



REPUBLIC OF KENYA



KENYA LAW
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**Owiny v Osumba (Environment and Land Appeal E034 of 2022)
[2023] KEELC 21231 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21231 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E034 OF 2022
AY KOROSS, J
OCTOBER 19, 2023**

BETWEEN

THOMAS OKONGO OWINY APPELLANT

AND

JOHN OJALA OSUMBA RESPONDENT

*(Being an appeal from the judgment of PM Magistrate Hon. J. P.
Nandi given on 2/09/2022 in Bondo PM ELC Case No. E17 of 2022)*

JUDGMENT

Background

1. In the trial court, the appellant was the plaintiff and the respondent the defendant. They are distant relatives and appear to live on adjacent parcels of land. The parcel of land at the heart of dispute is land no. Siaya/Nyagoko/1383 ('suit property') that is registered in the name of the appellant but occupied by the respondent and his family.
2. In his plaint dated 02/03/2021, the appellant sued the respondent for trespass to the suit property. He contended the respondent had without his permission and authority entered and occupied the suit property and caused loss and damage to him. He contended there had been no suits between the parties and sought orders of permanent injunction, eviction and costs.
3. The respondent filed a defence and counterclaim dated 22/04/2021. He contended he and his family had been in long occupation of the suit property from 1971 having been given permission by the 1st registered owner who was his uncle. Further, the parties' predecessors in title had been feuding over the suit property for decades resting with orders for certiorari and *mandamus* restraining the transfer of the suit property to any party.



4. The appellant testified alone while the respondent called 9 witnesses; they included himself, family members, a land registrar, a surveyor and area chief. After hearing the parties, the trial court in its judgment framed 3 issues for determination; who the registered owner of the suit property was, whether the respondent was a trespasser and whether the respondent's counterclaim complied with Order 7 Rule 8 of the *Civil Procedures*.
5. On the 1st issue, the trial court found the appellant was the registered owner. On the 2nd issue, the trial court found the respondent and his family were not mere trespassers and the appellant was guilty of material non disclosure and dismissed the appellant's claim. As for the 3rd issue, the trial court found the counterclaim was fatally defective, bad in law and struck it out. On the issue of costs, each party was ordered to bear their respective costs.
6. Both parties were aggrieved by the decision of the trial court. The appellant on the trial court's determination on the 2nd issue and the respondent on the 3rd issue.
7. However, before I deal with the appellant's grounds of appeal, I will apply my mind on the leave that was granted to the respondent for him to file a file a cross appeal.
8. On 30/05/2023, this court granted leave to the respondent to file his cross with directions that he was to file it within 2 days thereof, serve it upon the appellant within two days of filing and for the cross appeal to be disposed of by written submissions.
9. The respondent merely served his submissions on the cross appeal. Having failed to comply with court's directions, there is no cross appeal capable for determination. His submissions on the cross-appeal will therefore be disregarded.
10. The appellant through Messrs. Okello Adipo & Co. Advocates came to this court by way of an appeal. In his 2-point memorandum of appeal, the appellant faulted the judgment of the trial court on the following grounds: -
 - a. The learned trial magistrate erred in law and fact in failing to consider the evidence before him as a whole.
 - b. The learned trial magistrate's decision was not supported in law and facts.
11. The appellant prayed for the appeal to be allowed with costs to him. The parties' counsels agreed to dispose of the appeal by written submissions. The appellant's counsel filed his written submissions dated 3/03/2023 while the respondent who was represented by the firm of Messrs. Wakiaga Semekia & Co. Advocates filed his on 19/04/2023.

Appellant's submissions

12. The appellant's counsel consolidated his grounds of appeal into one issue for determination; whether the grounds of appeal were justified. In reiterating the respective parties' claim and defence before the trial court together with their respective evidence, counsel submitted Section 23 (1) (a) and (b) of the *Land Registration Act* recognised sanctity of title and in the absence of challenge, title could not be defeated.
13. It was counsel's submissions that the respondent's evidence before the trial court was unsupported while the appellant's was supported by documentary evidence.



