019. He dismissed the suit of the appellant. He further directed that the Plot No. 614 be partitioned into two equal shares, two thirds of it to be owned by the 4th respondent and one third of it to be owned by the appellant, the partitioning 'to abide to the current setting on the ground.' It appears as if the parties moved to employ surveyors but they could not agree on how to partition the Plot.
 6. Through a Notice of Motion application dated 21 February 2022, brought pursuant to Order 45 Rule 1 (a) of the Civil Procedure Rules, the appellant sought an order for review of the judgment and decree so that the subdivision of the Plot No. 614 will be in a manner that each portion will have frontage touching the main road and have a rear touching a loading bay. The application was opposed culminating into a ruling delivered on 3 August 2022 dismissing the application.
 7. Aggrieved by this ruling, the appellant filed this appeal seeking that his application for review be allowed. I directed counsel to file submissions towards the appeal and reserved judgment. However, when I retired to write the judgment two issues stood out for me. One, I wondered how title to the Plot No. 614 could have been obtained in 2018 when the order of inhibition issued on 15 July 2016 still stood. It was not clear to me at that time what the position of the suit ELC No. E005 of 2016 was and I was concerned that the parties herein had proceeded to litigate at the Magistrates' Court when there was a pending suit in the superior Environment and Land Court over the rightful shares of the parties. The second issue that struck me was that it appeared to me that the subject matter of the suit was at least Kshs. 12,500,000/=, being the price paid by the 4th respondent to purchase the share of the Obaras, yet the matter was heard by a Principal Magistrate whose jurisdiction according to my understanding of the law is capped at Kshs. 10,000,000/=. I directed counsel to file submissions to address me on these two points.
 8. Mr. Soire, learned counsel for the appellant, conceded that the matter was heard by a Magistrate without the requisite pecuniary jurisdiction as Section 7 of the Magistrates Court Act provides that the pecuniary jurisdiction of a Principal Magistrate does not exceed Kshs. 10,000,000/=. He was of the view that the proceedings and the judgment are all a nullity and should be set aside as being null and void ab initio. Over the dealings in the suit land he agreed that the order of Mutungi J of 15 July 2016 was subsisting and the sale to the 4th respondent was thus in defiance of that order. He submitted that the transaction should be nullified.



9. On the part of the 1st – 4th respondents, Mr. Nyangacha, learned counsel, submitted that what was before court was a dissolution of a partnership, that is severance of a proprietorship in common, and that it was the appellant who chose the forum. He was of opinion that the orders in the counterclaim were seeking dissolution of the proprietorship and the trial court had jurisdiction. On the dispositions, he submitted that the suit ELC No. E005 of 2016 was dismissed on 30 November 2020 for want of prosecution and that the orders of inhibition were not registered against the title. He nevertheless submitted that the appellant in defiance of the orders proceeded to subdivide the Plot No. 614 and that the 4th respondent, when purchasing the plot, thought that it was still Plot No. 97 as shown in the sale agreement. I have taken all the above into consideration.
10. What I have is an appeal seeking reversal of an order declining to review the judgment. If I am to allow the appeal, the result will be that this court will proceed to review the judgment and give orders as sought in the application for review. However, this court can only proceed to order a review of a valid judgment and not an invalid judgment. It is clear that the dispute herein related to the purchase by the 4th respondent of the share of the Obaras which purchase was at Kshs. 12,500,000/=. At the minimum, the value of the subject matter was Kshs. 12,500,000/=.
11. The *Environment and Land Court Act*, at Section 26 (3) and (4) does give the Magistrates' Courts jurisdiction to hear land matters but with some limitations. The said law provides as follows :

26.

- (3) The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country.
- (4) Subject to Article 169(2) of *the Constitution*, the Magistrate appointed under subsection (3) shall have jurisdiction and power to handle —
- (a) disputes relating to offences defined in any Act of Parliament dealing with environment and land; and
- (b) matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Courts Act.

It will be seen from the foregoing that the Magistrates' Court can hear land disputes involving occupation and title to land, provided the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Court Act, and also subject to Article 169 (2) of *the Constitution*. What Article 169 (2) provides is that 'Parliament shall enact legislation conferring jurisdiction, functions and powers of the courts established in Article 169 (1)', which are the subordinate courts, 1 of which one is the Magistrates' Courts. The legislation outlining the jurisdiction of the Magistrates Court is the Magistrates' Court Act. In so far as civil cases are concerned the jurisdiction of Magistrates' Court is restricted to hearing subject matter depending on the value thereof and the rank of the Magistrate. It provides as follows at Section 7 (1) :

7. Civil jurisdiction of a magistrate's court

- (1) A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed—
- a. twenty million shillings, where the court is presided over by a chief magistrate;
- b. fifteen million shillings, where the court is presided over by a senior principal magistrate;



- c. ten million shillings, where the court is presided over by a principal magistrate;
 - d. seven million shillings, where the court is presided over by a senior resident magistrate; or
 - e. five million shillings, where the court is presided over by a resident magistrate.
12. The suit herein was heard by a Principal Magistrate and it will be seen that such Magistrate is limited to hearing civil matters where the value of the subject matter does not exceed Kshs. 10 million. These are jurisdictional limitations and if any Magistrate proceeds to hear a matter exceeding the statutory cap then such Magistrate has no jurisdiction to hear the case. It is trite law, and it is not even necessary for me to cite any judicial authority, that any judgment arising from a court that has no jurisdiction would be null and void ab initio. I would caution Magistrates to be careful before proceeding to hear a matter filed in their court. They first need to be satisfied that it is within their jurisdiction to hear the case, given that their jurisdiction is not unlimited, before proceeding with a matter, otherwise there is a risk that whatever will be done in the case will end up being nullified.
13. In our instance, the case was heard by a Magistrate without jurisdiction. The judgment is null and void ab initio and is of no effect. It is hereby set aside. It follows that even this appeal, which seeks review of the judgment, has no legs to stand on given that the judgment has already been set aside. With the setting aside of the judgment, the appeal herein is spent, and is for dismissal. For the avoidance of doubt the judgment and all subsequent orders including the order declining to review the judgment are all set aside.
14. The suit is remitted back to the Magistrates' Court for hearing afresh, this time, to be heard by a Magistrate with jurisdiction.
15. I am aware that I had raised a second issue regarding transfer of title despite the order of inhibition. I am of course disturbed that a party would proceed to deal with property despite an order of court. I however chose not to dwell too much on this point. Any aggrieved party is however at liberty to appropriately move the court.
16. The last issue is costs. I would fault the appellant, the respondents, and the court, for not being keen as to whether the court hearing the case had jurisdiction. The appellant had a suit and 1st – 4th respondents had counterclaim which they both allowed to proceed. In those circumstances, I make no orders as to the costs of the trial that was a nullity and I also make no orders as to the costs of this appeal.
17. Judgment accordingly.

DATED AND DELIVERED THIS 18 DAY OF JUNE 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

