



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC APPEAL 8 OF 2020**

**JOHN MBWIRI Z. KAMUNDI.....APPELANT**

**VERSUS**

**JOSEPH KINJA..... RESPONDENT**

*(Being an appeal from the Judgment of Hon. J. Irura (P.M.) delivered on 31<sup>st</sup> October, 2019, in Nkubu P.M. C.C. 188 of 2016 No. 8<sup>th</sup> January of 2020)*

**JUDGEMENT**

1. The appellant seeks to overturn the lower court judgment on the grounds that: it failed to find him as the registered owner of **L.R Nkuene/Kithungu/241**, his land include the disputed portion; find there can be unregistered land in an area which had undergone land registration; failing to find that a title deed and the approximate area indicated therein is not an authority on boundaries; failing to find and appreciate the title deed held by the appellant is only an approximation of land acreage and not an accurate measurement of that land; failing to find that there was an error on the face of the title deed indicating 1.21 acres instead of 169 acres; failing to settle the ambiguity one way or the other by directing the land registrar to register the disputed portion to either the appellant or the respondent hence creating uncertainty or chaos as to who is the rightful owner of the portion; dismissing the counterclaim while at the same time directing the respondent may be registered as the absolute owner of the disputed portion; going against appellant's evidence and submissions on record.
2. The respondent filed with leave of court, a cross-appeal dated 22.7.2021 challenging the judgment on the grounds that: the trial court dismissed the counterclaim despite overwhelming evidence before it; failing to find him the rightful owner of the unregistered land; directing the land registrar to either register the appellant or the cross-appellant as the owner thereof; dismissing the counterclaim when the appellant's witnesses had failed to prove the appellant as the owner of the disputed portion.
3. This being a first appeal, it is the court's duty to re-assess and preview the pleadings, evidence and submissions so as to come up with independent findings and conclusions while mindful the trial court had the benefit seeing and hearing the witnesses including their demeanors. **See *Selle –vs- Associated Motor Boat Company Ltd [1968]***.
4. At the lower court, the appellant vide a plaint dated 20.6.1996 as the registered owner of **L.R No. Nkuene/Kithirune/241**, sued the defendant/respondent for wrongfully, illegally and maliciously invading, trespassing and forcefully curving out a portion of his land with effect from 18.6.1996 in an efforts to have it registered under his name.
5. He sought for declaration that he is the rightful owner and permanent orders of injunction against any surveying, sub-divisions or inference with his land and general damages for trespass.
6. The respondent denied the claim vide a defence and counterclaim dated 22.7.1996. He pleaded he had a parcel of land neighbouring the appellant which was unregistered and that the appellant had without his consent or approval pulled out the boundary separating the two, trespassed into his land and damaged his crops.
7. He prayed the appellant's claim be dismissed and judgment to be entered as counterclaimed for an order directing the land registrar to register his land, general damages and a permanent order of injunction to restrain the appellant from trespassing into his land.
8. By a reply to defence and defence to counterclaim dated 27.7.1996, the appellant insisted the respondent was liable for damages and wrongs he had committed, stated the respondent's claim was unknown in law, misplaced and misconceived.
9. Specifically, the appellant pleaded the respondent had no right on his land, had failed to specify his land, denied the respondent had ever cultivated any such land or had any crops or property therein and if at all he had any claim, the same fell elsewhere.
10. The appellant's testified was the registered owner of the suit land as per copies of green card and title deed which he produced as **P exh 1 and 2** respectively, which is 0.489 Ha.

