Wahome v Ngunjiri (Environment and Land Appeal 15 of 2020)
[2023] KEELC 18443 (KLR) (29 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18443 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ENVIRONMENT AND LAND APPEAL 15 OF 2020

YM ANGIMA, J

JUNE 29, 2023

BETWEEN

CHRISTOPHER MURAGE WAHOME ..... APPELLANT

AND

CECILIA NJOKI NGUNJIRI ..... RESPONDENT

(An appeal against the judgment and decree of Hon. S.N. Mwangi (SRM) dated 28.08.2020 in Nyahururu CM ELC No. 214 of 2018)

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. S.N. Mwangi (SRM) dated 28.08.2020 in Nyahururu CM ELC No. 214 of 2018 – Cecilia Njoki Ngunjiri v Christopher Murage Wahome. By the said judgment, the trial court allowed the Respondent's suit for recovery of the suit property and also awarded her Kshs. 150,000/= against the Appellant as general damages for trespass. The Respondent was also awarded costs of the suit.

B. Background

2. By a plaint dated 09.03.2017 the Respondent sued the Appellant seeking a declaration that the Appellant was a trespasser on Title No. Laikipia/Nyahururu/1247 (the suit property) and for his forcible eviction therefrom. She also sought costs of the suit.

3. The basis of the Respondent's action was that she was the registered proprietor of the suit property measuring approximately 1.35 ha whose title deed was obtained on 05.03.2012. She pleaded that the Appellant had illegally encroached on the suit property and settled on a portion of one (1) acre thereof without her consent and without any lawful justification or excuse.

4. The Respondent further pleaded that the Appellant had wrongfully erected some structures on the said portion of land and fenced it in violation of her proprietary rights. It was pleaded that there was no previous suit in any court between the parties over the same subject matter.

5. The material on record shows that the Appellant filed a defence dated 24.05.2017 denying the Respondent's action in its entirety. The Appellant pleaded that he had purchased a portion of one acre from the Respondent in 1999 and had been in occupation thereof for at least 21 years. The Appellant further pleaded that he had been in peaceful and uninterrupted occupation of the said portion of land for the said period of time in consequence whereof he had acquired adverse possession thereof.

6. The Appellant further pleaded that the Respondent's claim was statute-barred and gave notice that he shall raise a preliminary objection to that effect at the earliest opportunity. He, therefore, prayed for dismissal of the Respondent's suit with costs.

C. Trial Court's Decision

7. The record shows that upon hearing the evidence of the parties the trial court held that the Respondent had proved her claim against the Appellant and allowed the same as prayed in the plaint. In addition, the court awarded the Respondent general damages of Kshs. 150,000/= for trespass. The trial court allowed the Respondent's claim, inter alia, on the grounds that the Appellant was not a bona fide purchaser for value; that he had failed to conduct due diligence before the purchase; and that the consent of the Land Control Board for the transaction had not been obtained.

8. The trial court further held that the Appellant's defence of adverse possession was not tenable because it had no jurisdiction to consider any claim for adverse possession. The court further held that, in any event, the Appellant was merely a licencee of the registered owner at the time of purchase and that the Appellant had not been in possession for the statutory minimum period of 12 years since time was to be reckoned with effect from 2012 when the Respondent was registered as proprietor of the suit property.

D. Grounds of Appeal

9. Being aggrieved by the said judgment and decree, the Appellant filed a memorandum of appeal dated 10.09.2019 raising the following six (6) grounds of appeal:

    a. The Learned trial magistrate erred in law and fact in failing to hold that the suit was statute barred by virtue of the *Limitation of Actions Act*, owing to the fact that suits founded on trespass ought to be bought within three (3) years of the accrual of the cause of action.

    b. The Learned trial magistrate erred in law and fact in failing to hold that the suit was statute barred by virtue of Section 7 of the *Limitation of Actions Act*.

    c. The Learned trial magistrate erred in law and fact in failing to hold that the defendant had acquired the portion of 1 acre that he occupies byway of adverse possession.

    d. The Learned trial Magistrate erred in law and fact by making a determination on issues not laid out for determination by any of the parties to the suit.

    e. The Learned trial Magistrate erred in law and fact in granting a relief which had not been pleaded/sought by the Respondent thereby occasioning a travesty of justice.

    f. The Learned trial Magistrate erred in law and fact in giving judgement that was against the weight of the evidence.

