



REPUBLIC OF KENYA



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**Karandini v Onyango (Environment and Land Appeal E002 of 2021)
[2023] KEELC 20084 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20084 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND APPEAL E002 OF 2021
BN OLAO, J
SEPTEMBER 28, 2023**

BETWEEN

JULIUS OGUTU KARANDINI APPELLANT

AND

JAMES ONYANGO RESPONDENT

*(Being an appeal from the Judgment on HON. LUCY AMBASI (CHIEF MAGISTRATE)
delivered on 18th February 2021 in BUSIA CMC CIVIL SUIT NO. 391 OF 2016)*

JUDGMENT

1. James Onyango (the Respondent herein) moved to the subordinate Court vide his plaint dated 25th November 2016 in which he sought judgment against Julius Ogutu Karandini (the Appellant herein) in the following terms:
 - a. Kshs.104,500 being cost of damaged trees.
 - b. General damages.
 - c. Interest in (a) and (b) at Court rates since 8th September 2016 till payment in full.
 - d. Any other relief the Honourable Court deems fit to grant.
2. The basis of the Respondents claim was that sometime in September 2016, the Appellant had maliciously up-rooted and burnt his trees on his land parcel No Bukhayo/Bugengi/4364 valued at Kshs.104,500 but had refused to compensate him despite demand.
3. The Appellant filed a statement of defence and counter claim dated 28th May 2019. He denied having up-rooted or burnt any plants on the land parcel No Bukhayo/Bugengi/4364. He pleaded that it is the Respondent who had trespassed onto his land parcel No Bukhayo/Bugengi/2715 and who should therefore compensate him for the trespass.



4. In the counter-claim, he confirmed that the Respondent is the proprietor of the land parcel NO Bukhayo/Bugengi/4364 while he is the proprietor of the land parcel No Bukhayo/Bugengi/2715 which he purchased in 1983 from one Desta Akuku Obara. He added that it was the Respondent who had trespassed and planted trees on his land particulars of which he pleaded in paragraph 6(a) to 6(c) of his counter-claim. He therefore sought judgment against the Respondent in the following terms:
 - a. Damages for trespass.
 - b. Costs of the suit.
 - c. Any such further relief that this Honourable Court may deem fit to grant.
5. The Respondent filed a reply to the defence and defence to the counter-claim. He pleaded, inter alia, that the counter-claim is defective and should be struck out or dismissed with costs.
6. The parties filed their respective statements and documents which they relied upon during the plenary hearings.
7. The dispute was heard by Hon Lucy Ambasi Chief Magistrate on 1st December 2020 and the parties were the only witnesses who testified in support of the respective cases.
8. In a judgment delivered on 18th February 2021, the trial magistrate found in favour of the Respondent and entered judgment in his favour in the following terms:
 - “ 1. Kshs.104,500.
 2. Costs of the suit.
 3. Interest at Court rates from the date of this judgment.”

No mention was made of the Appellant’s counter-claim.

9. Aggrieved by that judgment, the Appellant filed this appeal on 16th March 2021 seeking to set it aside. The following four (4) grounds of appeal were proffered:
 1. The learned trial magistrate erred in law and in fact when she ignored the Appellant’s counter-claim dated 28th May 2019 and reached an erroneous decision.
 2. The learned trial magistrate erred in law and in fact by entering judgment in favour of the Respondent (the memorandum of appeal wrongly states that judgment was entered in favour of the Appellant) whereas the surveyor’s report indicated that the Respondent was in trespass on the Appellant’s land parcel No Bukhayo/Bugengi/2715 and ordered the Appellant to pay Kshs.104,500 and costs to the Respondent.
 3. The learned trial magistrate erred in law and in fact when she found that the Respondent has proved this case on balance of probabilities and disregarding the Appellant’s evidence and submissions that in fact it is the Respondent who had trespassed on the Appellant’s land.
 4. The learned trial magistrate erred in law and in fact when she entered judgment in favour of the Respondent whereas his evidence was not clear and shrouded in ambiguity and the Respondent had therefore not proved his case on a balance of probabilities as expected of him.
10. The appeal was canvassed by way of written submissions. These were filed both by Mr Nyegenye instructed by the firm of Calistus Nyegenye & Company Advocates for the Appellant and by Mr Omeri instructed by the firm of Omeri & Associates Advocates for the Respondent.



