



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT HOMA BAY

ELC APPEAL NO. 17 OF 2021

LUCAS OGOLLA OIMBA.....APPELLANT /PLAINTIFF

VERSUS

ROSE AOKO.....1ST RESPONDENT

JARED OTIENO OUMA.....2ND RESPONDENT

(Being an Appeal from the Judgment of Hon. B.O Omwansa- SRM

delivered on 20th May, 2015 in Ndhiwa PMCC Case No. 5 of 2012)

JUDGMENT

1. This appeal is arising from the judgment of Hon. B. Omwansa (SRM) delivered on 20th May 2015 in Ndhiwa PMCC No. 5 of 2012 where the learned trial magistrate rendered himself thus;

“.....I decline to grant the injunction and dismiss this suit with costs.....”

2. The appellant was aggrieved thereby. Therefore, it provoked the instant appeal.

3. The appellant who was the plaintiff before the trial court, is represented by learned counsel, Mr. S. O.Nyauke.

4. The 1st and 2nd respondents were the defendants before the trial court and were represented by learned counsel, Mr. S.M. Sagwe. They are unrepresented in this appeal.

5. The subject matter of this appeal is land reference number Kabuoch/Kachieng/1704 measuring approximately zero decimal six nine hectares (0.69 Ha) in area. The same is contained in Registry Map Sheet Number 10 and located in Ndhiwa sub County within Homa Bay County.

6. The instant appeal was commenced by way of a memorandum of appeal dated 2nd June 2015 and filed herein as per the amended records of appeal dated 30th September 2015 and filed herein on 29th October 2015 and founded on the following eight (8) grounds;

a) That the Court below erred in Law and/or in fact when he failed to appreciate that the degree of proof of once claim in a civil suit is on a balance of probability and not beyond reasonable doubt.

b) The Honourable subordinate court did not appreciate the import of its judgment especially the consequences of failing to carefully analyse the conflict that is likely to occur between the parties without a proper adjudication of the issue in question.

c) The Honourable learned trial magistrate thus failed to appreciate the weight of the evidence placed before him appropriately.

d) The learned trial magistrate erred in failing to consider the evidence of the report by the land office that was placed before the court below for consideration.

e) The learned trial magistrate thus arrived at a wrong decision that there as no trespass demonstrated against the Report from the

land Officers who had visited the land in question.

f) The learned trial magistrate was thus biased against the plaintiff as demonstrated by the fact that when the subordinate court visited the land in question, the court failed to take proceedings and check the alleged trespass merely that the clan elder and the area chief were not present.

g) That the subordinate Court erred in Law and/or in fact by relying on evidence which was otherwise contradictory and doctored to give credence to the Respondent's case.

h) The Honourable learned trial magistrate failed to consider the respondents own evidence that the said respondent sold a portion of her land but failed to demonstrate through any record that the land she sold was in existence or not.

7. In that regard, the appellant has proposed that;

a) This appeal be allowed and the appellant's prayers as sought in the subordinate court be granted.

b) That the cost of this appeal be granted to the appellant.

8. Initially, the appeal was lodged at Kisii Environment and Land Court and was admitted on 7th October 2015. Further to this court's orders given on 12th March 2019 and restated on 28th October 2021, the same was heard by way of written submissions.

9. On 11th August 2020, learned counsel for the appellant filed submissions dated 16th March 2020 and urged this court to consider to consider and allow the appeal with costs to the respondent (I think, counsel meant the appellant). Counsel cited authoritative pronouncements including **Dr Joseph Arap Ngok-vs-Justice Moiwo Ole Keuwa and 5 others (1997) eKLR** and **Paul Hirbo Isatu-vs-Abdirahaman Ake (2018) eKLR**, in support of the submissions.

10. The respondents were duly served as shown in affidavits of service sworn on 26th March 2018, 9th May 2018, 11th February 2019, 17th June 2019, 17th November 2019, 22nd June 2021 and 1st November 2021 by the appellant's counsel as well as via email of 7th October 2021 at 9.28 by the Deputy Registrar of this court. So, having been made aware of the existence of the appeal, the respondents had the right to appear or decline to appear in this appeal. Indeed, they opted not to appear herein; see **Ogada-vs-Mollin (2009) KLR 620**.

11. In the foregone, I am of the considered view that grounds 1 to 8 of the appeal are compressed to whether the respondent trespassed onto the suit land and whether the present appeal is tenable.

12. In the case of **Peterson-vs- Sunday post (1958) EA 424 at 429**, Sir Kenneth O'Connor, P, remarked, inter alia;

"The appellate court has indeed the 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....."