10. As a result, the Appellant sought the following reliefs:

a. That the appeal be allowed.

b. That the Respondent's suit before the trial court be dismissed with costs.

c. That any other or better award be granted as the court may deem fit.

E. Directions on Submissions

11. When the appeal was listed for directions it was directed that it shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Appellant's submissions were filed on 14.03.2023 whereas the Respondent's submissions were filed on 10.03.2023.

F. Issues for Determination

12. Although the Appellant raised 6 grounds of appeal in his memorandum of appeal, the court is of the opinion that resolution of the following four (4) issues shall effectively determine the appeal:

a. Whether the trial court erred in law in framing the wrong issues for determination.

b. Whether the trial court erred in law and in fact in failing to hold that the Respondent's suit was statute-barred.

c. Whether the trial court erred in law and fact in holding that the Respondent had proved her claim to the required standard.

d. Who shall bear costs of the appeal.

G. Applicable Legal Principles

13. This court as a first appellate court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 at P.126 as follows:

> " ...Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally."

14. Similarly, in the case of *Peters v Sunday Post Ltd* [1958] EA 424 Sir Kenneth O' Connor, P. rendered the applicable principles as follows:

> " ...it is strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion..."

15. In the same case, Sir Kenneth O'Connor quoted Viscount Simon, L.C in *Watt v Thomas* [1947] A.C. 424 at page 429 – 430 as follows:

> "My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the class of cases in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of court, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a Tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other Tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

16. In the case of *Kapsiran Clan -vs- Kasagur Clan* [2018] eKLR Obwayo J summarized the applicable principles as follows:

    a. First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

    b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

    c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

H. Analysis and Determination

a. Whether the trial court erred in law in framing the wrong issues for determination

17. The court has considered the material and submissions on record. The Appellant submitted that the trial court erred in framing and determining issues which were not laid out for determination by the parties. It was submitted that the trial court erred in framing the first 2 issues in its judgment, that is, whether there was a valid land sale agreement between the Appellant and the Respondent's late husband, and whether the Appellant was a bona fide purchaser for value. It was contended that the trial court had misapprehended the Appellant's defence since he was not seeking enforcement of the sale agreement as a result of which it arrived at an erroneous decision.

18. It is evident from the pleadings and evidence on record that the Appellant was not seeking enforcement or recognition of the validity of the sale agreement he made with the Respondent's deceased husband.

He was not seeking to be declared a bona fide purchaser for value of a portion of one acre of the suit property. The thrust of his defence to the action was that the Respondent's suit for recovery of the suit property was statute-barred and that he had acquired an interest in the suit property on account of adverse possession hence he ought not to be evicted.

19. The court is thus of the opinion that the validity or otherwise of the sale agreement between the Appellant and the Respondent's deceased husband was not a legitimate issue for determination in the suit before the trial court. The question of whether the Appellant was bona fide purchaser for value without notice and whether he had fully paid the purchase price were not legitimate issues for determination. The court is of the opinion that the framing and determination of the wrong issues had an influence on the ultimate decision of the trial court.

b. Whether the trial court erred in law and in fact in failing to hold that the Respondent's suit was statute-barred

20. The Appellant contended that the trial court erred in failing to hold that the Respondent's suit was statute barred under Section 4(2) of the *Limitation of Actions* (Cap.22) (LAA) which prescribed a limitation period of 3 years from the date of accrual of a cause of action based on tort. It was submitted that the Respondent's cause of action was based on trespass hence it was statute barred since the Appellant had been in occupation of the disputed portion of land for over 21 years prior to the filing of the suit. It was further submitted that even if time were to be reckoned from 2012 when the Respondent was registered as proprietor, the action would still be time-barred since it was filed in 2018.

