



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
ELC CIVIL APPEAL NO. E027 OF 2020

1. DOMINIC NZIOKA KASANGA
2. ISAAC KIBANDE WANARIANGE
3. JACOB OMWANGE,
CYRUS MWANGI ITHAGI & ISAAC KIBANDE WANARIANGE
(sued as officials of MOWLEM VALLEY JUA KALI ASSOCIATION)
4. ELIZABETH MUMBUA MUSYOKI.....APPELLANTS

VERSUS

SAMMY JIMMY MWANGI NG'ANG'A.....DEFENDANT

JUDGMENT

Background

1. This is an appeal against the Judgment and decree of the Chief Magistrate's Court at Nairobi dated and delivered on the 29th day of June 2020 by Honourable Mrs A.M Obura (SPM) in Nairobi Civil Case No. 1925 of 2018.
2. Vide an amended Complaint dated 26th March 2018, the Plaintiff sought for the following orders: -
 - a) *A declaration that the Plaintiff is the bonafide owner of the plot Number 72 upon parcel No.209/606.*
 - b) *An order declaring allocation of Plot Number 72 upon parcel No. 209/9606 by Mowlem Valley Jua Kali Association to the 1st, 2nd and 4th Defendants null and void.*
 - c) *Permanent injunction restraining the defendants by themselves, their servant's agents or anyone acting through them from trespassing entering, taking possession, constructing, developing or in any other way with the plaintiff's working therein. quiet possession and enjoyment of all that land being Plat No. 72 on parcel No 209/606.*
 - d) *An order directed to the defendants to remove and/or demolish the construction upon the*

Plaintiff's property and to forthwith cease from any or further encroachment upon the property being Plot No. 72 on land parcel No.209/9606.

e) In the alternative an order for the defendants to compensate and pay the Plaintiff the market value of Plot Number 72 upon Parcel No. 209/9606 upon valuation of the property.

f) General damages for trespass.

g) Exemplary/Aggravated damages.

h) Costs of this suit.

i) Interest.

j) Any other and/or further relief that the court may deem fit and just to grant.

3. The Respondent opined that he was the rightful owner of plot described as Plot Number 72 upon parcel No.209/9606 having purchased the same in the year 2000 from Mowlem Valley Jua Kali Association (where officials were the 3rd Appellants). The 1st and 4th Appellants had trespassed on the suit land knowing very well it was his land suit land and erected illegal structures thereon.

4. The Appellants case was that the 2nd Appellant was lawfully allocated the suit property which was transferred to the 4th Appellant and that there was no fraud attributed to them.

5. Vide a Judgment delivered on 29th June 2020, the Trial Magistrate determined that the Respondent had proved his case as required by law and proceeded to enter judgement as follows: -

a) The Plaintiff hereby declared the bonafide owner of the plot Number 72 upon parcel No.209/9606.

b) The allocation of Plot Number 72 upon parcel No. 209/9606 by Mowlem Valley Jua Kali Association to the 1st, 2nd and 4th Defendants is hereby declared null and void.

c) A Permanent injunction is hereby issued restraining the defendants by themselves, their servant's agents or anyone acting through them from trespassing entering, taking possession, constructing, developing or in any other way with the plaintiff's working therein. quiet possession and enjoyment of all that land being Plat No. 72 on parcel No 209/606.

d) An order directed to the 1st and 4th Defendants to remove and/or demolish the construction upon the Plaintiff's property and to forthwith cease from any or further encroachment upon the property being Plot No. 72 on land parcel No.209/9606. There shall be a grace period of three (3) months for compliance with the order.

e) The Plaintiff is awarded General Damages for trespass in the sum of Kshs.1,000,000/=.

f) The Plaintiff is also awarded exemplary aggravated damages in the sum of Kshs.1,500,000/=.

g) Costs of the suit.

h) Interests on (e), (f), (g), hereinabove.

6. The Appellants being dissatisfied with the trail court judgment, filed this appeal vide the Memorandum of Appeal dated 14th July 2020. The Appeal has 17 grounds enumerated as follows; -

1) THAT the Learned Trial Magistrate erred in fact and in law by ignoring the Appellants'

evidence on record and therefore misdirected herself when she failed to appreciate the salient terms of the contract of sale agreements between the 2nd and 4th Appellants.

2) THAT the Learned Trial Magistrate erred in law and fact by misdirecting herself that there was a contract of sale of property between the Respondent and 3rd Appellants.