11. I have considered the appeal, the record and the submission by counsel.
12. This is a first appeal and the duty of this Court, as a first appellate Court, was well captured in the case of *Abok James Odera T/a John Patrick Machira T/a Machira & Co. Advocates 2013 eKLR*. Therein the Court of Appeal said the following with regard to the duty of a first appellate Court:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not, and give reasons.”

The same duty was set out in *Peters -v- Sunday Post Ltd 1958 E.A 424* by the then East Africa Court of Appeal. It said:

“Whilst an appellate Court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate Court will not hesitate to so decide.”

13. I must therefore reconsider and evaluate the evidence which was before the trial Court and draw my own conclusions though bearing in mind that I neither saw nor heard the witnesses testify. This Court is however not bound by the findings of the trial magistrate if it is clear that she failed to take into account particular circumstances relevant to the case. See also *Selle & Another -v- Associated Motor Boat Co. Ltd & Others 1968 E.A 123*. In a first appeal, the appellate Court re-opens the case for hearing on both questions of fact and law.
14. Keeping in mind the foregoing, I consider the following issues to be germane in determining this appeal:
 1. Whether the Respondent proved that the Appellant had maliciously up-rooted and burnt his trees on land parcel No Bukhayo/Bugengi/436 and was entitled to damages of Kshs.104,500.
 2. Whether in fact it was the Appellant who was entitled to damages for the trespass on his land parcel No Bukhayo/Bugengi/2715.
 3. Whether the trial Court considered the Appellant’s counter-claim.
15. The Respondent’s case as contained in his affidavit dated 26th March 2018 and which he adopted as his evidence during the trial was that sometime in September 2010, the Appellant maliciously destroyed his 2,090 Eucalyptus trees valued Kshs.104,500 on his land parcel No Bukhayo/Bugengi/4364. It was not in dispute that the Respondent is the registered proprietor of the land parcel No Bukhayo/Bugengi/4364. In support of his case, the Respondent filed a valuation report from the Kenya Forest Service dated 16th September 2016 confirming that trees valued at Kshs.104,500 had been destroyed on the land parcel No Bukhayo/Bugengi/4364. He also produced a copy of the title deed for the said parcel of land and a letter from his Chief dated 8th September 2016 requesting the District Forester Busia to assess the value of the damaged trees.



16. The Respondent was however required to go further and prove that it was the Appellant who had trespassed on to his land and damaged the trees. By dint of Sections 107, 108 and 109 of the Evidence Act, the burden of such proof lay on him. Those provisions read:

“ 107

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

A trespass is defined in Black’s Law Dictionary 10th Edition as:

“ An unlawful act committed against the person or property of another; esp. wrongful entry on another’s real property.”

17. The record shows that on 18th July 2016 the parties were summoned by the Land Registrar Busia for a hearing on a boundary dispute. In his report dated 27th July 2016, the said Land Registrar Mr Tom M. Chepkwesi made the following finding:

“ It is established that there is encroachment on part of the complainant land starting from the upper middle area and going onto the lowest swampy area as indicated in the surveyor’s report.”

The complainant in those proceedings was the Respondent herein who was represented by Gladys Ochieng. She is the one who had purchased the land parcel No Bukhayo/Bugengi/2715 but had it registered in the name of her brother the Respondent herein as is clear from the opening remarks in the said Land Registrar’s report.

18. The dispute had also been handled by the County Surveyor Busia Mr Geoffrey Kamadi. In his report dated 17th September 2020, he made the following finding:

“ The owner of P/NoBukhayo/Bugengi/4363 was cultivating part of 2715.”

When he was cross-examined by Mr Ouma counsel for the Respondent on 1st December 2020 on the said reports, he said:

“ My land is Matayos(sic) BUGENGI/4364. Defendant’s is 2715. He trespassed in 1916 (sic). I can’t remember when the Land Registrar came to survey with the County Surveyor. I saw the report. I do not agree with the report. The report states the land is on the defendant’s land 2715. That is not true. That is all.”



