IN THE COURT OF APPEAL

AT ELDORET

(CORAM: ASIKE MAKHANDIA, KIAGE & ODEK, JJ.A.)

CIVILAPPEAL NO. 59 OF 2017

BETWEEN

ISAAC JULIUS SANG.....APPELLANT

AND

KIPSAINA ARAP MURSOI.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Eldoret ***(Kimondo J)*** *dated* ***27th April, 2017*** **in**

CIVIL SUIT NO. 201 OF 1997)

JUDGMENT OF THE COURT

In this judgment which relates to two appeals filed in Eldoret, namely **Civil Appeal No. 55** and **Civil Appeal No. 59** both of **2017**, we are once again called upon to pronounce on the far reaching consequences of a court's proceeding to hear and determine a matter that falls outside its jurisdictional competence.

The appeals, filed by one **Ezekiel Kiplel (Kiplel)** and **Isaac Julius Sang (Sang)** respectively, against **Kipsaina Arap Mursoi (Mursoi),** emanate from the judgment of the High Court (Kimondo J) delivered on 27th April, 2017 in which he decreed as follows;

(a) That the transfers of seven properties known as Eldoret Municipality/Block (King'ong'o) 915, 919, 920, 921, 922, 960 and 961 to the 1st defendant, Ezekiel Kiplagat Kiplel, are null and void and are hereby cancelled. The register shall be rectified; and, the titles restored to the plaintiff;

(b) That the transfer of the property known as Eldoret Municipality/Block (King'ong'o) 946 to the 4th defendant, Isaac Julius Sang, is null and void, and it is hereby cancelled. The register shall be rectified; and, the title restored to the plaintiff;

(c) That the 1st defendant, Ezekiel Kiplagat Kiplel, in consideration of the sum of Kshs.326,700 paid as survey and subdivision fees is entitled to the property known as Eldoret Municipality/Block (King'ong'o) 923 measuring 0.151 hectares (2.844 acres or thereabouts) including the two bedroomed house erected thereon;

(d) That as a condition of retaining the title in order (c) above, the 1st defendant shall pay to the plaintiff general damages for fraud assessed at Kshs.688,000 (as more particularized in paragraph 88 of the judgment) together with interest at court rates from the date of this decree until full payment;

(e) The suit against 2nd, 3rd, 5th, 6th, 7th and 8th defendants is dismissed with no orders as to costs. For the avoidance of doubt,

their titles to the properties known as Eldoret Municipality/Block (King'ong'o) 916, 924, 943, 944, 945 and 947 are indefeasible. The cautions or other restrictions registered by the plaintiff against the title shall be removed forthwith;

(f) The title to the property known as Eldoret Municipality/Block (King'ong'o) 948 which is also the subject of this suit, and which is registered in the name of Willy Kyole Mutiso (DW3), but who was not named as a defendant, is also indefeasible. The cautions or other restrictions registered by the plaintiff against the title shall be removed forthwith. That leaves the question of costs against the 1st and 4th defendants. Costs normally follow the event and are at the discretion of the court. The 1st defendant indicated that he would not pursue costs against father in law. The 4th defendant was operating closely with the 1st defendant in the impeached transactions. In the interests of justice; and, cognizant of the predicament that has now befallen the 1st and 4th defendants, I order that each party shall bear its own costs."

It is instantly obvious that the suit heard and determined by the learned Judge concerned title to land. Indeed, it was Mursoi's claim before the court below that he was the registered owner of all that agricultural parcel of land comprised in Eldoret Municipality/Block 21/King'ong'o measuring about 30 acres and that Kiplel, who was his son in-law, had unlawfully and fraudulently sub-divided and transferred the same to himself and to other parties, including Sang. That is why he prayed for judgment against Kiplel, Sang and six other defendants for;

"(a) A declaration that the registration of Eldoret Municipality Block 21 (KINGONGO) plot numbers 915, 916, 919, 921, 922, 923, 926, 942, 943, 944, 945, 946, 947, 948, 960 and 961 in the names of the defendants jointly and severally was fraudulent, null and void abinitio;

(b) A declaration that the letters of consent granted were fraudulently obtained and were of no legal effect and that the transfer forms executed were obtained by trick and the same be revoked;

(c) Damage arising from the fraud on the part of the defendants jointly and severally;

(d) Interest;

(e) Costs of and incidental to this suit;

(f) Any other or further relief this Honourable court may deem fit to grant."

The suit proceeded in that court before several judges with Mursoi testifying and calling a total of seven witnesses in proof of the his case, while seven witnesses testified for the defence. It is then that the learned Judge rendered the judgment as expressed in the decree we have referred to.

Aggrieved, Kiplel and Sang filed their separate appeals challenging the decision of the learned Judge on various grounds as contained in their memoranda of appeal. In Sang's memorandum of appeal, there is contained ground 10, our decision on which is potentially determinative of this appeal. It is complained that;

"10. The decision on jurisdiction of the honourable Judge to hear the matter is contrary to the Constitution of Kenya 2010."

Even though **Mr. Momanyi**, learned counsel for Sang did not elaborate on that ground in his filed written submissions, and appears to have given the issue a wide berth, making no mention of it during his submission before us at the plenary hearing, the ground was not withdrawn and is live for our consideration. Even if it were not raised, the question of jurisdiction is so fundamental that it cannot be ignored or wished away for, as Nyarangi JA famously put it in ***THE OWNERS OF THE MOTOR VESSEL 'LILLIANS S' -vs- CALTEX OIL [1989] KLR 3 at p.14;***

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

Now, it is axiomatic that where a court proceeds to hear and determine a matter that lies outside its jurisdiction, its decision is a

nullity. That being the case, we think it stands to reason that when on appeal the jurisdiction of the first instance court is questioned, the appellate court ought to immediately interrogate the issue *in limine.* Should it find that the court below was indeed bereft of jurisdiction, it would have to declare the impugned decision a nullity without delving into a consideration of the appeal on the merits.

