



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
ELC APPEAL NO. 35 OF 2014
(FORMERLY CIVIL APPEAL 150 OF 2012)

JOSEPH NDUNGU.....PLAINTIFF

-VERSUS-

RUTH ANYANGU.....DEFENDANT

(Being an appeal from the decision of the SRM in Mombasa CMCC No 2019 of 2002 delivered on 7th August 2012)

JUDGEMENT

1. This is an appeal from the judgement of the learned Senior Resident Magistrate Hon. Ole Tanchu made in Mombasa CMCCC No 2019 of 2002. The appeal was filed by the defendant who not being satisfied with the whole of that judgement raised 7 grounds in his appeal. The grounds are as follows ;

- 1) That the Learned Magistrate totally erred in law in giving judgement to the plaintiff on prayers that were not asked for nor evidence produced in support thereof.**
- 2) That the Learned Magistrate erred in law and in fact in arriving at a decision that was not supported by evidence.**
- 3) That the Learned Magistrate misdirected himself on the nature of the plaintiff's case and therefore arrived at a wrong decision.**
- 4) That the Learned Magistrate was totally wrong in his evaluation of the evidence, in particular the standard of proof in respect of the plaintiff's case, as such arrived at a wrong decision.**
- 5) That the Learned Magistrate was totally wrong to order for a survey when neither the plaintiff nor the defendant had applied for it, nor was it proper to order a survey after the evidence had been tendered and case closed, hence he totally fell into error.**
- 6) That the entire judgement was wrong and was delivered against the weight of evidence, hence the Magistrate fell into error.**

7) That the Learned Magistrate in failing to find for the plaintiff in any of her prayers and granting prayers that were not prayed for, totally fell into error, and the entire judgement should be set aside.

2. Brief summary of the facts of this case is that both the Appellant and the Respondent each purchased a plot from the mother title No 281/Section 1/M. N Freetown Ziwa la Ngombe. The Appellant purchased his plot from Ali Shambi measuring 50 x 80 at Kshs 120,000= . He built four (4) rooms and the other rooms were still at foundation level.

3. The Appellant produced receipts confirming payment of the purchase price, approved plans for the house and receipt for payment of ground rents. According to him, the Respondent (plaintiff) ought to have sued Ali Shambi. The Appellant stated that when he bought the plot, the area was bushy and he was shown his plot by Mohamed Shambi the son of Ali Shambi. He said he did not know if the Respondent (plaintiff) had land there.

4. The Respondent on her part testified and said she has lived in Germany for the last 25 years. She built a house on a plot belonging to Hamisi Swaleh Shambi. He got to know the Appellant after he trespassed on her plot No 281 at Kisimani measuring 100 feet by 200 feet. She bought the plot in 1998 and was issued with payment receipts. She built on a plot measuring 100 by 50 while the Appellant has built on a portion of the 2nd plot and part of it is empty. As per the Respondent, the encroachment was by 30 feet by some feet she could not tell.

5. The Respondent's witness Hamisi Swaleh Shambi confirmed the Respondent bought two plots from him both measuring 150 feet by 50 feet. His work was to give out plots and collect ground rent. He said he did not give the Appellant authority to build. He did not know how far the Appellant had encroached on the Respondent's plot. He only recognised the Respondent but not the Appellant.

6. In cross – examination, this witness said that plot 281 measured 20 hectares and it was family land. His father had two brothers. He denied his cousins were also selling the land but again said that he did not know whether they were also selling this land. He admitted that Mohamed Shambi sold some pieces without his authority and if the Appellant bought from one of the family members then he had no mistake. The witness stated that the Respondent's sub plot has no number and it is a family problem they are trying to sort out.

7. Having heard all this evidence, the learned trial magistrate found that the Appellant's approved plans produced as Dexh 2 showed he had utilized 32 feet by 60 feet. The learned magistrate calculated that from the 50 by 80 plot the Appellant bought, he found that the remaining portion of the Appellant's plot could only be 18 feet by 20 feet. He found that there was no problem if the Appellant's construction was within these boundaries. However if he exceeded then he must stop and vacate the encroached portion. The learned magistrate went ahead and directed the District Land Registrar/Surveyor to identify the Appellant's plot measuring 50 feet by 80 feet and if there were any constructions done beyond that area then the Appellant be evicted. He also awarded the costs of the suit to the Respondent.

8. The parties prosecuted the appeal by making oral submissions. Mr Ambwere advocate for the appellant argued grounds 1, 3, 5 and 7 of the petition together and grounds 2, 4 and 7 together as the 2nd ground. Mr Ambwere faults the learned trial magistrate for giving orders that were not prayed for and that the evidence did not support the judgement. Counsel submitted that there was no prayer for a survey to be done yet the trial magistrate made an order directing a surveyor to visit the plot.

