

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
MACHAKOS
ELCA CASE NO. E005 OF 2021

NZIOKA MWANIA

MASIKA MWANIA

MUSYOKA NGUI

SIMON NGUI NDAMBUKI.....APPELLANTS

VERSUS

BENSON MUTUKU

KITENYE.....RESPONDENT

JUDGMENT

Introduction

1. This appeal was filed by Nzioka Mwanja and 3 others challenging the judgment of Honourable G.O Shikwe, Principal Magistrate delivered on 28th January, 2021 in Kithimani PMCC ELC Case No. 12 of 2021. In the impugned judgment, the learned trial magistrate found that the defendants (appellants herein) had trespassed on the plaintiffs (respondent herein) parcel of land No.

Masinga/Kagonde/ 2281 and ordered permanent injunction against the respondents as well as general damages for trespass in the sum of Kshs. 80,000/=.

Background

2. The plaintiff in Kithimani PMCC ELC Case No. 12 of 2021 pleaded vide plaint dated 29th April, 2019 that he was the registered proprietor of the parcel of land known as Number 2281 within Masinga/Kangonde Adjudication Section and that the defendants had trespassed on this land, dug a well thereon and cut trees and grass thereon and were also grazing their livestock on his land.
3. In a defence dated 13th May, 2019, the defendants denied the plaintiffs claim and stated that they had been grazing, cultivating and cutting down trees and grass on their grand father's land known as Masinga/Kangonde/1272.
4. The matter was heard by way of viva voce evidence. The plaintiff presented one witness while the defendant presented two witnesses.

Plaintiff's Case

5. It was the plaintiff's evidence that he was the owner of the suit property and on 2nd January, 2019, the defendants invaded his land without his consent. In cross-examination, he stated that the search shows that the land is registered in his name although he is yet to be issued with a title deed.

Defendants' Case

6. The 1st defendant testified that his grandfather Ndambuki Nzioki Ndunda owns parcel Masinga/Kangonde/1272 where he lives, he denied trespassing on the suit property. DW2 Simon Ndambuki Ngei, a son of Ndambuki Nzioki Ndinda owner of parcel Masinga/Kangonde/1272 testified that he is one of the beneficiaries of his father's land and that he has lived thereon. In cross-examination, he stated that he does not know of plot No. 2281 and that the plaintiff was not their neighbour.

7. The court ordered for a survey to be done on the disputed properties. The surveyor prepared the report showing that the defendants barred him from accessing the suit property, forcing him to conduct aerial survey. His findings were that the two parcels of land being parcels 1272 and 2281 were demarcated in accordance with the map but that the defendant had occupied and cultivated both parcels including the plaintiffs parcel. The report also stated that the defendants had built a semi-permanent building on it.

8. Upon consideration of the pleadings, evidence and submissions, the trial court found that the plaintiff had proved his case on the required standard the same having been corroborated by the evidence of the surveyor. The trial court therefore allowed the plaintiff's claim as prayed in the plaint and awarded general damages for trespass in the sum of Kshs. 80,000/=.

9. Aggrieved with the judgment of the trial court, the appellant herein appealed against the said decision vide their Memorandum of Appeal dated 10th February, 2021 raising four grounds of appeal as follows;

- a) The trial magistrate erred in law and in fact by placing reliance on the aerial survey which is in glaringly indifferent with the actual measurements on the ground and therefore arrived at an erroneous decision.**
- b) The trial magistrate erred in law and in fact by failing to consider the defendants case in that land parcel Masinga/Kangonde/1272 being the originally adjudicated bigger parcel, how then would Masinga/Kangonde/2281 be curved out within Masinga/Kangonde/1272 without involving the registered proprietor as required under the Land Act.**
- c) The learned trial magistrate disregarded the defence by the defendants without giving reasons as required under the law.**
- d) The trial magistrate arrived at the finding that the appellants blocked the County Surveyor from carrying out survey without evidence.**

10. The appellant sought for orders that judgment of the trial court be set aside and instead judgment be entered in their favour. They also sought for costs of the appeal. The appeal was canvassed by way of written submissions.

On record are submissions filed by the appellant dated 23rd February, 2024 and the respondent's submissions dated 15th January, 2024.

Appellant's Submissions

- 11.** Counsel for the appellant submitted that the trial court was wrong in allowing the respondent's claim yet he did not produce any proof of ownership of the suit property. Counsel argued that parcel No. 2281 was inside parcel No. 1272 belonging to the appellants grandfather. Counsel argued that as the respondent did not produce a copy of title then he failed to prove ownership.

- 12.** Reliance was placed on the decision in the cases of **Sara Leitich v Joshua Rutto & 2 Others (2021) eKLR** and **Gichinya Kivutha -v Caroline Nduku(2018) eKLR** and Section 112 of the Evidence Act for the proposition that even where a suit is undefended the burden of proof rests on the plaintiff.