In determining the issue of jurisdiction raised in this appeal, it is clear from the judgment that the learned Judge was aware of the contention around it and he addressed it, after identifying the issues for determination in the suit, *normal* and *suo motu*, thus;

"54. I would add the general question of jurisdiction. I stated at the beginning that this is a claim for recovery of titles. Under Article 162(2) of the Constitution of Kenya 2010, it is a matter squarely within the sphere of the Environment and Land Court. Jurisdiction is everything. Without it, the court must lay down its tools. OWNERS OF THE MOTOR VESSEL 'LILLIAN S' -vs- CALTEX OIL (KENYA) LIMITED [1989] KLR 1. But that would be to simplify the matter too much. This suit predates the Constitution: it was presented to court on 20th May, 1997 at the High Court. The evidence by the plaintiff and his seven witnesses was taken by my predecessors, Gacheche J; and, Ibrahim J (as he then was). The first three defence witnesses were heard by Azangalala J (as he then was). I took the evidence of the last four defence witnesses.

55. Under the Land Court Act, all land matters partly heard by the High Court were to proceed before the High Court. On 18th February, 2013, the matter had been placed for directions before the Land Court. The learned Judge (Munyao J) referred to the Land Act; and, noting that the matter was partly heard by the High Court, returned the file to this court. Thus find the court has jurisdiction to determine the suit. None of the parties contested the jurisdiction of the court."

Now, we doubt not that the learned Judge had the best of intentions in reasoning as he did; and we dare add there is something attractive, pragmatic and facially reasonable and practical about his approach but, was it right" This is the very issue we had to grapple with recently in ***LAWRENCE MUSANGO OKETCH & 2 OTHERS -vs- KAREN ENTERPRISES LIMITED [2019] eKLR*** involving the exact question of whether the High Court could hear and determine cases reserved for the Environment and Land Court, which we opened by stating;

"This appeal turns on whether a Court that is expressly divested of jurisdiction by constitutional and statutory fiat in a particular matter may nonetheless, for the noblest, most salutary reasons of expeditious justice, party autonomy and consent or such other well-intentioned and pragmatic reasons, go ahead to hear and determine such a matter."

It seems to us quite indisputable that no matter what justification the learned Judge had in considering himself possessed of jurisdiction to hear and determine the land case before him, the matter was by constitutional pronouncement removed from his purview as a High Court Judge. That much is plain from even a cursory reading of **Article 165(5)** of the **Constitution**, which is couched in express mandatory exclusionary, indeed prohibitory, terms;

"The High Court shall not have jurisdiction in respect of matters –

(a) …

(b) falling within the jurisdiction of the court's contemplated in Article 162(2)." (our emphasis)

The courts contemplated under **Article 162(2**) are courts with the status of the High Court to be established by Parliament;

"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."

The latter court is what is referred to as the Environment and Land Court established under its eponymous statute.

Given that state of the law, it is much to be regretted that a Judge of the Environment and Land Court, Munyao, J. according to the

exerpt of the judgment we have referred to, failed to take the matter up and proceed with it to completion when it was placed before him on 18th February, 2013 as he should have. Both he and the learned Judge seem to have considered that **section 30** of the **Environment and Land Court Act** permitted the case that was part-heard before the High Court to proceed completion before that court. That understanding was erroneous given the express provisions of **Article 165(5)** aforesaid. There is no saving grace to the issue and, shorn of any niceties, the act of taking up or proceeding with a dispute involving use and occupation of, and title to land, is offensive to the principle expressed by the Supreme Court in ***REPUBLIC -vs- KARISA CHENGO & 2 OTHERS [2017] eKLR;***

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

The apex court in that case was quite emphatic that the specialized courts have their jurisdictions limited to the matters provided for in their constitutive statutes, an inference it stated flowed from the fact that **Article 165(5)** of the **Constitution** "*prohibits the High Court from exercising jurisdiction in respect of [those] matters."*

This Court has itself been quite firm and consistent that the High Court has no such jurisdiction as in the case of ***LAWRENCE MUSANGO OKETCH & 2 OTHERS*** (supra) and ***LAW SOCIETY OF KENYA NAIROBI BRANCH -vs- MALINDI LAW SOCIETY & 6 OTHERS [2017] eKLR.*** We maintain that it was never open to Parliament or any other person or authority, to purport to confer jurisdiction to the High Court to handle matters the Constitution placed beyond its reach, even on the basis that there was a transitional hiatus before the Environment and Land Courts were established. That which the Constitution prohibits remains prohibited absolutely.

The upshot is that the proceedings of the High Court from the time the Constitution was promulgated were a nullity. The judgment of the High Court was also a nullity and both are quashed, and set aside in entirety.

Costly and inconvenient as it may be, the order that we must make is that this matter is remitted to the Environment and Land Court in Eldoret for expedited hearing on priority basis before a judge of that court, other than Munyao, J.

The parties shall each bear own costs of this appeal.

DATED and delivered at Eldoret this 28th day of November, 2019.

ASIKE MAKHANDIA

JUDGE OF APPEAL

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P. O. KIAGE

JUDGE OF APPEAL

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OTIENO ODEK

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.