3) THAT the Trial Magistrate erred in law and fact and further misdirected herself that there was no contract of sale between the 2nd and 4th Appellants and yet there was a sale agreement to the effect between the 2nd and 4th Appellants.

4) THAT the Trial Magistrate erred in law and fact by misdirecting herself that the 4th Appellant did not deserve to own the said property and further misdirecting herself by ordering the same be demolished without value to the same.

5) THAT the Trial Magistrate erred in law and fact by further misdirecting herself to declare that the Respondent was entitled to permanent injunction, general damages and exemplary/ aggravated damages, against the principles of the law and justice.

6) THAT the Learned Trial Magistrate erred in law and fact and further misdirecting herself by awarding general damages and aggravated damages which were not proved and or relieved by any supportive evidence thereof.

7) THAT the learned Trial Magistrate erred in law and fact by further misdirecting herself by failing to find that there was no contract of sale proved by the Respondent as opposed to that of the 4th Appellant as such.

8) THAT the learned Trial Magistrate erred in law and fact by first misdirecting herself to not appreciate on the Appellant being the officials of the Association and further did not appreciate their role to members.

9) THAT the Learned Trial Magistrate erred in law and fact and further misdirecting herself that the matter was statutory time barred as per limitation of Actions Act having purported to have purchased plot in 2000 and filed the action in year 2013 thereof.

10) THAT the Learned Trial Magistrate erred in law and fact and further misdirecting herself not affording the Appellants to file their written submission more especially during the pandemic and further if having been afforded that opportunity the Trial Magistrate could have arrived at a different decision.

11) THAT the learned Trial Magistrate erred in law and fact by not appreciating the evidence adduced by the PW2 on the role of the 3 Appellant's (officials of the "Association").

12) THAT the Learned Trial Magistrate erred in law and fact and further misdirected herself in finding out that there was fraud between the 2nd, 3d and 4th Appellants without any tangible evidence.

13) That the Learned Trial Magistrate erred in law and fact and further misdirecting herself by declaring that the Respondent was entitled to the said property without any tangible evidence thereof.

14) THAT the Learned Trial Magistrate erred in law and fact and further herself notwithstanding that the Respondent and the 3rd Appellant governed by the associations by-laws and Rules.

15) THAT the Learned Trial Magistrate erred in law awarding the Respondent interest on the

award of Kshs 2,500,000/= which award does not deserve as such any circumstances.

16) THAT the Learned Trial Magistrate erred in law and in fact to consider the Appellants submissions and binding authorities and in doing so arrived at an erroneous decision.

17) THAT the Learned Trial Magistrate erred in law by placing undue reliance on a decision which was arrived at per incuriam and made in obiter to arrive at her decision.

7. The Appellants has sought for the following prayers: -

a) THAT the Appeal be allowed.

b) THAT the Judgment and Decree of the Subordinate Court delivered on 29 June 2020 be set aside and substituted with an Order dismissing the Respondent's suit before the Subordinate Court, and

c) THAT the Respondent do pay the costs of this Appeal as well as the Appellants costs before the subordinate Court.

The Appellants submissions.

8. The Appellants though their Counsel filed detailed submissions dated 26th October 2021. They submitted that the Respondent purchased the suit property in the year 2000 and it was not until 2013 when he filed suit, hence therefore the suit was filed out of the stipulated 6 years.

9. It was also submitted that the Trial Magistrate erred in law when she failed to recognize that there was a valid sale agreement between the 2nd and 4th Appellants and further that the 4th Appellant was just an innocent purchaser who ought to be protected by the law.

10. The Appellants also submitted that the learned Trial Magistrate erred in law and fact not taking into consideration that there was contract between the parties herein and she granted all the prayers that were sought in the Plaint. Reference was made to the case of **Kenya Power Lightening Company Ltd & Abel N Birundi (2015) eKLR**, which case was to the effect that no general damages maybe awarded for breach of contract.

11. It was further submitted that the Trial Magistrate erred in law by awarding the Aggravated /Exemplary Damages to the Respondent. On this limb, it was stated that the 3rd Appellants being officials were punished for an act they had not committed.

12. On ground 4 of the Appeal, it was submitted that the Trial Magistrate erred in law by ordering the demolishing of the suit property and yet the Respondent did not prove ownership to the same.

13. It was also submitted that the Trial Magistrate did not consider the Appellants written submissions which had been filed online on 12th June 2020 at 1.20 pm through the email address of the Trial Magistrate. According to the Appellants, the Learned Trial Magistrate had a duty to follow up and consider the submissions of all parties.