And when he was re-examined by his counsel Mr Ashioya, he said:

“I was not satisfied with the Land Surveyor’s report. I have appealed for them to return to the land today 1/12/2020 but it was the hearing date.”

19. Those two reports were evidence of expert witnesses. It was not enough for the Respondent to simply trash them by saying that he did not agree with them. The probative value of those reports could only be impugned by other expert evidence or if the Court found that there was other cogent evidence to cast doubt on the veracity of such expert evidence. The Land Registrar and Surveyor were of course not called as witnesses by either of the parties. However, the two reports were produced with no objection. While it is trite law that the Court is not bound by an expert’s evidence, it is upto the Court to decide whether or not to reject it – Shah -v- Shah 2003 1 E.A 290 and also Kimani -v- R. 2000 2 E.A 417. Each case must however be determined on the basis of it’s own peculiar circumstances. In the circumstances of this case, I see no reason to doubt the veracity of the two reports which show that it was the Respondent who had trespassed onto the Appellant’s land parcel No Bukhayo/Bugengi/2715.
20. Counsel for the Respondent has made the following submission on that issue at paragraph 5:

“It is our humble submission that the learned trial magistrate correctly applied the evidence before her and arrived at the correct finding in terms of liability on the part of the Appellant. It was PW’s evidence both in examination – in chief and in cross-examination that the Appellant maliciously burnt and destroyed his treed planted on his land parcel No Bukhayo/Bugengi/4364. This is at page 13 of the Record of Appeal where he produced the Chief’s letter which proved the fact of involvement of the Appellant in crop/tree destruction.”

21. I have looked at the said letter contained in page 13 of the record of appeal. It is a letter dated 8th September 2016 and addressed to the District Forester Busia from the Chief Busia West Location. It is a brief letter and so I will reproduce it in extenso:

“The District Forester Busia District

Re: Crop Damages

The owner of L.R Bukhayo/Bugengi/4364 registered in the names of James Onyango Manyuru complained of a person known to him having illegally cut and destroyed his trees without his consent.

Kindly make value of damage for necessary action.

Thank you.”

As is clear from that letter the Respondent never named the Appellant in his complaint to the chief.

22. It is clear from the evidence of the Appellant as corroborated by the reports that it was the owner of the land parcel No Bukhayo/Bugengi/4364, and who is the Respondent in this case, who had in fact trespassed into the Appellant’s parcel of land No Bukhayo/Bugengi/2715.
23. The trial magistrate clearly erred both in fact and in law when she made a finding that the Respondent had proved his case.
24. As to whether it was the Appellant who was entitled to damages for trespass, it is again very clear both from the Appellant’s own testimony and the reports of the Land Registrar and County Surveyor



that in fact it was the owner of the land parcel No Bukhayo/Bugengi/4364 (the Respondent) who was cultivating on the land parcel No Bukhayo/Bugengi/2715 belonging to the Appellant. In trying to discredit the Appellant's testimony, the trial magistrate stated as follows in paragraphs 13 and 14 of her Judgment:

- " 13: The defence relied on the Surveyor's report 7/9/2020 which concluded that the owner of Bukhayo/Bugengi/4364 was cultivating on part of 2715 owned by the Defendant and also on the attached boundary map.
- 14: Whereas this is important evidence, I have two reservations on the same. The first is that the defence never alluded to there being a land dispute which was resolved by way of County Surveyor Report. It is trite law that a party is bound by its pleadings. Secondly, even if the plaintiff had encroached on the Defendant's land as alleged, the remedy was not to burn the plaintiff's crop, but to follow due process."

It is difficult to comprehend those two paragraphs because when the Appellant testified on 1st December 2020, he is recorded as having said:

"I am Julius Ogutu Karandini from Busia. A farmer. I know the plaintiff. He is a neighbour. We have a boundary dispute. We reported to lands and it was resolved. He cannot again be demanding. I rely on my witness statement of 20/10/2017 as my evidence. I rely on my list of documents for defence of 26 documents of 31/10/2017 and wish them marked as exhibits. The Land Registrar came with Surveyor and made a report. It is in my further list of documents."