Respondent's Submissions

14. The respondent's counsel identified 4 issues for determination. The 1st two were on the grounds of the appeal while the other were on whether the appellant's prayers should be granted and costs.
15. On the 1st ground of appeal, counsel submitted the trial court properly considered the evidence placed before it. Counsel submitted that from the evidence adduced, the appellant was guilty of material non-disclosure.
16. On the 2nd ground of appeal, counsel submitted on 3 sub issues; trespass, adverse possession and customary trust. On the last two sub issues, this court has taken note they were not the subject for adjudication before the trial court and will not belabour much in enunciating them and later in this judgment, will apply its mind on whether new evidence can be raised on appeal without leave.
17. On the sub issue of trespass, counsel submitted its definition was laid out in Section 3(1) of the *Trespass Act* and on application of this definition, it had emerged the appellant had never occupied the suit property but rather pursuant to the provisions of Section 26 (1) of the *Land Registration Act*, the appellant was a fraudster. Counsel fortified his position by relying on the Court of Appeal decision of *Municipal Council of Eldoret v Titus Gatitu Njau* [2020] eKLR where the court stated: -

" In *M'Mukanya v M'Mbijiwe* [1984] KLR 761, the ingredients of the tort of trespass were revisited by this Court and restated as follows:

" trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership (See *Thomson v Ward*, [1953] 2QB 153."
18. On the 3rd and 4th issues, counsel submitted the appellant having failed to prove his claim of trespass to the required standard, was not entitled to the grant of the order for temporary injunction. To buttress his position, counsel relied on the case of *Nguruman Limited vs. Jan Blonde Nielsen & 2 others* [2014] eKLR).
19. On 4th issue of costs, counsel submitted the trial court erred in ordering each party to bear their respective costs and should substitute it with an order awarding costs of the trial court suit and of the appeal to the respondent. Counsel cited Section 27 of the *Civil Procedure Act*.

Analysis and Determination

20. As this is a 1st appeal, it is my duty to analyse and reassess the evidence on record and reach my own conclusions in the matter but giving allowance I did not hear the parties. See *Selle v Associated Motor Boat Co.* [1968] EA 123.
21. I have carefully perused the record including the lower court pleadings and impugned judgment. I have also carefully considered the grounds of appeal and the parties' respective rival submissions and considered applicable provisions of law, case law and common law principles as enunciated by courts.
22. In my considered view, the crux of the issue for determination was whether the trial court erred in law and fact in failing to find the respondent was a trespasser.
23. As stated earlier in this judgment and before I delve into the issue for determination, the respondent's counsel in his submission's went on a frolic of his own and introduced issues that were not in the



appellant's grounds of appeal or issues that were not the subject for determination before the trial court.

24. The respondent was bound by the grounds of appeal postulated by the appellant and no more. If at all he was disgruntled by the trial court's judgment, he should have exercised his right by filing his cross appeal which as earlier mentioned, he failed to so do.
25. As to the issue of adverse possession and customary trust, notwithstanding his counterclaim was struck out on technicality meaning his counterclaim was not determined on merits, he never pleaded he was as an adverse possessor or that the appellant held the suit property in customary trust for him.
26. Bearing the trial court struck out the counterclaim and taking into consideration these issues were never pleaded, canvassed, raised or succinctly made an issue before the trial to enable it exercise its mind upon them and leave to introduce new evidence having been not being sought and allowed, these lines of arguments will be disregarded. I place reliance on the Court of Appeal decision of *Kenya Hotels Ltd vs. Oriental Commercial Bank Ltd (Formerly known as The Delphis Bank Limited)* [2019] eKLR which stated: -

“As this Court in *Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others Ex-Parte Tom Mbaluto* [2018] eKLR emphasised, submissions must be founded on the issues before the court and the evidence on record regarding the issue. A party is not at liberty to change the nature of his case surreptitiously at the submissions stage. I may add that the philosophy behind the appellate system, which save in exceptional cases, restricts the appellate court to consider only those issues that were canvassed before (and perhaps determined) by the trial court. See *North Staffordshire Railway Co. v Edge* [1920] AC 254). Of course if a matter is raised at the trial and the trial court does not determine it, it may be made the subject of an appeal.”

27. Now turning back to the issue for determination, this court has been called to disturb the finding of the trial court on trespass and whether in so arriving at its finding, the trial court acted on some wrong principles of law or misconstrued the evidence adduced.
28. I have looked up Section 23 (1) (a) and (b) of the *Land Registration Act* that was relied upon by the appellant and no doubt, counsel relied on the wrong provision of law since a scrutiny of this Section illustrates it deals with reparation of land. Probably, counsel meant Sections 24, 25 and 26 of the said *Act*. Be that as it may, the issue for determination before the trial court was trespass which has been defined by Section 152A of the *Land Act* 2016 as: -

" A person shall not unlawfully occupy Private, Community or Public Land"

While Section 3 (1) of the *Trespass Act* defines it as: -

" any person who without unreasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on private land without the consent of the occupier thereof shall be guilty of an offence."