In support this limb of his submission, the appellant cited the cases of **Nairobi City Council vs Thabiti Enterprises (1995 – 98) EA 231 at 238 and Galaxy Paints Ltd vs Falcon Guards Ltd Nairobi CA CA No 219 of 1998 at page 5.**

9. In grounds 2, 4 and 6, the appellant submits that the plots were sold without demarcations of plots' boundaries. The appellant posed a question thus ; if the Respondent bought two plots, where were they ? Further that since the mistake was not occasioned by the Appellant, he ought not to have been made to

pays costs of the suit in the Court below.

According to the Appellant, the trial magistrate shifted the burden upon him to show where his plot is which was contrary to the law. Lastly he submitted that the judgement cannot be enforced as he has built and lived on the plot for over 10 years.

10. Mr Okanga advocate for the Respondent submitted that the judgement was sound and proper as the magistrate decided on the matter that was in issue i.e whether there was encroachment. The Respondent submitted that one of the prayers was for eviction on the portion encroached on by the Appellant. PW 2 stated that he did not know the extent of the encroachment hence the learned magistrate's direction for a survey to be done.

11. I will analyse and re-evaluate the evidence and reach my conclusions while I am alive to the fact that I did not see the witness testify and therefore miss out on the demeanour of the witnesses. The learned trial magistrate found the Respondent was truthful but found the Appellant and his witness were economical with the truth. As was held in the case of **Jabane vs Olenja (1986) KLR 661, 664 and Ephantus Mwangi vs Duncan Mwangi Wambugu (1982 – 88) IKAR 278** where the Court of Appeal held that it will not differ from the findings of fact of a trial Judge and will only interfere with them if they are based on no evidence.

12. The learned magistrate in his judgement said that he did not grant prayers (i), (ii) and (iii) of the Plaintiff. He gave orders only in terms of prayer (vii) which were for, ***“Any other and/or further order that this Court may deem fit to grant.”*** From my interpretation of the judgement, he also granted prayer (ii) and (v). Prayer (ii) was for eviction which he allowed conditionally if it was confirmed that the Appellant had exceeded construction on the boundaries of his plot. The magistrate also awarded costs of the suit to the Respondent. He did not however grant the substantive orders sought by the Respondent and he gave his reasons why. The reasons he gave creates a loophole on whether the Respondent established her case.

13. The issue before the trial Court was whether there was proof that the Appellant had indeed encroached on the Respondent's plot. It is a requirement of the law of evidence that he who alleges a fact must prove the existence of that fact (see provisions of 107 and 108 of the Evidence Act). In this instance, it was incumbent upon the Respondent to establish that indeed the Appellant had encroached on her plot and to what extent.

14. From the evidence on record, both parties were sold their respective plots by different members of the family who owned the main plot. When the suit was concluded in the lower Court, the plots sold had not been allocated titles. The Respondent averred that the Appellant had encroached on her plot by about ***“30 feet by some feet”***. PW 2 on his part stated that he does not know how far the Appellant had encroached on this land.

15. The Respondent stated that she was shown the beacons by PW 2 who had done the survey. No survey plan or sketch maps were produced. The trial Court based its findings on the approved plan of the Appellant for the development already undertaken that the plan showed he had utilized 32 feet by 60 feet leaving a balance of 18 feet by 20 feet.

16. The Appellant felt aggrieved by this finding as he felt the burden was shifted upon it by the Court. To this extent, I agree with the Appellant since it was upon the Respondent to prove the extent of the encroachment and not vice versa. The Respondent could have moved the Court before the case was concluded to have an order for the surveyor who surveyed the mother title (parcel No 281) to identify the two plots in dispute and report on the extent of the encroachment. By the Court making an order for survey at the conclusion of the case is tantamount to assisting the plaintiff to prove her case.

17. Further from the evidence on record the plots were sold by different members of the family. There is a possibility that they pointed different boundaries to each of the parties herein. It will be unfair to blame the Appellant on encroachment on a situation that is a kin to a possibility of one plot being sold twice out of greed or misunderstanding amongst the family members. PW 2 admitted there was a problem on

allocation of the plots they were trying to resolve as a family.

18. Parties are bound by their pleadings and the learned magistrate went outside what was prayed for when he made an order for a survey at the stage of judgement. This order merely establishes the fact that the Respondent did not satisfy the magistrate on whether there was encroachment by the Appellant and to what extent. The Respondent ought to have joined PW 2 or whoever in that family in the suit for them to identify all the three plots sold to her and the Appellant. In conclusion, I am satisfied that the Respondent did not prove her case within the standards required. The result is this appeal succeeds. I substitute thereto the order of the trial magistrate allowing the plaintiff's case with an order of dismissal of the suit with no order as to costs. I do allow this appeal with costs to the Appellant.

Judgement dated and delivered at Mombasa this 26th day of February 2016

A. OMOLLO

JUDGE