11. He testified the respondent entered his land on 18.6.1996, fenced off half an acre but he repulsed him after which he sued him and obtained injunctive orders. Even after the case was filed the appellant testified the respondent continued trespassing into his land until contempt proceedings were brought against him and on 22.9.1997, he vacated the land.
12. He stated the respondent was not his immediate neighbour as his land was Parcel No. No. 243. He produced the map as **P Exh 3**.
13. Regarding the counterclaim, the appellant denied they were neighbours, that he had destroyed the respondent's crops or destroyed any boundary and denied knowing any respondent's land near Parcel No. 241.
14. In cross-examination, the appellant admitted he had known the respondent, denied the respondent's grandfather was known to him or was a neighbour and stated he had seen a letter dated 25.8.1995 from the survey office alleging his land was to be subdivided which he resisted through a demand letter.
15. He admitted whereas the title deed indicated his land was 0.489 Ha, on the ground, the land was more than 0.489 Ha. But all of it belonged to him.
16. He denied he had interfered with the survey office conducting the alleged subdivision or the allegations that the respondent was occupying an unregistered portion of land. His view was he got the land from his late mother, did not participate in the demarcation process, acquired the title deed in 1991, took vacant possession through his sister who was currently in occupation through his late mother, who had been on the land since 1950. He denied he was blocking the respondent from utilizing the land.
17. In re-examination, the appellant admitted he chased away the surveyor since he did not know why the respondent was bringing him to his land yet he had a title deed. He insisted he could not understand how the respondent was claiming he had no title number but insisted his land had a clear boundary and a fence. He also stated the extra land was his and the respondent had no justification to claim the said portion.
18. By an order dated 29.5.2012, the District Land Registrar and the Surveyor Imenti North were mandated to visit the **locus in quo** and file a report with the court for further orders.
19. The matter was eventually transferred from the High Court to the lower court where it commenced **denovo** on 12.6.2019. PW1 adopted his witness statement dated 2.10.2017 as evidence in chief and produced his list of documents dated 2.10.2017 as **P exh 1 – 7**.
20. In cross examination, the appellant admitted there was a scene visit directed by the court whose report indicated his land measured 1.18 acres but the green card showed 1.20 acres. He insisted the dispute was over ½ an acre of land allegedly claimed by the respondent as unregistered portion.
21. He stated he had inherited the land from his late mother and if the land was unregistered, the mistake must have been by the land surveyors or the title deed showing less land than what was on the ground. According to him his late mother and sister had been cultivating the entire land before it was transferred to him.
22. In his view the title deed had only an approximation of land size, but the sheet map 7 showed his land extended to the disputed portion. He denied there was any grave on the disputed portion belonging to the respondent's relatives.
23. PW2 told the court the suit land initially belonged to the late **Gakiri Mwari Kanjara** who used to live there, had built houses on it and planted coffee, grevillea trees and yams. PW2 confirmed Consolata Wanja is a sister to PW1 who was currently on the land.
24. Even though he could not know the acreage, PW2 insisted he knew the land and where it was situated, and went on to state that even in 1972 her grandmother had planted sugarcane on the disputed portion which had now been replaced with water pipes.
25. PW3 testified the respondent was not one of the neighbours to the disputed land and as a brother to PW1, he confirmed the land initially belonged to their late mother who had transferred it to PW1. He stated he was the one tilling the land and as a fact the respondent had no land or homestead near the disputed portion since his only neighbours were Mbijiwe and Clement who reside nearby.
26. PW4 told the court that PW1 and his late mother planted coffee on the disputed land for many years. He admitted he could not estimate the land measurements.
27. DW1 adopted his witness statement dated 19.9.2017 and produced letters dated 13.9.1995 and 4.5.1995 as **D exh 1, 3 and 3**. He stated survey officers came to the land on 18.6.1996 but the appellant chased them away after which the suit was filed against him.
28. He insisted before the boundary could be established, PW2 destroyed the same and interfered with it after which he wrote him a demand letter dated 12.10.1995. He produced the letter as **D exh 4** together with a form for a determination of the boundary as **D exh 5**.
29. In his view the scene visit report filed with the court established PW1 was only entitled to 1.21 acres as per his title deed instead of 1.69 acres hence the disputed portion was 0.51 acres.
30. He produced the District Surveyor's Report, a sketch plan and a surveyor's letter to chief dated 7.8.1995 as **D exh 6A, 6B** and **7** respectively.
31. DW1 testified he had been living on the land since he was born, stated his late grandfather's grave site was on the disputed portion, that

his father used to live on the land but moved to his **Land Parcel No. 242**. Further he stated that at the time they left the disputed land, there was a farm house but they continued to cultivate the portion. He could not however tell what the appellant did with the farm house. He urged the court he be allowed back to the land and that the land registrar be ordered to register the disputed land under his name.