21. The Appellant further contended that, in any event, the Respondent's suit was statute-barred under Section 7 of the LAA since it was in reality an action for recovery of land long after the expiry of 12 years from the date of the accrual of the cause of action either to the Respondent's deceased husband or the registered proprietor at the time of his occupation. It was further contended that the Respondent had acquired the suit property which was due to her late husband (the vendor) by virtue of being his wife. It was, therefore, contended that since the sale agreement of 1995 became void for lack of the consent for the Land Control Board (LCB), then the right of recovery accrued to him upon expiry of 6 months from the date of the agreement.

22. The Respondent, on the other hand, submitted that her suit was not statute barred since the Appellant's trespass was a continuous trespass hence he continued with his tortious acts on each and every single day he remained in possession. It was thus contended that the limitation period of 3 years prescribed in Section 4(2) of the LAA was not applicable. The Respondent cited the case of *Gladys Koskey v Benjamin Muati* [201] eKLR in support of her submissions.

23. The court is of the opinion that the Respondent's suit before the trial court was not simply a claim for trespass. It was in reality a claim for recovery of the suit property whose limitation period was prescribed under Section 7 of the *LAA*. The court is of the view that provisions of Section 4(2) were not applicable to the Respondent's suit regardless of how the plaint was framed. The court has to look at the nature and substance of the claim and not the manner in which it has been framed in order to determine the applicable limitation period.

24. The material on record shows that the Appellant took possession of one acre out of the suit property in 1995 pursuant to a sale agreement dated 27.04.1995 with the Respondent's late husband. The record shows the vendor was not the registered proprietor at the material time. The record further shows that the consent of the LCB for the sale transaction was not obtained within 6 months from the date of the agreement or at all. In the circumstances, the registered owner Susan Kabuthu or the vendor had a right to seek recovery of the portion of one acre from the Appellant as from 27.10.1995.

25. Section 7 of the *LAA* provides that:

> " An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

26. The court is of the opinion that the right of action to recover the portion of one acre which was in the possession of the Appellant first accrued to the registered proprietor who appears to have been Susan Kabuthu (Susan) according to the evidence tendered at the trial. The evidence on record shows that the Respondent was not the first registered owner of the suit property. She simply obtained it from her late husband's sister, Susan, in her capacity as wife of the vendor. So, if the Appellant wrongfully occupied and settled upon a portion of the suit property in 1995 or thereabouts the right of recovery first accrued to Susan. There is no evidence on record to demonstrate that Susan ever took steps to recover the land. There is also no evidence to show that the vendor who handed possession to the Appellant ever took steps to recover the land.

27. In its judgment dated 28.08.2020 the trial court suggested that the Appellant was probably a licencee of Susan between 1995 when the Appellant took possession and 2012 when the Respondent obtained title to the suit property. With due respect to the trial court, there was absolutely no evidence at the trial to support that conclusion. There is no indication that Susan ever testified at the trial to that effect. The Respondent herself did not even suggest at the trial that the Appellant was ever a licencee of Susan on the portion of one acre the subject of the suit. The court is thus of the opinion that the trial court erred in concluding that the Appellant was a licencee of Susan at any given time between 1995 and 2012.

28. The court is of the opinion that the Respondent's claim for recovery of the portion of one acre was statute-barred under Section 7 of the *LAA*. The persons to whom the right of recovery first accrued did not take legal steps to recover the same. The material on record shows that the Respondent was aware of the Appellant's occupation as far back as 1999 when she attended the burial of the vendor on the suit property. Where a person is in continuous and uninterrupted possession of land, his defence of limitation cannot be defeated merely on account of change of ownership of the land. See *Githu v Ndeete* [1984] KLR 776.

b. Whether the trial court erred in law and fact in holding that the Respondent had proved her claim to the required standard

29. It is evident from the material on record that the trial court found that the Respondent had proved her claim merely on the basis that she was the absolute registered proprietor of the suit property and that the Appellant was not a bona fide purchaser for value. The trial court was further of the opinion that it had no jurisdiction to look into the defence of adverse possession since only the superior court could consider the same. The trial court was further of the view that even if it had jurisdiction to consider the issue of adverse possession the same was not demonstrated since the Appellant was merely a licencee of Susan and he had been in occupation of the disputed portion of one acre for less than 12 years.