29. The case of *John K Koech v Peter Chepkwony* [2019] eKLR cited with approval Clerk & Lindsell on Torts 18th Edition at paragraph 18-01 which defined trespass as follows:-
- " Any unjustifiable intrusion by one person upon land in possession of another"...Trespass is actionable at the instance of the person in possession and that proof of ownership is *prima facie* proof of possession."
30. The trial court held that by virtue of Section 107 of the *Evidence Act*, it was trite law he who alleges must prove. In arriving at its determination, it stated as follows: -
- “...the defendant has demonstrated that he has a genuine interest in the suit property and the defendant are not mere trespassers as claimed by the plaintiff...they have a right over the same by virtue of occupation.The plaintiff is guilty of material non-disclosure. The plaintiff presented the defendant as a complete stranger. The plaintiff also concealed the fact when the defendant entered, occupied and started cultivating the suit property before he became the registered owner...”
31. From the evidence adduced before the trial court, that was undeniably the position. I do not fault the trial court in its analysis. Material particulars of the case were concealed by the appellant. He was silent on facts *inter alia*; that he was a neighbour and relative of the respondent, the respondent’s family had at one time been registered as the proprietor of the suit property and there had been disputes between the predecessors in title.
32. It was uncontroverted the respondent and his family including his father Evan Osumba (Osumba) were given permission to enter and occupy the suit property by the 1st registered owner Odawa Langu (Odala). Osumba and Odawa were brothers.
33. From the evidence adduced, the appellant’s father who was Martin Owiny Dacha (Martin), became the 2nd registered owner. He had long feuded with Odawa before the African court in Bondo and in Bondo District Magistrate Court in Land Case No. 11 of 1961. The outcomes of these decisions were not tendered before the trial court.
34. During registration of customary land under the *Land Adjudication Act*, Odawa and Martin continued disputing each other’s title over the suit property. It was apparent appellate mechanisms enounced in the said *Act* were followed resting with Appeal No. 381 of 1985 before District Commissioner- Siaya who acted in his delegated authority as Minister. In this decision, judgment was entered for Martin.
35. In an application by Odawa for leave to apply for judicial review orders of certiorari and mandamus in Nairobi HC. Misc. Appli. No. 396 of 1986, O’connor J granted him leave and issued orders staying execution of the minister’s decision.
36. It gets muddy after that, Martin was registered as the proprietor of the suit property on 5/10/1987 after the Minister’s decision was implemented by the Chief Land Registrar who lifted the restriction that had earlier been issued. Martin then transferred the suit property to the appellant on 5/10/1987 who for 34 years was silent on the respondent’s occupancy.
37. Certain pertinent questions that arise are *inter alia*; was registration of Martin done in contravention of the stay order? Was the substantive judicial review filed and determined? What was the outcome? Was Martin properly registered as the proprietor?
38. The order that was produced by the respondent staying the Minister’s decision was not refuted by appellant. These gray and obscure areas especially on the order staying the Minister’s decision gives



the respondent who derived permission from Odawa some semblance of right to occupation. Some of the defences to a claim of trespass include customary, common law and statutory rights to enter land, *volenti non fit injuria*, necessity and licenses.

39. In light of the court order by O'Connor J which no evidence was produced to show it was ever set aside or that the substantive application was disposed of either way, I agree with the trial court the respondent had some semblance of a right to occupation and had a genuine interest in the suit property. There cannot therefore be trespass where a person is in occupation by a Court Order.
40. At the end of it all, I conclude and find this appeal lacks merit. It is dismissed with costs to the respondent.

DELIVERED AND DATED AT SIAYA THIS 19TH DAY OF OCTOBER 2023.

HON. A. Y. KOROSS

JUDGE

Judgment delivered virtually through Microsoft Teams Video

Conferencing platform in the presence of:

N/A for the Appellant

Mr. Wakiaga for the Cross Appellant/Respondent

Court assistant: Ishmael Orwa

