



Benjamin Barasa Wafula (Appealing as the Petitioner Intestate Estate of the Late Musiya Kitui Nasong'o) v Cabinet Secretary for Lands and Settlement & 7 others (Environment and Land Appeal 30 of 2019) [2022] KEELC 3660 (KLR) (18 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3660 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL 30 OF 2019
DO OHUNGO, J
MAY 18, 2022

BETWEEN

**BENJAMIN BARASA WAFULA (APPEALING AS THE PETITIONER
INTESTATE ESTATE OF THE LATE MUSIYA KITUI NASONG'O) APPELLANT**

AND

CABINET SECRETARY FOR LANDS AND SETTLEMENT .. 1ST RESPONDENT
**NATIONAL CHIEF LAND REGISTRAR DEPARTMENT OF
LANDS 2ND RESPONDENT**
**MINISTER FOR LANDS AND SETTLEMENT COUNTY GOVERNMENT OF
KAKAMEGA 3RD RESPONDENT**
NATIONAL LAND COMMISSION 4TH RESPONDENT
EVANS W. MULEKA PRINCIPAL MAGISTRATE - BUTALI. 5TH RESPONDENT
GILBERT C. TARUS (STATE COUNSEL 6TH RESPONDENT
FRONICAH SHIRIKA (STATE COUNSEL 7TH RESPONDENT
PHOEBE MUNIHU MULESHE & CO. ADVOCATES 8TH RESPONDENT

(Being an appeal from the ruling of Principal Magistrate's Court at Butali (Hon. E.W. Muleka, Principal Magistrate) delivered on 22nd August 2019 in MLEC No. 8 of 2019 Benjamin Barasa Wafula Suing as legal representative intestate estate of the late Musiya Kitui Nasongo –v- The Cabinet Secretary for Lands & settlement & two others)



JUDGMENT

1. This appeal traces its roots to originating summons (os) dated November 14, 2018 which the appellant filed seeking the following orders from the subordinate court:
 - a. This Hon Court be pleased and grant orders under the statute of accrual of Limitation of Action Act cap 22: Sections 1, 7, 9 and 16 directing and allowing the County Land Registrar together with the County Surveyor both of the County Government of Kakamega to confirm the acreage of and revert the propriety of LR No N Kabarar/Luandeti26 to the names of Kennedy Wamalwa and Meshack Jacob Biketi Seme on behalf of their Ancestor Musiya Kitui Nasong'o's and Seme Kisaina Werenalo's Intestacies, who have occupied and developed the suit land under adverse possession rules, since their ancestors' birth (more than 100 years ago) and prior to 1975 first Land Adjudication.
 - b. Costs of the entire process.
2. In response to the OS, the 3rd respondent, who was represented by the 8th respondent, raised a preliminary objection to the effect that the subordinate court lacked jurisdiction to hear and determine the OS and prayed that it be struck out with costs. The 1st and 2nd respondents who were represented by the 6th and 7th respondents, also raised a similar preliminary objection.
3. Upon hearing the preliminary objections, hon EW Muleka, Principal Magistrate, who has been joined in this appeal as the 5th respondent, delivered a ruling on August 22, 2019 and upheld them. He therefore struck out the OS with costs. Dissatisfied with that outcome, the appellant filed this appeal through memorandum of appeal dated August 26, 2019 which he subsequently replaced with amended memorandum of appeal dated November 4, 2019.
4. The prayers aside, the grounds in the amended memorandum of appeal run into some 32 paragraphs, contrary to order 42 rule 1 (2) of the *Civil Procedure Rules* which provides that a memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against without any argument or narrative. I also note that the appellant also filed, together with his record of appeal, a separate document dated October 1, 2019 and titled "grounds of appeal". I must however point out that pursuant to order 42 rule 4 of the *Civil Procedure Rules*, an appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal. No leave of the court was obtained to advance any grounds beyond those specified in the amended memorandum of appeal.
5. Beyond the verbosity in the amended memorandum of appeal, the overarching ground upon which the appellant is challenging the ruling and order dated August 22, 2019, as discerned from paragraphs 12 to 15 and 19 to 23 of the amended memorandum of appeal, is that the learned magistrate ought not to have upheld the preliminary objection.
6. The appeal was canvassed through written submissions. The appellant submitted that the jurisdiction of magistrate's courts in environment and land matters is basically guided by pecuniary value as well as location of the subject matter regardless of whether the claim is by way of plaint, petition, and or originating summons.
7. The 8th respondent argued that the appeal is bad in law and an abuse of the court process and null and void for misjoinder. That the 5th to 8th respondents are wrongly enjoined in the appeal as they



are officers discharging duties and are not parties to the suit. She therefore prayed for the appeal to be dismissed with costs.

