REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA

AT MALINDI

ELC APPEAL NO. 3 OF 2020

DANIEL KENGA KATANA

PONDA KIRAO MENZA

JOSEPH NGALA HINZANO

KIPONDA HINZANO MENZA

FRANCIS KARISA KENGA.....APPELLANTS

VERSUS

DZITU TOTO BOKOLE

KARANI KADHENGE MENZA

JUMAA NYOLA MWARO

MSINDA NGOMBO.....RESPONDENTS

(Being an appeal from the Judgment of the of the Principal Magistrate

(Hon. L/ N Wasige) delivered on 13th October 2020 at Kaloleni Law Courts

in Environment and land Court Case No. 1 of 2019)

JUDGMENT

This appeal arises from the lower court's judgment dated 13th October 2020 delivered at Kaloleni **PMCC No. 1 of 2019.** The appellants herein being aggrieved by the judgment lodged a Memorandum of Appeal dated 9th November 2020 and listed the following grounds:

1. That the Learned Magistrate erred in fact and in law in failing to appreciate the evidence before her on proof of ownership.

2. That the Learned Magistrate erred in fact and in law in failing to appreciate the best evidence of proof of ownership of unsurveyed and undemarcated land, primarily witness testimonies which were tendered in evidence by the appellants as opposed to the respondents who forwent their right to be heard.

3. That the Learned Magistrate erred in fact and in law by disregarding the appellants' testimonies and documentary evidence before court on ownership of the land.

4. That the Learned Magistrate erred in fact and in law in totally disregarding exhibits produced by the appellants and more particularly the agreement dated 17th July 2012.

5. That the Learned Magistrate erred in fact and in law in failing to note that the appellants' action was based on fresh and new trespass and not premised on enforcing the Land Disputes Award Case No. 11 of 2005.

6. That the Learned Magistrate erred in fact and in law in making a shallow determination on the minutes of the meeting of 6th February 2015 without considering the appellants' observation on the same.

7. That the Learned Magistrate erred in fact and in law in failing to consider the magnitude of dispute herein.

8. That the Learned Magistrate erred in fact and in law in failing to consider the submissions by the appellants.

A brief background to this appeal is that the appellants filed a suit dated 16th April 2019 in the lower court seeking for the following orders:

a) A permanent order restraining the Respondents' Agents, servant, employees, proxies and/or assigns from selling, trespassing, encroaching, grabbing or whatsoever dealing with all that un-surveyed and un-demarcated piece of land located along Mashuhuri Road off Kaloleni – Bamba Road at Katsagani Village, Kinagoni Location, Kaloleni Sub-county Kilifi County.

b) An order directing the Respondents to demolish the houses or any structures erected on the suit property.

c) General and special damages.

d) Costs of the suit.

The trial court heard the case and dismissed the Appellants' suit on 13th October 2020 for lack of evidence. The Appellants being dissatisfied with the Judgment have filed the current appeal.

Counsel agreed to canvas the appeal vide written submission which were duly filed. At the time of writing this judgment only the appellants' counsel had filed submissions despite service being effected.

APPELLANTS'SUBMISSIONS

Counsel submitted that this being a first appeal, the court should reconsider, re-evaluate the evidence and reach its own conclusion and cited the Court of Appeal case of **National Bank of Kenya v Samuel Nguru Mutonya [2019]**

Counsel further relied on evidence on record in the lower court and the submissions therein in support of the appeal. Counsel submitted that the respondents filed a defence but neither filed a witness statement nor documents to rebut the plaintiff's allegation in the plaint.

Mr. Anaya relied on the provisions of Order 7, rule 5 of the Civil Procedure Rules 2010 which makes compliance with pre-trial procedures mandatory.

5. The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—

(a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;

(b) a list of witnesses to be called at the trial;

(c) written statements signed by the witnesses except expert witnesses; and

(d) copies of documents to be relied on at the trial.

Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.

On the issue of ownership of the suit land counsel faulted the Learned Magistrate in finding that the Appellants had not proved ownership of the suit property and stated that the court completely disregarded all the documents placed before it indicating that the Appellants have always been in control, possession and ownership of the suit land. That the appellants demonstrated how they acquired the suit land being ancestral land and produced photographs and sketch map of the area.

