



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

CIVIL APPEAL NO. 45 OF 2011.

BARASA EKAPOLONI.....APPELLANT

VERSUS

1. GRACE ANYANGO OLANDO)
2. THE DISTRICT LAND REGISTRAR, BUSIA).
3. THE DISTRICT SURVEYOR, BUSIA.....RESPONDENTS.
4. THE HON. ATTORNEY GENERAL)

*(An appeal from the judgment of the Hon. E.K. Keago, SRM delivered on 21<sup>st</sup> day of July, 2011 in Busia SPM.CC. No.360 of 2000)*

**J U D G M E N T.**

**BARASA EKAPOLONI**, hereinafter referred to as the Appellant ,being dissatisfied with the judgment in Busia SPM. CC. No.360 of 2000, delivered by Hon. H.E. Keago on 21<sup>st</sup> July, 2011 filed this appeal setting out the following four grounds;

“ 1. That the learned trial Magistrate erred in law and in fact in declaring that the Appellant was not entitled to the orders of eviction from his land parcel No. South Teso/Angoromo/ - (**reference not complete**) when he is the absolute proprietor to the exclusion of anybody else. [Emphasize mine]

2. The learned trial Magistrate erred in law and in fact in declaring the existence of a road of access on the Appellant’s land parcel No. South Teso/Angoromo/1094 when P. Exb. 12 is to the contrary.

3. That the learned trial Magistrate erred in law and in fact in dismissing the Appellant’s case against the 1<sup>st</sup> Respondent when the 1<sup>st</sup> Respondent is using the Appellant’s land as road of access and built on the remaining part.

4. That the learned trial Magistrate erred in law and in fact in failing to declare that in the absence of the evidence of the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants (**Respondents**), no road of access exists on his land and as such the 1<sup>st</sup> Appellant (**Respondent**) stood to be evicted .” (Emphasize mine)

The Appellant prays for the lower court’s judgment regarding eviction to be set aside and his claim for eviction be allowed with costs. The memorandum of appeal dated 19<sup>th</sup> August, 2011 names Grace Anyango Olando, The District Surveyor, Busia. The District Land Registrar, Busia and The Hon.

Attorney General as Respondents and are hereinafter referred to as 1<sup>st</sup> to 4<sup>th</sup> Respondents.

## **BACKGROUND.**

1. The Appellant had filed SRM CC. No.360 of 2000 against six Defendants. The Defendants included the four Respondents herein as 1<sup>st</sup>, 4<sup>th</sup> to 6<sup>th</sup> Defendants. The two others were Jonathan Wabala and Holy Redeemed Apostolic church as 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
2. The prayers in the amended plaint dated 12<sup>th</sup> September, 2003 were as follows:

“ a. **Kshs.95,000/=**

**b. General damages, eviction and production order as per paragraph 12A above.**

**c. Any other or further relief this Honourable court may deem fit and just to grant.”**

3. That during the hearing, the Appellant testified as PW 1 and called two witnesses, who testified as PW 2 and PW 3. Among the Respondents, only the 1<sup>st</sup> Respondent testified. She testified as DW 1.
4. The learned trial Magistrate, after setting out the summary of the evidence presented by the parties and analyzing the same found as follows;-

**“.....I find that the claim of the Plaintiff against the 1<sup>st</sup> Defendant will fail and the same is dismissed. Further, since the Plaintiff admitted that he wished to withdraw the case against the 2<sup>nd</sup> Defendant, and that he had not filed any case against the 3<sup>rd</sup> Defendant, the same will be dismissed with costs payable by the plaintiff. On the other hand, I will enter judgment for general damages for Kshs.350,000/= against the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants with costs. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants will also pay costs of the 1<sup>st</sup> Defendant as its actions which resulted into her being made a party, otherwise the case against the 1<sup>st</sup> Defendant is equally dismissed.”**

The only party who preferred an appeal was the Appellant herein and only on one aspect of the judgment. This is the dismissal of his prayer for eviction.

This being a first appeal the court is obligated to consider and reevaluate the evidence afresh and make its own conclusion while bearing in mind that it did not see or hear the witnesses testify. **See Seller -vs- Associated Motor Boat Company Ltd [1968] E.A 123.**

## **ANALYSIS OF THE EVIDENCE.**

1. That the Plaintiff is the registered owner of South Teso/Angoromo/1094 on which he had constructed iron sheets rental structures with 11 rooms. That the Plaintiff had a boundary dispute with the 1<sup>st</sup> Defendant and he called the surveyor. The Surveyor visited the land but did not give the Plaintiff a copy of his report.
2. That later the Plaintiff's structures were demolished on orders issued in Busia SPM.CC. No.288 of 2000 during which some Kshs.95,000/= which he had kept in one of the rooms went missing.
3. The Plaintiff stated that the 1<sup>st</sup> Defendant had constructed houses on part of his land. He produced copy of the judgment in Busia SPM.CC. No. 288 of 2000 where the 1<sup>st</sup> Respondent was the Plaintiff while Jonathan Wambala and Holy Redeemed Apostolic Ministries were the Defendants. The court had in its judgment in that case,among others ordered as follows;-