32. In cross-examination, DW1 insisted his father was deceased but buried on the disputed portion. He stated he had nothing in writing to show the portion was bequeathed to him either by his late grandfather or his late father. He admitted however he stays in **Parcel No. 242** which is a distance from the disputed portion.

33. Further, DW1 stated he did not report the appellant over the eviction, had found out the boundary after the demarcation was done. He said he did not know about the land registration process until the appellant allegedly removed the boundary in 1995.

34. He further testified his late grandfather died in 1980 and he only reported to the area chief in 1995 that the land was not registered under his name.

35. Further, DW1 admitted he knew the appellant's late mother who was living on her land but was not on the disputed portion.

36. DW2 adopted his witness statement, claimed he came from a different Parcel of land and knew the parties as his neighbours.

37. Further, he testified the land belonged to the appellant's mother who did not occupy the disputed land. He could attest the respondent's late grandfather had been buried on the disputed portion.

38. DW3 told the court his land was on the left side to the disputed portion, had lived in the area since 1965 and would see the respondent's grandfather living on the disputed portion. He could not however recall when the dispute arose since prior to the death of appellant's mother Gakiri Kanjara, there was no contest over ownership.

39. He told the court his parcel was **Parcel No. 458**, which he had inherited from his father. He testified he was unable to know the boundary between the disputing parties.

40. Further DW3 confirmed PW1's sister was the one utilizing the disputed portion.

41. With leave of court parties opted to dispose of the appeal and cross appeal through written submissions to be filed by 30.11.2021. It is only the appellant who complied with the order on time.

42. The appellant submits there was evidence of trespass as per the **Trespass Act Cap 294** and guided by the authority of ***Rhoda A. Kiiru – vs- Jangxi Water & Hydropower Construction Kenya Ltd [2019] eKLR*** the trial court should have allowed the claim.

43. Regarding the issue of the acreage on the title deed and that on the ground, the appellant submits the title deed is an approximation and hence the court ought to have found the extra land does not mean the area is unregistered. The appellant relies on **Section 19 (1) of the Land Legislation Act**.

44. As to whether the respondent had proven the source of land, the appellant submits there was no such proof of a gift *intervivos*. Reliance is placed on ***Re Estate of the Late Gedion Manthi Nzioka (Deceased) [2015] eKLR, Halsburys Laws of England Vol. 20 (1) at paragraph 32 to 51.***

45. On the issue of the counterclaim it is submitted the land registrar was not party to the proceedings, the court had no powers to issue orders of mandamus and that the said claim was already statute barred as is being brought 25 years contrary to **Section 7 of the Limitation of Actions Act**. The appellant relies on ***Bosire Ongero –vs- Royal Media Services Ltd [2015] eKLR.***

46. Having gone through the pleadings, the evidence tendered, submissions, appeal and cross appeal, what turns out in my view to be the issues for determination are:-

**a) If the trial court was justified in reaching the decision appealed against.**

**b) If the issues raised by the appeal and the cross-appeal are the same issues raised in the lower court and which were determined by the trial court.**

**c) If not in (b) above, what ought this court ought to do under the circumstances.**

47. It is trite law that parties are bound by their pleadings, issues flow from the pleadings, a court of law is bound by the pleadings and issues arising therefore unless where evidence has been lead and an issue is left by the parties for the court's determination. In ***David Sironga Ole Tukai –vs- Francis Arap Muge & 2 Others [2014] eKLR*** the Court of Appeal held in an adversarial system, it is the parties who set the agenda. Each has to formulate its own case in its own way and that a party cannot be allowed to raise a different case from that which it has pleaded without amending the pleadings.

48. In the instant case the pleadings before the court were the plaint dated 20.6.1996, the defence and counterclaim dated 22.7.1996 and a reply to defence and defence to counterclaim dated 27.7.1996. Parties were directed to comply with **Order 11**. The appellant filed a list of witnesses and documents dated 2.10.2017 whereas the respondent filed his list of witnesses statement on 19.9.2017 and list of documents dated 2.11.2017.