8. I have carefully considered the grounds of appeal and the parties' respective submissions. The issues that arise for determination are whether the 4th to 8th respondents are properly joined in this appeal and whether the preliminary objections were merited.
9. A reading of the record of the subordinate court shows that parties in Butali MLEC No 8 of 2019 were the appellant herein and the 1st to 3rd respondents herein. The 4th to 8th respondents were not parties to the case. They have only been brought in at the appellate stage. There is nothing on record to show that they have sought to be joined to the proceedings.
10. As noted earlier, the 5th respondent is the judicial officer who delivered the ruling appealed against while the 6th to 8th respondents are counsels who represented parties in the proceedings before the subordinate court. As counsels on record in the subordinate court proceedings, the 6th to 8th respondents are agents of known principals. If ever there was any cause of action arising from the proceedings, such cause of action would accrue against the principals and not the agents and would be pursued in a separate suit. Further, pursuant to section 55 of the *Advocates Act*, they are officers of the court. Nothing has been availed in this appeal to justify joining the 6th to 8th respondents in this appeal.
11. The 5th respondent's position as a judicial officer couldn't be any clearer. Pursuant to article 160 (5) of the *Constitution*, a member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function. The Supreme Court restated that position in *Bellevue Development Company Ltd v Francis Gikonyo & 3 others* [2020] eKLR where it held:
 - (57) The immunity granted by this provision therefore encapsulates protection from legal proceedings founded on acts committed or omissions made by Judges in the lawful performance of their judicial functions.
 - (ii) The objective of the principle of judicial immunity
 - (58) The concept of judicial immunity is not without foundation. Judicial immunity is an important tenet in the delivery of justice and the maintenance of the rule of law. For the proper administration of justice, it is a well-established public policy that Judges should freely express themselves in matters brought before them. A Judge, as well as other judicial officers, require to have confidence in carrying out their judicial functions without the fear that they shall be prosecuted or harassed for their acts or omissions. As the US Supreme Court reaffirmed in *Stump* it is "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself."
12. In view of the foregoing, I find that the 4th to 8th respondents are not properly joined in this appeal.
13. The next and final issue for determination is whether the preliminary objections were merited. The said preliminary objections were that dated May 2, 2019 filed by the 1st and 2nd respondents and the 3rd respondent's preliminary objection dated June 24, 2019. The gist of both objections was that the subordinate court lacked jurisdiction to hear and determine the OS. The record shows that the arguments advanced on behalf of the 1st to 3rd respondents was that pursuant to section 38 (1) of the *Limitation of Actions Act*, jurisdiction to hear and determine adverse possession claims was a preserve of the High Court. The appellant on his part argued that the subordinate court had jurisdiction since the value of the subject matter was within the pecuniary jurisdiction of the said court.



14. In his ruling, the learned magistrate stated in part:

The PO is not about the value of the subject matter, but on the rights the plaintiff wants from this court, those rights are a preserve of the High Court as provided under section 38(1) of the *Limitations of Actions Act*, I don't have much more I can say but down my tools. The PO is therefor allowed with costs to the defendant.

The suit is hereby struck out for lack of jurisdiction.

15. The objections were raised, argued and determined within the year 2019. As at that time, the *Constitution* of Kenya, 2010, the *Environment and Land Court Act*, 2011 and the *Magistrates' Courts Act*, 2015 had long come into operation.

16. Whereas it is true that section 38 of the *Limitation of Actions Act* specifies the High Court as the court before which a person who claims to have become entitled to land by adverse possession may seek an order that he be registered as the proprietor of the land, I had occasion to consider the said section in light of the *Constitution* of Kenya, 2010 and recent legislation in *Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & another* [2020] eKLR. So as not to reinvent the wheel, I quote in extenso what I stated in that case:

10. Owing to the provisions of section 38 (1) of the *Limitation of Actions Act* which specifically refer to the High Court, claims in the nature of adverse possession have traditionally been filed in the High Court and following the enactment of the *Environment and Land Court Act*, 2011, in this court. That is in line with the jurisdiction of this court to hear and determine disputes relating to the environment and the use and occupation of and title to land as provided for under article 162(2) (b) of the *Constitution* of Kenya, 2010 and at section 13 of the *Environment and Land Court Act*, 2011. ...

12. The judicial system in Kenya also includes the magistrates' courts as established under article 169 of the *Constitution* of Kenya, 2010. Pursuant to article 169 (2), parliament is mandated to enact legislation conferring jurisdiction, functions and powers on the magistrates' courts. In that regard parliament legislated the following provisions at section 26 (3) and (4) of the *Environment and Land Court Act*, 2011:

(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*. [Emphasis supplied]

13. Indeed, the Chief Justice has, by various gazette notices, made appointments pursuant to Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011. Such gazette notices include Gazette Notice No 1472 dated March 1, 2016, Gazette Notice No 1475 dated March 4, 2016, Gazette Notice No 11930 dated December 5, 2017 and Gazette Notice No 2575 dated February 28, 2019. Thus, there exist within the magistrates' courts, several magistrates duly



gazetted and granted jurisdiction and power to handle cases involving occupation and title to land. ...