Counsel further faulted the Learned Magistrate on the issue of ownership and stated that the appellants had established that they are members of Wakiza Clan. Further that the Respondents do not dispute bordering the Appellants' land and that the Respondents have not shown any evidence to dispute the Appellants' ownership claim.

It was counsel's submission that the court disregarded the evidence that World Vision had engaged the Appellants to allocate a portion of their land for purposes of construction of a water pan/dam (**pg 74**) whereby the Appellants' Representative then Kazungu Kalume Menza signed on their behalf in 2012.

Counsel also submitted that the Learned Magistrate failed to appreciate that trespass is a new cause of action every time it occurs and that it cannot be time barred and that the Appellants were only relying on the Award to prove their historical ownership of the suit land through papers and not in any way enforcing the said award.

Counsel relied on the case of **Isaack Ben Mulwa v Jonathan Mutunga Mweke [2016] eKLR** the Court of Appeal had this to say;

> ***Each action of trespass constitutes a fresh and distinct cause of action. It is inconceivable that a claim based on an action for trespass committed in 2015 would be res judicata simply because the same parties or their parents litigated over the same matter in 1985. It is a well-settled principle that continuous injuries to land caused by the maintenance of tortious acts create separate causes of action barred only by the running of the statute of limitation against each successive acts. As explained by the learned authors Winfield and Jolowicz in WINFIELD AND JOLOWICZ ON TORT, 11th Edition, Sweet and Maxwell, London, 1979 at page 342: -***
>
> ***"Trespass, whether by way of personal entry or by placing things on the plaintiff's land may be continuing and give rise to actions de die in diem so long as it lasts. Nor does a transfer of the land by the injured party prevent the transferee from suing the defendant for continuing trespass."***

Counsel also submitted that the appellants proved that the land is in existence by filing a survey report which indicated the appellants' homes and this being unregistered land the only evidence would have been the testimonies of the parties. Counsel further submitted that the Learned Magistrate set the standard of proof in this case beyond reasonable doubt despite this being a civil dispute.

Mr. Anaya further submitted that the Respondents neither filed witness statements nor testified to rebut the appellants' claim hence the evidence was uncontroverted and relied on the case of **Gateway Insurance Co Ltd v Jamila Suleiman & another [2018] eKLR** where the court stated that;

> *54. What are the consequences of a party failing to adduce evidence? In the case of* ***Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002****,* ***Lesiit, J*** *citing the case of* ***Autar Singh Bahra And Another vs. 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 defence 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".***
>
> *55. Again in the case of* ***Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001*** *the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged."*

Counsel also relied on the case of **Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007** Ali-Aroni, J. citing the decision in **Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997** held that:

> ***"In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations…Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence".***

Mr. Anaya submitted that it was also wrong for the Learned Magistrate to make remarks on the alleged Minutes by the Chief and insinuate that the 1st Respondent had an interest in the land and yet the Respondents did not bother to defend this suit and/or prosecute their defence.

Counsel further submitted that the 1st plaintiff confirmed to court that they have been denied use of their land for a long time by the Respondents and considering the time the Appellants have been denied use of their land, the extent of encroachment, illegal structures erected thereon and continued trespass on the land, counsel urged the court to award Kshs. 6,000,000/= as general damages.

Counsel relied on the case of **Nakuru Industries Limited v S S Mehta & Sons [2016] eKLR** where the court held that

> ***"A similar situation pertains in the present case. The exact value of the land before and after the trespass is not proved. However, as I have found the Respondents did trespass onto the plaintiff's land and conduct some excavation. For this reason, I award the defendant damages in the amount of Ksh 500,000/= (five hundred thousand only) plus interest and costs of this suit from the date of this judgment until payment in full."***

Counsel therefore urged the court to allow the appeal as prayed.

ANALYSIS AND DETERMINATION

This appeal was not defended by the Respondents who were served with a hearing notice but their counsel though present when directions were taken on canvassing the appeal vide written submission did not file any.