49. From the said compliance documents, the two parties included the scene visit report filed in court on 24.9.2012.
50. It is important to note that the matter was initially filed in the High Court but transferred to the lower court by consent of parties dated 29.2.2016 and through a ruling made on **29.2.2016**. The matter had also been filed before the coming into force of Civil **Procedure Rules 2010**. Again at the time it was transferred, the matter was already part heard before **Hon. Justice Lenaola** now Supreme Court Judge of Kenya.
51. When the parties were ordered to comply with the **Civil Procedure Rules 2010**, parties filed witness statements based on the scene visit report thereof but never amended their pleadings.
52. Again the said report in my considered view was never produced by the maker before court and adopted as forming part of the court record.
53. Further the parties did not frame any issues for the determination if at all they expected the court to determine issues which were not pleaded at all.
54. The duty of the court is to adjudicate upon specific matters in dispute. Witness statements are not pleadings and cannot replace pleadings.
55. In ***IEBC & another –vs- Stephen Mutinda Mule & 3 Others [2014] eKLR*** the court reiterated the position that a decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and lead to denial of justice.
56. In this case, the appellant pleaded he owned **Parcel No. L.R Nkuene/Kithunguri/241** which he alleged the respondent had encroached upon and purported to claim ownership, had caused damage over it and sought for a declaration that the land was his, a permanent injunction stopping any subdivision, resurveying or interference and general damages for trespass.
57. The respondent denied encroachment, claimed his land was neighbouring the appellants' though which he claimed was unregistered. He alleged the appellant had destroyed its boundaries, trespassed into it, caused destruction and sought for the land registrar to register it in his favour.
58. In reply to defence and defence to counterclaim, the appellant stated the respondent had no legal or equitable right to excise a portion from **Parcel No. Nkuene/Kithunguri/241**, his alleged claim was unknown in law, bad in law and that the respondent had no right over his land.
59. Further the appellant stated the counterclaim had mentioned no particulars of the respondent's parcel of land, he had never occupied or utilised in the alleged land hence he had no sustainable claim against him.
60. The respondent did not deny or admit the defence to counterclaim by way of a reply.
61. In ***Raila Amollo Odinga & Another –vs- IEBC & 2 Others [2017] eKLR*** the court held in the absence of pleadings, evidence if any produced by parties cannot be considered and parties should not be permitted to travel beyond their pleadings since pleadings ensure each side is fully alive to the questions that are likely to be raised so as to bring the relevant evidence thereof.
62. Similarly the court held it was neither desirable nor permissible for a court to frame an issue not arising from the pleadings.
63. Going back to the pleadings and the evidence in this matter, the appellant produced a green card as **P exh I** for **L.R Nkuene/Kithunguri/241** whose acreage is approximated at 0.489 Ha. The 1<sup>st</sup> entry was made on 20.9.1965 in the registry map sheet No. B13C13 was in favour of Gakiri Kanjara and a title deed issued on 7.10.76 as the 2<sup>nd</sup> entry. The 4<sup>th</sup> and 5<sup>th</sup> entry indicates the land was transferred to the appellant on 28.3.1991 and a certificate of title issued on 25.8.1991.
64. The appellant also produced **P exh 3**, a plan No. AL 90 sheet No. 6 of 11 file 6/116 for Kithunguri sub-location sheet, No. 6 & 7 original No. C 13 (the RIM map). The index map clearly indicates her neighbouring parcels as Parcels No. 239, 307, 458, 470 and 483.
65. PW1, PW2 and PW3 testimony clearly was in harmony with the contents of **P exh 1, 2 and 3**. The respondent did not produce any documentary evidence contrary to the appellant's documentary evidence.
66. In ***Azzuri Ltd. –vs- Pink Properties Ltd [2017] eKLR*** the court looked at the implications of RIM vis a vis general boundaries and the duty of a land owner to maintain in good order the fences, hedges and other features which demarcate boundaries.
67. The appellant called evidence on how he has been consistent on the land. and who is neighbours were. **P Exh 1** does not show any idle land between the appellant and his neighbours.
68. The respondent did not call any evidence to justify his unavailability when the areas was being demarcated in 1965 and registered in favour of the original owner. Strangely, he did not call the land officer and or surveyors to support his claim that indeed the appellant was occupying more land than he deserved.
69. Even though the respondent seeks to lay his claim on the scene visit report, the same was neither produced nor adopted by consent of parties as evidence before court. The respondent produced **D exh 6**. He was neither the author nor the maker of the document. He did not