**“.....The Plaintiff is ordered to surrender and transfer to the 1<sup>st</sup> Defendant from her land an area of 0.014 hectares and bear the expenses of the transfer of the land to the 1<sup>st</sup> Defendant the market value of the land encroached assessed by the District valuer, Busia or any licensed and practicing valuer. The semi-**

***permanent houses constructed along the four metres access road accessing to parcel number 2292 and 2291 and are marked “mud houses” 1, 2, and 3 “ respectively in Exhibit D4 to be demolished to pave way for the surveyed access road.”***

4. The 1<sup>st</sup> Defendant stated that she is the registered proprietor of land parcel South Teso/Angoromo/2292 and had filed Busia SPM.CC. No.288 of 2000. That the court ordered that the surveyor to visit the suit land and make a report. The surveyor’s report indicated that the Plaintiff herein had houses on the road of access and the court ordered that they be demolished. The 1<sup>st</sup> Defendant produced copies of the Land Registrar’s and surveyor’s report plus proceedings in Busia, HCCA. No. 1 of 2003 as exhibits. The record of appeal in Busia HCCA. No. 1 of 2003 shows that the two Defendants in Busia SPMCC. No.288 of 2000 had appealed against the judgment of the learned trial Magistrate and the appeal was allowed in terms shown hereinafter.
5. The Land Registrar’s and Surveyor’s reports dated 19.2.2000 which formed part of the evidence adduced before the trial court, had noted the following, among others.

***“ (iv) There are semi permanent houses constructed along the 4 m road accessing to parcel No.2292 and 2291 are marked “mud houses 1, 2, and 3 “ respectively. [see surveyor’s report marked Exhibit 3].***

***(x) The area encroached by the proprietor of No.2292 onto the road is 20 m by 4 m = 0.008 Ha.” [see surveyor’s report marked exhibit 3].***

***(xii) Proprietor of 2292 has left out part of his land measuring 7m by 8 m to yet another neighbour as shown on our mutation forms.”***

There was no finding made by the Land Registrar and Surveyor in their reports dated 7<sup>th</sup> September, 2000 to suggest that the 1<sup>st</sup> Defendant’s (Grace Anyango Olando’s) land parcel South Teso/Angoromo/2292 had encroached onto parcel South Teso/Angoromo/1094 which belonged to the Plaintiff.

6. That the evidence of PW 3 (Alice Wepukhulu), that South Teso/Angoromo/2292 had encroached onto South Teso/Angoromo/1094 by 0.032 hectares was found by the trial court to be unreliable as she was not among the officers recognized by the Registered Land Act, Cap 300 of Laws of Kenya (Repealed under Section 109 of The Land Registration Act, 2012) to determine boundaries. The authority to determine the boundary disputes vests in the Land Registrar and Section 21 of the Registered Land Act (Supra) is relevant and states;

***“ 21.....***

***(2) Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any registered party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary.***

***(4) No court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section.”***

The provision of section 21 (4) of the Registered Land Act, (Supra) has been retained as section 18 (2) of the Land Registration Act, 2012 in the same terms. The law being then and now, that the authority to determine boundaries vests with the Land Registrar, the learned trial Magistrate was correct to hold as he did that;

***“.....The report by PW 3 was unadmitted since she admitted that she was not recognized by the Institute of Surveyors. She could not therefore give a competent***

*report hence this court cannot rely on her report. I wish to further state that the report by the Surveyor found that the Plaintiff [Appellant] had encroached into the access road and ordered removal of the structures.....Hence the portion where demolition took place having been found to be access road, no eviction order will issue in favour of the Plaintiff [Appellant] as the land does not belong to him but the public.” [Emphasize mine]*

7. That though the appeal against Busia SPM CC. No. 288 of 2008 in Busia HCCA. No. 1 Of 2003 was allowed, the court confirmed the findings of the Land Registrar and Surveyor and issued orders to evict the Respondent in the following terms:

*“..... Having found that Grace had trespassed onto Jonathan’s land parcel 912, the court had no option but to order for her eviction. That seems a pertinently harsh outcome but the law does not allow otherwise.”*

## **CONCLUSION.**

1. That having found as above, and noting that this appeal was only on the dismissal of eviction prayer, the court finds that the Appellant has failed to present before this court sufficient or any grounds to interfere with the learned trial Magistrate’s order or decision of 21<sup>st</sup>, July, 2011. The court upholds the learned trial Magistrate decision on the eviction prayer. The appeal is therefore dismissed with costs.
2. That the following orders are therefore issued;
  - a. The appeal is dismissed with costs.
  - b. The learned trial Magistrate’s decision of 21<sup>st</sup> July, 2011 rejecting the prayer of eviction is upheld.

It is so ordered.

**S.M. KIBUNJA,**

**JUDGE.**

**DATED AND DELIVERED ON 26<sup>TH</sup> DAY OF FEBRUARY, 2015.**

**IN THE PRESENCE OF;PRESENT..... APPELLANT**

**...PRESENT....1<sup>ST</sup> RESPONDENT**

**...N/A.....2<sup>ND</sup>RESPONDENT**

**...N/A.....3<sup>RD</sup>RESPONDENT**

**N/A.....4<sup>TH</sup> RESPONDENT**

**MR. ONSONGO FOR .....APPELLANTS COUNSEL**

**MR. ASHIOYA FOR .....1<sup>ST</sup> RESPONDENTS COUNSEL.**

**JUDGE.**