Respondent's submissions

14. The Respondent also filed written submissions dated 29th October 2021 which were highlighted on 11th November 2021 by Mr Ngethe Advocate holding brief for brief for Mr Mwaniki.

15. It was submitted that, this being the first Appellate Court, the court had a duty to consider both the law and the evidence without losing sight that it did not have the advantage of seeing and hearing the witnesses. Reference was made to the case of **Chairman, Board of Governor's Murang'a College of**

Technology Primary School –Vs- Julius Ngigi Munjuga [2018] eKLR.

16. In response to grounds 1 and 3 of the Appeal, the Respondent submitted that there was conflicting testimony given by the 2nd Appellant which showed that he was an untruthful and unreliable witness. In his testimony before the trial court he could not tell who he had sold the suit property to, he failed to demonstrate that the sale agreement dated 24th June 2013 had any meaning to him or the 4th Appellants and hence it was inconsequential.

17. It was also submitted that the Respondent had proved that he bought the suit property from the 3rd Appellant vide the following documents which were produced in evidence.

a) Membership Card-PE1 (Page 10 of the Record of Appeal)

b) 5 Receipts -PE3 which are;

i. Receipt dated 29th June 2000 (Page 14 of the Record of Appeal)

ii. Receipt dated 20th February 2002 (Page 10 of the Record of Appeal)

iii. Receipt dated 20th December 2001 (Page 12 of the Record of Appeal)

iv. Receipt dated 23rd January 2001 (Page 13 of the Record of Appeal)

(c) Beacon Certificate dated 8th July 2000-PE3(Page 10 of the Record of Appeal)

18. It was further submitted that the Respondent had proved that he bought the suit property before the 3rd Appellant in the year 2000 and hence therefore, the land was not available for allocation to any other person. Reference was made to the case of **Augustine Ngotho Thuo Vs James Maina Thuita & Another (2020) eKLR and the case of Katana Kalure & Another Vs Municipal Council of Mombasa & Another (2019) eKLR.**

19. On the claim for compensation for the market value of the suit property instead of demolition of the offending structures, the Respondent submitted that the claim was baseless, since the Respondent was entitled to all the rights flowing from being the owner of the suit property which included the demolition of the structures built by the 1st and 4th Appellant.

20. The Respondent also submitted that they were entitled to the order of the permanent injunction and declaration on ownership together with the other orders on general damages and aggravated /exemplary damages that were issued by the trial court since the Respondent had proved his case to the required standard.

21. Counsel finally submitted that the Trial Magistrate was correct in finding for the Respondent. There was no wrong application and misapprehension of the law. In opposition to the appeal, counsel made reference to several authorities including, **Daniel Toroitich Arap Moi Vs Mwangi Stephen Muriithi & Another (2019) eKLR , Kenya Akiba Micro Financing Limited Vs Ezekiel Chebii & 14 Others (2012) eKLR, Chase Bank (Kenya) Limited Vs Cannon Assurance (K) Limited (2019) eKLR, Pamela Waithera Mburu Vs County Government of Kajiado (2018) eKLR** among others.

22. Counsel for the Respondent further urged the court to dismiss the Appeal with costs.

Analysis and Determination

23. In determining the issues raised in the Appeal, this court is cognizant of its duty on a first appeal. In **China Zhingxing Construction Company Ltd vs Ann Akuru Sophia [2020] eKLR** it was stated as follows:

“The appropriate standard of review established in these cases can be stated in three complementary principles:

- a) First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;***
- b) In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and***
- c) It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.”***

24. The High Court in the *China Zhongxing Construction Company Ltd* case (*supra*) cited the Court of Appeal for East Africa in *Peters vs Sunday Post Limited [1958] EA 424* where Sir Kenneth O’Connor stated as follows:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs-Thomas (1), [1947] A.C. 484.”

24. From the foregoing, the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the trial court, analyze them and arrive at an independent conclusion, bearing in mind that the trial court had the advantage of seeing and hearing the parties.

25. The Appellants’ case before the trial court was that the Respondent did not lawfully purchase the suit property. It was also their case that the suit property was already developed and occupied by parties who were not before the court prior to 30th November 2013.

26. The Appellants had also denied any particulars of fraud that were attributed to them and insisted that the 2nd Appellant was lawfully allocated the suit property which he subsequently transferred to the 4th Appellant for value.

27. On the contrary the Respondent case was that he purchased the suit property in the year 2000 and the Appellants encroached on 30th November 2013 despite their knowledge that the suit property belonged to him.