14. Some four years after enactment of the *Environment and Land Court Act*, 2011, parliament also enacted the *Magistrates' Courts Act*, 2015 so as to among others give effect to articles 23 (2) and 169 (1) (a) and (2) of the *Constitution* and to confer jurisdiction, functions and powers on the magistrates' courts. The *Act* came into operation on January 2, 2016 and its section 9 (a) provides:

A magistrate's court shall –

- (a) in the exercise of the jurisdiction conferred upon it by section 26 of the *Environment and Land Court Act* (cap 12A) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to –
- (i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (ii) compulsory acquisition of land;
 - (iii) land administration and management;
 - (iv) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (v) environment and land generally. [Emphasis supplied]

15. The upshot of the provisions at section 26 (3) and (4) of the *Environment and Land Court Act*, 2011 and section 9(a) of the *Magistrates' Courts Act*, 2015 is that magistrates who are duly gazetted and have the requisite pecuniary jurisdiction have jurisdiction and power to handle cases involving occupation of and title to land. Claims in the nature of adverse possession involve title to land since the claimant ultimately seeks an order that he be registered as the proprietor of the land. ...

16. Although section 38 (1) of the *Limitation of Actions Act* specifically refers to the High Court without mention of the magistrates' courts, it must be remembered that is an old statute that came into operation way back on December 1, 1967 compared to the more recent *Environment and Land Court Act*, 2011 and the *Magistrates' Courts Act*, 2015, both of which were enacted after promulgation of the *Constitution* of Kenya, 2010. ...

17. Since section 38 (1) of the *Limitation of Actions Act* predated the *Constitution* of Kenya, 2010, its interpretation must be guided by Section 7 (1) of the Sixth Schedule of the *Constitution* of Kenya titled transitional and consequential provisions which provides:

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

18. The alterations, adaptations, qualifications and exceptions referred to above must give section 38 (1) of the *Limitation of Actions Act* conformity to section 26 (3) and (4) of the *Environment and Land Court Act*, 2011 and section 9 (a) of the *Magistrates' Courts Act*, 2015 both of which were enacted to give effect article 162(2) (b) and article 169(1) (a) and (2) of the *Constitution*. So as attain that conformity, section 38 (1) of the *Limitation of Actions Act* must be construed as not depriving magistrates who are duly gazetted and have the requisite



pecuniary jurisdiction, of the jurisdiction and power to handle cases involving occupation of and title to land, including adverse possession which is essentially a dispute on title to land. Such an interpretation is further in line with article 259 which enjoins the court to interpret the *constitution* in a manner that promotes its purposes, values and principles.

17. My position in the matter, which has not changed, has been applied in several cases such as *Philip Kithaka v Mercy Karimi Nyaga* [2021] eKLR, *Christopher Kangogo Cheboiboch v Susan Chepichi Chepkuyeng* [2021] eKLR, and *Justo Odymah Ngonga v Amondi Odymah Oluoko* [2022] eKLR.
18. The interplay between section 38 of the *Limitation of Actions Act*, articles 162 (2) (b) and 169 (2) of the *Constitution* of Kenya, 2010, section 7 (1) of the Sixth Schedule of the *Constitution* of Kenya 2010, section 26 (3) and (4) of the *Environment and Land Court Act*, 2011 and section 9 (a) of the *Magistrates' Courts Act*, 2015 was neither raised nor addressed before the subordinate court. Had all those provisions of law been taken into account, the learned magistrate would have come to the conclusion that the subordinate court had jurisdiction to hear and determine a claim for adverse possession as was raised in the OS. I am aware that the authority of *Lucia Muthoni & another v Betha Wanjiru Muriuki & 2 others* [2016] eKLR was placed before the learned magistrate. In the said case, however, the above provisions were not discussed.
19. I have said enough to demonstrate that the learned magistrate erred in upholding the preliminary objections and striking out the OS. The appeal succeeds to that extent only. Needless to state, this appeal addresses only the specific preliminary objections that were raised before the subordinate court. Any other jurisdictional issues that may be raised before the subordinate court will have to be resolved by the said court on their respective merits.
20. In the result, I make the following orders:
 - a. The ruling and order of the subordinate court dated August 22, 2019 are hereby set aside.
 - b. The 1st and 2nd respondents' preliminary objection dated May 2, 2019 and the 3rd respondent's preliminary objection dated June 24, 2019 are hereby dismissed with costs to the appellant.
 - c. Considering the appellant's conduct of wrongly joining the 4th to 8th respondents to this appeal, I do not consider him deserving of the costs of this appeal. In the circumstances, I order that each party shall bear own costs of this appeal.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 18TH DAY OF MAY 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the appellants

No appearance for the 1st to 7th respondents

No appearance for the 8th respondent

Court Assistant: E. Juma