call the maker for cross-examination and or to give details on how the demarcation could have left out the alleged portion undemarcated.

70. The report is also not prepared by both the land surveyor and the land registrar. The attached sketch map was not drawn to scale and cannot oust the appellant's RIM map **P exh 3** which has all the details including the neighbouring parcels of land, details of adjoining paths and roads. See *Ali Mohammed Salim –vs- Faisal Hassan Ali [2014] eKLR* and *Azzuri Ltd (Supra)*.

71. The respondent was basing his claim on the failure to have his land registered and which land he believed to be the one occupied and registered in favour of the appellant.

72. **D exh 1** is dated 24.4.1996. He claims his unnumbered plot borders **458, 241, 358 and 259** and alleges it was not allocated a number during the adjudication. The maker of **D exh 2 and 3** was not called to produce the same and or give details of whether he had any powers under the law to undertake such a request especially long after the title deed had been issued.

73. As regards **D exh 5** the same appears to be relating to determination and indication of the position of an uncertain boundary. If indeed the respondent was raising an issue of boundary under **Sections 18 and 17** of the **Land Registration Act**, the court obviously would have had no jurisdiction to entertain such a claim until the land registrar had determined the boundary.

74. An issue has been raised as regards the acreage and that the appellant was occupying more land on the ground and which the trial court has termed as a disputed portion.

75. First, as indicated above, the maker of **D exh 6** was not called to testify in court. The report is also not conclusive at all and the trial court should not have taken the report on its face value without interrogating its probative value.

76. The respondent testified he became aware his portion had been registered in favour of the appellant in 1996. This is also the time he lodged his claim as per **D exh 1, 2, 3 and 4**. There is no evidence the respondent lodged any objection proceedings during the adjudication exercise. He is therefore estopped from seeking to adjust the acreage on the land register under **Section 27** of the **Land Adjudication Act**. See *Stephen Onyango Oloo –vs- Nelson Makokha Kaburu & 4 Others [2015] eKLR*.

77. Likewise on the other hand the appellant faults the trial court for failing to find there can be no unregistered land, failing to find the title deed acreage is an approximation and that there was an error on the face of the title deed.

78. With respect, parties did not raise those facts and or issues for determination. The court was therefore not bound to determine issues which were never pleaded nor put before it for its determination. There is no evidence whatsoever the appellant lodged a claim and or sought for both the land surveyor and the land registrar to come and harmonize and or realign his land as demarcated and indicated in the title deed with what was actually on the ground.

79. Again, the court could not act on unverified information whose veracity was not tested through cross examination. If there was any mistake at all on the appellant's title, there was no specific pleading to that effect and a claim brought against whoever made the title deed in line with **Section 80 (1)** of the **Land Registration Act**. See *Mary Ruguni Njoroge –vs- John Samuel Gachuma Mbugua & 4 Others [2014] eKLR*, *John Kimutai Bii –vs- Charles Kiprotich Ngeno [2019] eKLR*.

80. The only remedy in my view for the appellant was to seek for the rectification of the survey map and the record of title from land registrar who has the powers under **Sections 15, 16 and 17** of the Land Act and not the court.

81. As regards the issue of unregistered land and or disputed land, the court has already made a finding that neither the appellant nor the respondent pleaded any such facts.

82. Given my findings that the letter/report dated 20.9.2019 (**D exh (6)**) had no probative value, and the trial court should not have relied upon it to make any definitive findings, my view is that there is nowhere in the said letter, where it stated the existence of any an unregistered land.