30. The court has already found and held that the trial court erred in law in failing to find that the Respondent's claim for recovery of the suit property was statute-barred under Section 7 of the LAA. It is evident from the material on record and the judgment that the trial court misapprehended the Appellant's defence to the action. The Appellant had simply employed the defence of limitation and adverse possession as a shield to the action. There was no counterclaim for him to be registered as proprietor on account of the doctrine of adverse possession under Section 38 of the *LAA*. A litigant

who is sued for recovery of land is at liberty to plead limitation and adverse possession as a defence only without necessarily counter-claiming for his registration as a proprietor.

31. In the case of *Gulam Mariam Noordin v Julius Charo Karisa* [2015] eKLR, it was held, inter alia, that:

> " Where a party like the Respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 rule 7 requires such a claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of *Wabala v Okumu* [1997] LLR 609 (CAK), which, like this appeal the claim for adverse possession was in the form of a defence in an action of eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in *Bayete Co. Ltd. v Kosgey* [1998] LLR 813 where the plaint made no specific plea of adverse possession, the plea was nonetheless granted."

32. As indicated before, the trial court also erred in concluding that the Appellant was a licencee on the suit party and that he had only been in adverse possession for less than 12 years by the time the Respondent filed suit. Those conclusions by the trial court were clearly against the weight of evidence on record. The court is thus of the opinion that the trial court erred in law and fact in holding that the Respondent had proved her case on a balance of probabilities whereas her claim was statute-barred under the *LAA*.

33. The court has considered the Appellant's submissions on the award of general damages of Kshs. 150,000/= for trespass. The Appellant faulted the trial court for awarding general damages for trespass when that remedy was not sought in the plaint and when the Respondent had foregone the same in her written submissions. It was submitted that the award of general damages for trespass was not one of the issues open to the court for determination hence none of the parties presented submissions thereon. The Appellant referred to the cases o*f John Mungai Murango & Another v Jeremiah Kiarie Mukoma* [2015] eKLR and *Caltex Oil (K) Ltd v Rono Limited* [2016] eKLR in support of his submissions on the award of general damages.

34. As a general principle of law a party is not entitled to a remedy which has not been sought in its pleadings, unless it is permissible in order to meet the ends of justice. See *Housing Finance Company of Kenya v J.N. Wafubwa* [2014] eKLR and the *Gulam Mariam Noordini Case* (supra). The Respondent must have recognized this general principle of law when she submitted as follows before the trial court:

> " We are alive of the fact that the plaintiff is entitled to damages for trespass but since the same was not pleaded in the plaint and sought in evidence, we shall not pursue for (sic) damages for trespass."

35. In the circumstances, the court has no hesitation in holding that the trial court erred in law in awarding the Respondent general damages for trespass when the same had not been pleaded and when the Respondent had specifically abandoned the claim. Consequently, the court shall set aside the award of special damages of Kshs. 150,000/= awarded to the Respondent.

(c) Who shall bear costs of the appeal

36. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21).

A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. In this appeal, both the Appellant and the Respondent prayed for costs of the appeal. The court finds no good reason to depart from the general rule that costs shall follow the event. Accordingly, the successful party in this appeal shall be awarded costs of the appeal.

I. Conclusion and Disposal Orders

37. The upshot of the foregoing is that the court finds merit in the Appellant's appeal. The court is satisfied that the trial court erred in law and fact in holding that the Respondent had proved her claim against the Appellant to the required standard. The court is also satisfied that the trial court erred in law in awarding the Respondent general damages for trespass to land. Consequently, the court makes the following orders for disposal of the appeal:

    a. The appeal be and is hereby allowed.

    b. The judgment and decree of the trial court dated 28.08.2020 in Nyahururu CM ELC No. 214 of 2018 is hereby set aside in its entirety.

    c. The Respondent's suit in Nyahururu CM ELC No. 214 of 2018 – Cecilia Njoki Ngunjiri v Christopher Murage Wahome is hereby dismissed with costs.

    d. The Appellant is hereby awarded costs of the appeal.

    It is so decided.

JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 29TH DAY OF JUNE, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Ms. Muigai holding brief for Ms. Ndegwa for the Appellant

N/A for the Respondent

C/A - Carol

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Y. M. ANGIMA

JUDGE