- 13.** Counsel referred to Sections 24, 25, and 26 of the Land Registration Act and argued that the respondent failed to prove ownership of the suit property.
- 14.** Regarding the evidence of the surveyor, counsel submitted that the aerial survey did not prove ownership of the suit property and that the trial court took the evidence of surveyor as proof of ownership. Counsel argued that survey cannot be proof of ownership. Counsel also argued that the surveyors report failed to show the acreage of parcel No. 1272 and submitted that the same was “useless report which has no probative or evidential value”. Counsel faulted the report on the basis that a title for parcel No. 2281 was not attached to the report.
- 15.** Counsel also argued that parcel No. 2281 was carved out of the existing parcel 1272. They argued that the respondent failed to show ownership of the suit property and to demonstrate how he acquired it.
- 16.** It was further contended for the appellants that the trial court failed to “properly fashion the issues before it

by ignoring the defence” and that the judgment failed to address the question of ownership of the suit property when the same had been raised by the appellant. Reliance was placed on the case of **Michael Gaiko Ngure & Another v Peter Njoroge Kinyanjui (2022) eKLR.**

Respondent’s submissions

17. Counsel for the respondent submitted that the law places the burden of proof in a case on the plaintiff. Reliance was placed on the case of **Alice Wanjiru Ruhii -vs- Messiac Assembly of Yahweh(2021) eKLR** on what constitutes the burden of proof. Counsel argued that there was no dispute that parcel 1272 and 2281 were neighbouring parcels and the dispute was where the boundary was. Counsel argued that the respondent purchased and owned the suit property as shown in the report in respect to parcels Nos. 1273, 2281 and 2385. Counsel argued that respondent gave evidence of ownership and encroachment of the suit property and the surveyors report confirmed the encroachment. Counsel argued that from the appellants pleadings they ought but

failed to prove that parcel 2281 was inside parcel 1272 and did not counter claim. Counsel contended that although the appellants pleaded on ownership of parcel No. 1272, that question was not in dispute.

18. Counsel submitted that the appellants were not the proprietors of parcel No. 1272 and that the surveyors evidence confirmed that they had trespassed on the suit property.

19. On whether the trial magistrate erred on granting the prayers sought by the respondent, counsel argued that the respondent having proved their claim they were entitled to the orders sought. Regarding the appellants argument that the trial magistrate failed to consider the defence, counsel referred to the case of **Daniel Otieno Migore v South Nyanza Sugar Co. Ltd (2018) e KLR** and submitted that parties are bound by their pleadings. They argued that the question of whether the two parcels of land originated from were neither pleaded nor proved. That the question before court was that of trespass which was proved. Counsel argued that the defence consisted of mere denials.

20. On the issue of the survey report, counsel referred to Section 65 of the Evidence Act and submitted that the appellants did not seek to cross-examine the surveyor. Counsel urged the court to dismiss the appeal.

Analysis and Determination

21. The court has carefully considered the appeal, the entire trial court record and the parties' rival submissions. The role of this court as a first appellate court is to re-assess, re-evaluate and re-analyze the evidence on record and make its own independent conclusions, bearing in mind that it had no advantage of seeing or hearing the witnesses, and make due allowance for that. This position was stated in the Cases of **Selle & Another -vs- Associated Motion Boat Co. Ltd & Others (1968) EA 123** and **Peters -v- Sunday Post (1958) EA 424**, among others.

22. The duty of the first appellate court was discussed in the case of **Gitobu Imanyara & 2 Others v. Attorney General [2016] eKLR**, where the Court of Appeal stated as follows;

“An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must consider the evidence, evaluate it itself and draw its own conclusions, although it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

23. While a first appeal is decided on facts and the law, the first appellate court is ordinarily the final court on facts and therefore on appeal, parties deserve a full, fair and independent evaluation of the evidence as anything short of that would amount to an injustice. Therefore, the role of this court being the first appellate court is to apply its mind to the entire case, re-evaluating both questions of fact and law and considering all issues arising from the case.

24. Having considered the appeal herein the only issue that arise for this court’s determination is whether the learned trial magistrate was wrong in concluding that the appellants had trespassed on the respondent’s property.

25. Section 26 of the Land Registration Act provides for conclusiveness of title as follows;

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

26. Therefore, registration vests in a proprietor absolute and indefeasible rights, unless there is evidence

that the acquisition of such title was by fraud, misrepresentation, illegality or corruption, whether or not the registered proprietor was party thereto.

27. In the instant matter, the respondent sought damages for trespass on the basis that the appellant had trespassed on his parcel of land known as Masinga /Kangode /2281. The appellant has in this appeal disputed the respondent's claim of ownership of the suit property because the respondent did not produce a title deed. Having considered the plaint and the defence filed, it is clear that the assertion by the respondent that he owned the suit property was denied in the defence and therefore by dint of the provisions of sections 107, 108 and 109 of the Evidence Act that place the burden of proof of that assertion on the plaintiff, the plaintiff bore the duty to prove that he was the registered proprietor of the suit property.