28. I have considered the grounds of the appeal, the oral and written submissions by the parties. I have also considered the authorities relied on by the parties. The issues which in my opinion arise for determination can be summarized as follows: -

- i) Who among the parties has a clear root of ownership of the suit property.***
- ii) Whether the Respondent’s claim was statutory time barred as per the law of limitation of Actions.***
- iii) Whether the trial court erred in not considering the Appellants written submissions.***
- iv) If the lower court was justified based on the facts, evidence and the law in arriving at the decision to grant the Respondent the reliefs that were sought.***

Issue No. (i)

Who among the parties has a clear root of ownership of the suit property.

29. The Appellants' case before the trial court was that, the 2nd Appellant was allocated the suit property in 1999 after paying the requisite charges. It was his further testimony that he was issued with a beacon certificate on 30th August 2003 and that on 11th June 2013 he sold the suit property to the 4th Appellant who co-owned it jointly with the 1st Appellant. He also testified that he never sold his plot to the Respondent. However, in cross examination during the trial he could not tell who the purchaser was and neither could he produce any beacon certificate in support of his testimony.

30. The Respondent testified that he acquired the suit property in the year 2000 from the 3rd Appellant and was issued with a beacon certificate dated 8th July 2000. He also submitted that he acquired the suit property earlier than the 1st and 4th Appellants.

31. **Section 26 of the Land Registration Act** provides as follows:

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

32. However, the case herein relates to an unregistered land and in that context this court will seek to determine the Appeal by establishing which party had satisfactorily proved the root of ownership of the suit property.

33. From the evidence that was adduced, the Respondent became the owner on 30th August 2003 way before the 2nd Appellant. Hence therefore the said suit could not be available for allocation to any other person. In view of the foregoing, it is the finding of this Court that indeed the Respondent had satisfactorily established his root to the ownership of the suit property. The Court is also guided by the cited authority of **Augustine Thuo v James Maina Thuita & Another [2020] eKLR** where the court stated as follows:

“The property was not available for allocation as it had already been allocated to the Plaintiff. The allocation of the property to the 1st Defendant was in the circumstances null and void. An illegal allocation of the suit property by the 2nd Defendant to the 1st Defendant could not confer upon the 1st Defendant any lawful interest in the suit property”.

Issue No. (ii)

Whether the Respondent's claim was statutory time barred as per the law of limitation of Actions.

34. The Appellants submitted that the Respondent's claim before the trial court was statute barred having been brought to court after 13 years. It was the Appellants submission that the Respondent had not

demonstrated what he was doing between the year 2000 when he claimed to have acquired the land and the year 2013 when he instituted the suit before the trial court.

35. The Court has perused the Statement of Defence that was filed by the Appellants before the trial court and noted that the said issue was not pleaded in their initial defence before the trial court. However, upon examination of the Respondent's plaint before the trial court, it is evident that he pleaded fraud and outlined the particulars of the same.

36. **Section 26 of the Limitation of Actions Act** provides as follows;

Where, in the case of an action for which a period of limitation is prescribed, either—

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

37. From the Respondent's pleadings it is clear that he had discovered the fraud in the year 2013 as stated in paragraph 6 of his amended plaint.

38. A cause of action, is a set of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party. The term also refers to the legal theory upon which a plaintiff brings suit. According to Section 26 of the Limitation of Actions Act, the cause of action accrues when the fraud is discovered. In the present scenario therefore, I find that the alleged fraud was discovered on the 30th November 2013. These proceedings were instituted on the 16th December 2013 which period was within the time frame from the date the fraud was discovered.

Issue No. (iii)

Whether the trial court erred in not considering the Appellants written submissions.

39. The Appellants also submitted that the trial court erred in not considering their written submissions. It was also stated that the Trial Magistrate did not consider the Appellants written submissions which had been filed online on 12th June 2020 at 1.20 pm through the email address of the Trial Magistrate. According to the Appellants, the Learned Trial Magistrate had a duty to follow up and consider the submissions of all parties.

40. However, upon perusal of the record, this Court finds that the Appellants did not comply with the trial courts directions which required parties to file their written submissions within 21 days from the 12th February 2020. Subsequently thereafter, On 9th June 2020 when the matter came up for mention with a view of confirming compliance and taking a judgment date, the Appellants submissions were equally not on record. It is the finding of this Court, that the trial magistrate cannot be faulted for not considering the submissions of the Appellants which were not on record when she retired to prepare the judgment.

