Muturi v Njoroge (Environment and Land Appeal E019 of 2021)
[2023] KEELC 21390 (KLR) (31 October 2023) (Judgment)

Neutral citation: [2023] KEELC 21390 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND APPEAL E019 OF 2021

A OMBWAYO, J

OCTOBER 31, 2023

BETWEEN

JOSEPHAT MWAURA MUTURI ..... APPELLANT

AND

NANCY WANJIKU NJOROGE ..... RESPONDENT

(Being an appeal from the Judgment/Decree of Hon. B. Limo Senior Resident Magistrate delivered on 27th August, 2021 in NAKURU C.M ELC CASE NO. 162 OF 2020)

JUDGMENT

1. This is an appeal arising from the judgment of Honourable Benjamin Limo Senor Resident Magistrate, Nakuru delivered on 27th August, 2021 in Nakuru CMC ELC No. 162 of 2020.
2. The Appellant filed a Memorandum of Appeal dated 14th September, 2021 appealing against the said judgment on the following grounds: -
    1. Thatthe trial court erred in law in not finding that the Respondent had not proved existence of the allegations pleaded as the law requires in section 107 and 109 of the *Evidence Act*.
    2. That the trial court erred in law and fact in finding that the Respondent had established a case on a balance of probability.
    3. That the trial judge erred in law in finding that the Respondent's evidence was not challenged.
    4. That the trial court erred in law and fact in making a finding on a non- existent pleading specifically finding that the Appellant's defence lacked merit and dismissing the same whereas there was no defence on record filed.
    5. That the trial court erred in law in taking into consideration extraneous and/or irrelevant matter specifically, on the issue of ownership of the suit land.

6. That the trial court erred in law in entering judgment against the Appellant and not making any finding against the 2nd Defendant.

3. The Appellant seeks orders allowing the appeal, setting aside the judgment and an order entering judgment for the Appellant by finding that the Respondent did not establish a case against him.

Brief Facts

4. The Respondent filed a suit against the Appellant *vide* a plaint dated 15th September, 2020 seeking a permanent injunction against the Appellant from the Respondent's land Gilgil/Karunga Block 9/1074 and costs of the suit.

5. The Respondent's case was that she is the registered proprietor of Gilgil/Karunga Block9/1074 the suit property herein. That the Appellant on diverse dates trespassed onto her property and fell all the trees and vegetation thereby denying the Respondent to enjoy her exclusive use of the same. She had sought for a permanent injunction restraining the Appellant from dealing with or interfering with the suit property.

6. The Appellant entered appearance but did not file any statement of defence.

7. At the hearing, the Respondent testified and closed her case. The Appellant did not testify or call any witness but his advocate cross examined the Respondent's witness and closed his case.

8. The trial magistrate found that the suit property belonged to the Respondent and that the Appellant did not adduce any evidence to prove existence of the alleged facts. The trial magistrate held that the Respondent proved her case on a balance of probabilities and proceeded to enter judgment in her favour.

9. The Appellant being dissatisfied with the judgment lodged the instant appeal before this court.

10. This court on 26th September, 2023 directed that the appeal be canvassed by way of written submissions.

Submissions

11. Parties did not file their submissions to the appeal.

Analysis and Determination

12. Upon consideration of the materials presented in respect to the Appeal herein including the Memorandum of Appeal and Record of Appeal, the following issues for determination:

    1. Whether the Appeal is merited

    2. Who should bear the cost of the appeal.

13. Being a first appeal, the court relies on a number of principles as set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

> ...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 this 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 ..."

14. Further as was held in the case of *Mwangi v Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence.

15. In the Plaint which culminated in the impugned judgement, the Respondent/Plaintiff sought for the following orders:

    a. A permanent order of injunction restraining the Defendants by themselves, their agents, their servants, and/or employees from dealing with or interfering with the Plaintiff's quiet and exclusive use of and registration of land parcel No.Gilgil/Karunga Block9/1074 measuring 0.2770 Hectares or in any manner howsoever dealing with or interfering with this land at all.

    b. Costs of this suit be borne by the Defendants.