13. In **Mwanasokoni-vs-Kenya Bus Services Ltd (1982-88) 1 KAR 278**, the Court of Appeal held that an appellate court will not ordinarily interfere with the findings of fact by the trial court unless the findings;

a) are based on evidence at all, or on a misapprehension of evidence, or

b) show that the trial court demonstrably acted on wrong principles in reaching the findings.

14. The Appellant's case before the trial court was originated by a plaint dated 16th March 2012 and filed in court on 21st March 2012 and he sought inter alia, that the respondents be compelled to vacate the suit land and permanent restraint order by way of permanent injunction to issue against them. The injunctive order sought therein is discretionary in nature and I take into account the very foundation of the jurisdiction to issue injunctive orders as noted in **Nguruman Limited-vs-Jan Bonde Nielsen and 2 others (2014) eKLR**. PW1 testified and relied on his statement dated 23rd January 2019 and referred to Exhibits, inter alia, a certificate of official search in respect of the suit land (PExhibit 2) and Homa Bay Land Registrar's report reference number SN/LR/103/11 dated 25th January 2011 (PExhibit 3), in support of his claim.

15. PW2, testified, inter alia;

"...that the boundary is intact for some of the sisal are still there....."

16. Sections 18, 19 and 20 of the Land Registration Act, 2012 (2012) govern boundaries, fixed boundaries and maintenance of boundaries respectively. It is the mandate of the Land Registrar to entertain any dispute relating to boundary of a registered land in the first instance as stated in said sections.

17. The respondents mounted their defence dated 30th April 2012 whereby they denied the jurisdiction of the trial court over the dispute by dint of **section 159 of the Registered Land Act (now repealed)**, the **Constitution of Kenya, 2010 and the Land and Environment Act, 2011**. The 1st respondent (DW1) testified in part that she was given L.R No. Kabuoch/Kachieng/918 registered in the name of her father in law. DW2 stated that he purchased a parcel of land from DW1 and referred to DEXHIBITS 1 to 3 which include; a sale agreement (DEXHIBIT 1)

and an acknowledgment (DExhibit 2).

18. It is noted that in his Judgment, the learned trial magistrate complied with **Order 21 Rules 3 (1) and 4 of the Civil Procedure Rules, 2010**

19. It discerned in the trial court's proceedings that the learned trial magistrate visited the scene on 28th May 2014. However, the appellant's counsel sought an adjournment as the place was muddy and the session was adjourned to 20th August 2014 for purposes of re-visiting the site.

20. Again, the learned trial magistrate mounted the scene visit on 19th November 2014. Counsel Sagwe for the respondents and counsel Ongoso holding brief for Nyauke for the appellant were present. The learned trial magistrate noted, inter alia;

“..... Having seen the scene and having noted that there are more issues to be determined, I direct that the matter be set down for hearing on the 7th January 2015.....”

21. PW1 stated that DW1 and DW2 encroached the suit land and destroyed demarcation. However, the Registrar's report (PExhibit 3) in observation number 2, reveals that the boundary was intact. PExhibit 3 is expert opinion. As a general rule, expert evidence is not binding on the court which is at liberty to accept or reject the same depending on the facts and circumstances as noted in **Amosam Builders Developers Ltd-vs-Gachie and 2 others (2009) KLR 628, Registered Trustees Legio Maria Africa Church Mission-vs Simeon Nyamweya Obwocha (2018) eKLR.**

22. In the foregone, the learned trial magistrate accepted the testimonies of PW1 and PW2 including PExhibit 3. He was of the considered view that the appellant had failed to demonstrate that the respondents had encroached into the suit land. That there was no connection between the suit land and LR. No Kabuch/Kachieng/918. That their boundaries were still intact.

23. In the end, it is the findings of this court that the reasoning of the learned trial magistrate was correct as it was made in consonant with the law. I find no iota of reason to disturb the reasoned judgment and the same is hereby upheld. So, this appeal is untenable.

24. A fortiori, this appeal originated by way of a memorandum of appeal dated 2nd June 2015 and filed herein, be and is hereby dismissed.

25. Given the nature of the dispute and by dint of the proviso to **section 27 (1) of the Civil Procedure Act Chapter 21 Laws of Kenya**, there shall be no order as to costs in this appeal.

26. DATED and DELIVERED at HOMA BAY this 28th day of **February 2022.**

G.M.A ONG'ONDO

JUDGE

Present

1. Odera, learned counsel for the appellant
2. Okello, court assistant.