Issue no. iv)

If the lower court was justified based on the facts, evidence and the law in arriving at the decision to grant the Respondent the reliefs that were sought.

41. It was submitted that the trial court erred in granting all the prayers sought by the respondent including an award of general damages of Ksh 1,000,000/= and exemplary/aggravated damages of Ksh

1,500,000/=

42. The principles under which an appellate court may award damages is outlined in the landmark case of **Butt vs Khan (1977) 1 KAR 1** as follows:

“An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

43. In consideration of awarding aggravated damages, the Court in **Abdulhamid Ebrahim Ahmed v Municipal Council of Mombasa [2004] eKLR** held;

“Aggravated damages are awarded in actions where the damages are at large, that is to say where the damages are not limited to the pecuniary loss that can be specifically proved. They are normally awarded in actions of defamation, intimidation, false imprisonment, malicious prosecution, trespass to land, persons or goods, conspiracy and infringement of copy right. Such damages are part of, or included in, the sum awarded as general damages and are therefore at large. As such they need not be specifically pleaded or included in the prayer for relief.”

44. In **Municipal Council of Eldoret v Titus Gatitu Njau [2020] eKLR**, the appeal arose from a judgment given in *Eldoret ELC Cause No. 207 of 2012* where the learned Judge ordered as follows:-

“(a) That judgment is hereby entered for the plaintiff against the defendant in the sum of Ksh. 15,500,000/= comprising of Kshs. 500,000/= as general damages for trespass and Kshs. 15,000,000/= as exemplary damages.

(b) That a declaration is hereby issued, that as against the defendant, the plaintiff is the owner of the land parcel Eldoret Municipality/Block 4/337.

(c) That a permanent injunction is hereby issued, restraining the defendant from interfering with the defendant’s occupation of the land Parcel Eldoret Municipality/Block 4/337.

(d) That the plaintiff shall have costs of the suit.

(e) That for the avoidance of any doubt, the liability of the judgment herein will be shouldered by the County Government of Uasin Gishu, who are the successors of the Municipal Council of Eldoret.”

Dissatisfied with that judgment, the appellant filed an appeal and raised 9 grounds of appeal that is: that the trial Judge erred in law and fact by: ***awarding exemplary damages which were not awardable in the circumstances; misapprehending the evidence on record and the legal principles governing the award of exemplary damages and thus making a wrong finding; making an award on exemplary damages which was excessive in the circumstances; failing to exercise proper discretion in awarding exemplary damages thus making an award that was excessive and an erroneous finding; finding that the appellant had trespassed on the respondent’s land; making an award of damages for trespass which was excessive in the circumstances;*** failing to take into account relevant factors and as a result his decision was wrong; and taking into account irrelevant and extraneous factors hence reached an erroneous verdict.

The Court of Appeal stated:

“ ...An appellate court should only be inclined to disturb the findings of a trial judge as to the amount of damages where it is convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to

make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. The purpose of damages has been stated is to give a plaintiff compensation for the damage, loss or injury that he has suffered. The general rule regarding the measure of damages is that the injured party should be awarded a sum of money so as to put him in position which is the same or nearly as close to the position he would have been had he not sustained the injury or loss...

45. In the case of [Godfrey Julius Ndumba Mbogori & another v Nairobi City County \[2018\] eKLR](#) it was stated:

“Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of [Rookes v Barnard \[1964\] AC 1129](#) where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are:

- i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government,*
- ii) cases in which the defendant’s conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and*
- iii) where exemplary damages are expressly authorized by statute”*

46. In view of the foregoing, it is the finding of this court that the trial magistrate did not commit any error of principle of law when she made the awards of general and exemplary/aggravated damages, together with the issuance of the other orders as was pleaded by the Respondent. It is therefore not open for this court to interfere with the same.

47. The upshot is that after careful review and analysis of all the grounds of appeal and the entire record, I find no fault with the decision of the trial magistrate. Consequently, the appeal fails and is hereby dismissed.

48. On the issue of costs, costs are in the discretion of the court and in any event, to a party who is successful. However, in this case, I order that each party do bear their own costs of the appeal.

49. Judgment accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JANUARY 2022.

E. K. WABWOTO

JUDGE

IN THE VIRTUAL PRESENCE OF:-

MR. MOSETI H/B FOR MR. GETANDA FOR THE APPELLANTS.

MR. NGETHE H/B FOR MR. MWANIKI FOR THE RESPONDENT.

COURT ASSISTANT: CAROLINE NAFUNA.