Clearly therefore, the Appellant alluded to the dispute and proceeded to produce the report of the Land Registrar and County Surveyor. What was important to plead in his counter-claim and which he did in paragraphs 4, 5 and 6 as follows:

- " 4. The defendant aver that he is not aware of who up-rooted or destroyed trees on land parcel Bukhayo/Bugengi/4363 (sic). He further aver on how the plaintiff went ahead and planted trees on land parcel Bukhayo/Bugengi/2715 without his knowledge.
5. The defendant avers that the plaintiff trespassed into his land parcel number Bukhayo/Bugengi/2715.
6. The defendant avers that the plaintiff trespassed his land."

The Appellant then went ahead to plead the particulars of trespass in paragraph 6(a) to (c) of his counter-claim.

25. It is true as the trial magistrate stated, that a party is bound by his pleadings. And that is what the Appellant exactly did in the above paragraphs. His counter-claim was founded on trespass. He did not have to plead the existence of the reports by the Land Registrar and County Surveyor which supported his case because those reports were his evidence. Evidence by which a fact will be proved does not need to be pleaded in the plaint or counter-claim. The Respondent clearly pleaded trespass in his counter-claim and from the evidence, he was able to prove his case. He was entitled to general damages.
26. The trial magistrate also erred in law and fact by failing to consider the Appellant's counter-claim. I have already set out above the Appellant's counter-claim and both counsel have confirmed that the



Appellant indeed had a counter-claim. In his submissions, however, counsel for the Respondent refers to the counter-claim as “an afterthought.” Once the Appellant was granted leave to amend his defence, he was at liberty to include a counter-claim.

27. However, the trial magistrate did not even make a fleeting reference to the counter-claim both in the body of the impugned judgment or the final disposal orders. If she was minded to dismiss the Appellant’s counter-claim, she ought to have said so. Order 21 Rule 4 of the Civil Procedure Rules provides that:

“ 4: Judgment in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision.”

28. A judgment must therefore determine all the issues raised by the parties. In paragraph 1 of the impugned judgment, the trial magistrate fully captured the Respondent’s claim and the remedies sought. In paragraph 2, the trial Court only stated as follows with regard to the Appellant’s case:

“ 2: The Defendant in his statement of defence denied all the allegations in the plaint but conceded the jurisdiction of this Court.”

And finally in paragraph 17, the following order was made:

“ 17: Disposition

Consequently, in light of the pleadings, document and submissions filed in this matter, together with the evidence on record, I hereby enter judgment for the plaintiff for:

- a. Kshs.104,5000.
- b. Costs of this suit.
- c. Interest at Court rates from the date of this Judgment.”

29. It is obvious therefore that the trial magistrate did not address the Appellant’s counter-claim nor make any findings on the same. In that regard, the trial magistrate erred both in law and fact. That ground of appeal is also well merited.

30. It is clear from the above that this appeal is meritorious and must be allowed.

31. Section 78(1) (2) of the [Civil Procedure Act](#) empowers this Court “to determine a case finally.” That includes assessing the general damages which the Appellant ought to have been awarded. This is because, under Section 78(2) of the [Civil Procedure Act](#) it is provided that:

“Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

32. Doing the best I can in the circumstances, and also bearing in mind that damages for trespass to land are at large and a party need not prove any actual loss since the same is actionable per se, I assess the general damages at Kshs.100,000.

33. Ultimately therefore and having considered this appeal, I allow it and make the following orders in disposition thereof:



1. The appeal is allowed and the judgment of the trial Court allowing the Respondent's claim is set aside.
2. There shall be a Judgment allowing the Appellant's counter-claim as follows:
 - a. The Appellant is awarded the sum of Kshs.100,000 being general damages for the trespass on his land parcel NoBukhayo/Bugengi/2715 by the Respondent.
 - b. The Respondent shall meet the Appellant's costs both here and in the Court below.

Judgment dated, signed and delivered on this 28th day of September by way of electronic mail.

Right of Appeal.

BOAZ N. OLAO

JUDGE

28TH SEPTEMBER 2023

Explanatory notes;

This Judgment was due on 27th July 2023 but I had travelled out of town for the ELC conference. The delay is regretted.

BOAZ N. OLAO

JUDGE

28TH SEPTEMBER 2023