16. The Appellant/1st Defendant entered appearance but did not file any Statement of Defence. The 2nd Defendant on the other hand never participated in the case despite having been served with the summons.

17. At the hearing the Appellant's advocate participated by only cross examining the Respondent. The trial magistrate found that the Appellant never tendered any evidence to counter that adduced by the Respondent. From a perusal of the proceedings as well as the pleadings, it is a fact that the Respondent adduced evidence in form of at title deed as well as the official search to the suit property. The same was never challenged by the Appellant during cross examination. It is noteworthy that during cross examination, the Respondent admitted that the Appellant never laid a claim on her suit land. However, from the Plaint, the issue was not ownership but trespass.

18. In a nutshell, the evidence adduced by the plaintiff was not controverted at all. The path of uncontroverted evidence has been trodden by many superior court judges and I do follow the same. In the case of *Motex Knitwear Limited v Gopitex Knitwear Mills Limited* Nairobi (Milimani) HCCC No.834 of 2002, Lesiit, J. citing the case of *Autar Singh Bahra and another v Raju Govindji*, HCCC No.548 of 1998 appreciated that:-

    'Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.'"

19. Similarly, the Court of Appeal in the case *Edward Marigathrough Stanley Mobisa Mariga v Nathaniel David Shulter & another*[1979] eKLR said:-

    The respondents filed a defence in which they denied the appellant's claim and averred that the accident was caused by the appellant's own negligence in that he suddenly ran across the road and in the process was hit by the motor vehicle. The respondents did not give evidence and so the only explanation as to how the accident happened was the version put forward by the appellant and his brother."

20. This is made further clear in the case *CMC Aviation Ltd v Crusair Ltd* (no.1) (1987) KLR 103 as follows:-

> The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents."(Emphasis mine)

21. Lord Nichol of the House of Lords in the case *RE H And others (minors) (sexual Abuse: Standard of Proof)* (1969) stated the Civil standard of proof to be:-

> The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probability the court will have in mind as factors, to whatever extent is appropriate in the particular case, that the more serious allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."

22. In the case *Miller v Minister of Pension*(1947) ALL ER 373 the civil standard of proof was also said to be:-

> That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a Criminal Case. If the evidence is such that the tribunal can say; 'we think it more probable than not', the burden is discharged, but if the probabilities are equal, it is not. Thus, proof on a balance of probabilities means a win, however narrow; a draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

23. The appellant did not file any Statement of Defence so as to raise any triable issues. I am of the view that this did not show good faith and seriousness on the part of the Appellant yet he had the opportunity to file the same. I find that it was incumbent upon the Appellant to prove that he had not trespassed onto the Respondent's land which he blatantly failed.

24. I therefore find that the trial magistrate was right in holding that the Respondent had proved her case on a balance of probabilities. Consequently, grounds (1), (2), (3), (5) and (6) of the Appellant's grounds of appeal fail in totality.

25. On ground (4) of the memorandum of appeal, this court agrees with the Appellant that the trial magistrate erred in making a finding on a non-existent pleading in this case the Appellant's defence which was never on record. The trial court in his judgment under paragraph 8 held as follows:

> ...I find the Plaintiff to have proved her case on a balance of probabilities. And having evaluated the defence before me I find the same to lack merit and substance and the same is accordingly dismissed..."

26. It is not in dispute that the Appellant did not file any statement of defence. I am of the view that the trial magistrate indeed erred by finding that the Appellant's defence lacked merit yet it is crystal clear that that there was no statement of defence on record. I find that the said ground succeeds. However,

this one ground having succeeded has a minimal effect to alter the earlier finding of this court which tilts in finding that the appeal in general lacks merit.

27. In the upshot, the appeal lacks merit and the same is hereby dismissed with costs to the Respondent. It is so ordered.

JUDGMENT DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 31ST DAY OF OCTOBER, 2023.

A. O. OMBWAYO

JUDGE