28. In proving registration, the plaintiff produced the "Minister's" decision in Appeal Case No. 214 of 2007 in respect of parcel Numbers 1273, 2281 and 2385 within Masinga/ Kangonde Adjudication Section. In the

“Minister’s” decision, the appeal by Peter Mwanja Ndambuki was dismissed and the “Minister” ordered that parcel No. 1273 to remain as registered in the name of Patrick Mbaluka Kilundo; that parcel No. 2281 to remain as registered in the name of Benson Mutuku Kitenye and that parcel No. 2385 to remain as registered in the name of Sammy Musyoki Kitonyi. The evidence of authenticity and validity of this decision which is dated 14th December 2018, was not rebutted or challenged in any way. The argument that since the respondent failed to produce a title deed he is not owner of the suit property is misplaced, as registration precedes issuance of title deeds and the fact that a registered proprietor has not asked for a title deed does not diminish his right as a registered proprietor. The appellants did not produce an adjudication register contrary to the Minister’s findings. This court takes judicial notice that adjudication is still ongoing within the larger former Eastern Province and upon conclusion of the adjudication process, titles are issued. In view of the evidence herein, I am satisfied that

the respondent proved ownership as registered proprietor of parcel No. Masinga/Kangonde/2281.

29. On the question of trespass, the appellants' argument was that the suit property was curved out of their grandfather's land parcel No. Masinga/Kangonde/1272. The appellants are not administrators of their grandfather's estate neither are they owners of parcel Masinga/Kangonde/1272, therefore the issue is whether the appellants trespassed on parcel No. Masinga/Kangonde/2281.

30. Trespass is defined in the Black's Law Dictionary 11th Edition as the wrongful entry into another's real property. The respondent having pleaded trespass, he was obligated to prove that the appellants unlawfully entered his land.

31. The trial court relied on the surveyor's report and the evidence on record in reaching a finding that the appellants had trespassed on the respondent's land. While a court is not bound by the opinion of an expert witness, it is trite that expert evidence should be tested

against known facts as the same does not trump other evidence but it must be considered in context and alongside other evidence. In the case of **Joseph Wangondu v The Arc Limited High Court Civil Appeal No 2 of 2014** the court discussed the place of expert evidence as follows;

Firstly, expert evidence does not “trump all other evidence.” It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.

Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be “artificially seperated” from the rest of the evidence. To do so is a structural failing. A court’s finding will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will

assist the court in forming its views on the expert testimony and vice versa. For example expert evidence can provide a framework for the consideration of other evidence.

Thirdly, where there is conflicting expert opinions, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.

Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones.”

32. In the instant case, the respondent testified that the appellants had cut trees and grass from his parcel of land and also dug a well thereon. The appellants confirmed that they cut trees and grass but stated that that was done on parcel No. 1272 and not on the respondent's land. The County Surveyor produced a report to address the question of trespass. His evidence shows that when the surveyor visited the locus in quo, the appellants denied him access, forcing him to take aerial survey thereof, whereof he found that the two parcels were well

demarcated but that the appellants were in occupation of the respondent's land. Even the appellant's own survey report shows that the appellants had made the respondents land as part of parcel Number 1272.

33. I have considered the evidence of the parties on record as well as the evidence of the surveyor and it is the findings of this court that the same is consistent with known facts including the fact that parcel No. 2281 exists as a separate parcel from parcel No. 1272 and the appellants have not demonstrated any inconsistencies in the county surveyor's evidence. Therefore, it is the finding of this court that the trial court was right in accepting the surveyor's evidence as part of the evidence which the court accepted.

34. The evidence on record therefore clearly demonstrate that the appellants were in trespass of the respondent's parcel of land and the trial court was right in finding as much.

35. Regarding the award of Kshs. 80, 000/= for trespass, the same was awarded upon exercise of judicial

discretion by the trial court. The appellant has not demonstrated in what manner that decision is wrong, or in what respect the trial court misdirected itself. Being guided by the decision in **Mbogo v Shah [1968] EA Page 93**, on instances where an appellate court can interfere with the exercise of judicial discretion, I find and hold that the appellant has failed to place material before this court to warrant this court's intervention in the award of damages for trespass and therefore, I find no basis for interfering with the said award.

36. In the result, I find no reason to upset the findings and judgment of the trial court. Therefore, I find and hold that this appeal lacks merit and the same is hereby dismissed with costs to the respondent.

37. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA
VIRTUALLY THIS 19TH DAY OF MARCH, 2025
THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM**

A. NYUKURI
JUDGE

In the presence of;

Mr. Oduor for the appellants

Mr. Uvyu for the respondent

Court Assistant: M. Nguyai