83. Further, there was no pleading or evidence tendered over adverse possession as I understand it under **Section 7 of the Limitation of Action Act** as read together with **Order 37** of the **Civil Procedure Rules** by the respondent.

84. A pleading is what forms a basis of one's claim and which is proved by evidence and not vice versa. Parties herein, after filing the suit, gathered more evidence which was at variance with their pleadings. They were at liberty to amend the pleadings. What they did was to put in witness statements which were completely in conflict with the pleadings. A witness statement cannot replace a pleading as defined by **Section 2 of the Civil Procedure Act**. See *Mary A. Onyango –vs- South Nyanza Sugar Co. Ltd [2019] eKLR*.

85. The respondent faults the trial court for failing to find he had proved his claim on a balance of probabilities.

86. The counterclaim did not specify the mode of acquiring the land, the time the land was acquired, reasons why it was not adjudicated to the respondent in the first instance and lastly the efforts the respondent had made towards being registered as the owner of the land.

87. The respondent did not assert, plead and or prove adverse possession against the appellant. See *Gabriel Mbui –vs- Mukindia Maranya [1993] eKLR*.

88. The respondent produced no letters of administration to sue for and on behalf of the estate of his later grandfather, father and mother who

had passed on 1970 and 1982 respectively. See *Julian Adoyo Ongunga & another –vs- Francis Kiberenge Bondeva (Suing as the administrator of the estate of Fanuel Evans Amudavi, Deceased) [2016] eKLR.*

89. During their lifetime, there is no evidence tendered if they had raised any claim to be registered owners of the land during the adjudication process in 1956. So if the respondent was all along in the suit land till 1995, one would have expected him to have been aware of the process at the time and raised his claim under **Section 13 of the Land Adjudication Act.**

90. It is also not clear from the respondent why out of all the other land owners including his witnesses, it was only him who was not given a land parcel number during the adjudication section. Evidence tendered shows the respondent lived on **Parcel No. 242** which is said to be 100 meters away from the appellant's land. It is also not clear why the respondent would only start laying a claim in 1996, four years after the land was transferred to the appellant and soon after the death of the original registered owner.

91. All the exhibits by the respondent arise from 1995 and not earlier on. Since there is evidence the land was already registered by 1965, and assuming the respondent was all along living as a neighbour to the appellant, there is no good reason why he did not lodge his petition for a parcel number on time or at all prior to 1996.

92. The respondent's claim is for the recovery of land which he alleges belonged to his late grandfather. **P exh 1** confirms the land was registered in 1965 in the name of Gakiri Kanjara who transferred it to the appellant in 1991. Clearly if the respondent seeks to recover that land and have it registered as his as opposed to the appellant, under **Section 7 of the Limitation of Action Act**, he had to lodge such a claim before expiry of twelve (12) years.

93. The appellant pleaded that the respondent had no right over his land and if he had any such claim as alleged or at all, was bad in law.

94. As pointed out, the respondent is not pleading any fraud, collusion or mistake in the title held by the appellant. His allegations are over land which he states is neighbouring the appellant and which is unregistered.

95. He who avers must prove under **Sections 107 and 109 of the Evidence Act.**

96. The onus was on the respondent to prove the appellant's parcel of land was overlapping his land to the extent of 0.51 acres, that the extra land was unregistered, there was omission on the part of the land adjudication officers and subsequently the land registrar who issued a title deed to the appellant and land surveyors who drew the RIM, and that the alleged subject land which remained unregistered could only belong to him.

7. In my considered view, the respondent did not discharge that burden at all and hence the trial court was right in finding he had failed to prove his counterclaim on a balance of probabilities.

98. Given the foregoing, it is therefore my considered view the trial court having found the appellant as absolutely owner of **L.R Nkuene/Kithunguri/241** he ought to have allowed the claim for reasons above mentioned. Likewise I find the cross-appeal lacking merits for reasons given above.

99. The appeal is hereby allowed and the cross-appeal dismissed with costs to the appellant.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 19<sup>TH</sup> DAY OF JANUARY, 2022**

**In presence of:**

Mukaburu for appellant

Miss Murithi for respondent

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**