This being the first appeal, it is trite law that the court ought to examine and re-evaluate the evidence on record, assess it and make its

conclusion. This position was taken in the case of **Selle & Another –vs- Associated Motor Boat Co. Ltd.& others (1968) EA 123** the court held as follows:

> ***"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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 or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.***

Upon perusal of the record and written submissions together with the authorities cited by the appellants I therefore condense the grounds of appeal to three and find that the issues for determination are as follows:

> ***a) Whether the Learned Magistrate erred in fact and in law in failing to appreciate the evidence before her on proof of ownership.***
>
> ***b) Whether the Learned Magistrate erred in fact and in law in failing to appreciate the best evidence of proof of ownership of unsurveyed and undemarcated land to be primarily witness testimonies which were tendered in evidence by the appellants as opposed to the respondents who forwent their right to be heard.***
>
> ***c) Whether the Learned Magistrate jumped into the arena of conflict by inferring or considering the defendants evidence in the defence and yet they neither filed statements, list of documents nor testified in the case.***

I notice from the record and the proceedings that the defendant filed a defence but did not file statements, list of documents and list of witnesses. The court dealt with an application to allow the defendant to file documents and list of witnesses after the plaintiffs had closed their case which application was dismissed. The court ordered the parties to file submissions of which only the appellant filed.

The Learned Magistrate referred to Pex 9 which were minutes of a meeting held at the Chief's Office and indicated that she was of the opinion that the 1st Defendant had a claim to the plot. This reference clogged the courts mind which led to the dismissal of the appellants claim to the suit land. There was no evidence from the Defendants to support such a claim to the suit land. There was also no counterclaim to the suit land therefore even if the court were to assume that the Defendant had a claim, the court could not grant what has not been sought for.

On the issue that the Learned Magistrate disregarded the evidence by the appellant on proof of ownership, the judgment indicates that the land was unsurveyed, undemarcated land which was ancestral land. The Learned Trial Magistrate stated that the Plaintiff did not show any proof other than word of mouth. This being an unsurveyed land it would be the Plaintiff's word against the Defendants who unfortunately did not give any evidence to rebut the Plaintiff's evidence.

It does not follow that if the plaintiff's evidence is uncontroverted his/her claim has to be allowed as prayed. This does not shift the burden of proof of a case to the Defendant. The Plaintiff still has that burden on a balance of probabilities. This is as per S**ection 107 and 108 of the Evidence Act** which provides: -

> ***107. Burden of proof***
>
> ***(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. Incidence of burden***
>
> ***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."***

The issue that the court has to deal with is whether the Plaintiff discharged the burden of proof. The Plaintiff gave evidence to proof ownership of the suit land by adducing oral and documentary evidence which was uncontroverted. It is trite that uncontroverted evidence is weighty and courts will rely on it to prove facts in dispute. The evidence cannot be controverted by allegations in the statement of defence if the defendants fail to call a witness to adduce evidence and be cross-examined to test the evidence. The issue of uncontroverted evidence was addressed by **Justice Mwongo** in ***Peter Ngigi & Another (suing as legal representative of the Estate of Joan Wambui Ngigi) -v-Thomas Ondiki Oduor & Another 2019 eKLR*** where he stated: -

> ***"There are any authorities that deal with the question of uncontroverted evidence, such as the situation in the present case where the defence did not show up at the trial. The general position running through such authorities is that uncontroverted evidence bears a lot of weight and a statement of defence without any evidence to support the assertions therein will amount to mere statements.***

It follows that the failure by the Defendant to adduce evidence in the lower court and in this appeal shows that the Defendants were not

serious in defending the claim against them and the appeal. They were just hanging in the fringes to benefit from their non-committal in defending the case.

I have considered the record of appeal, the submissions by counsel and find that the Magistrate erred in disregarding the Plaintiff's evidence of proof of ownership which she termed as mere word of mouth. I therefore allow the Appeal and set aside the Judgement dismissing the Appellants claim and instead enter Judgment in the following terms.

a) A permanent order is hereby issued restraining the Respondents' Agents, servant, employees, proxies and/or assigns from selling, trespassing, encroaching, grabbing or whatsoever dealing with all that un-surveyed and un-demarcated piece of land located along Mashuhuri Road off Kaloleni – Bamba Road at Katsagani Village, Kinagoni Location, Kaloleni Sub-county Kilifi County as per the sketch map showing their portions of land.

b) The respondents to give vacant possession of the suit land and demolish their structures at their own costs within 30 days failure to which eviction to issue.

c) Costs of the suit the suit in the lower court together with costs of the appeal.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 25TH DAY OF JANUARY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.