**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL NO. 14 OF 2011**

***(Being an appeal from the Judgment and Decree of P. A. Olengo, Senior Resident Magistrate dated 11th February, 2011 in Hamisi Senior Resident Magistrate's Court Civil Suit No. 1 of 2008 Jamin Musa Chiveri -vs- Charles Linyulu Mukanda)***

**JAMIN MUSA CHIVERI ....................................... APPELLANT**

**VERSUS**

**CHARLES LINYULU MUKANDA ........................ RESPONDENT**

**JUDGMENT**

1. **JAMIN MUSA CHIVERI**, (the Appellant), lodged this appeal against the Judgment and Decree of O. A. Olengo, Senior Resident Magistrate, made on 11/2/2011 in SRMCC No. 1 of 2008 at Hamisi Senior Resident Magistrate's Court. The Appellant had sued **CHARLES LINYULU MUKANDA**, (the Respondent), for a permanent injunction restraining the Respondent and his agents from baking bricks on land parcel No. NYANGORI/KAPSOTIK/940.

2. The Appellant pleaded in his plaint that the Respondent had illegally encroached onto the suit land where he began construction of a shop but stopped when warned by the Appellant. The Appellant further pleaded that on 11/1/2008 the Respondent again entered the suit land with workers and began making bricks thereon. The Respondent filed a defence and denied the Appellant's allegations that he had entered the suit land and maintained that his activities were on his own land.

3. After hearing the evidence, the learned magistrate dismissed the Appellant's suit with costs provoking this appeal. The Appellant has proffered six grounds of appeal as follows;

> 1) The learned Senior Resident Magistrate erred in law in failing to address himself properly on the evidence on the record tendered by the appellant.
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> 2) The learned Senior Resident Magistrate did not correctly apply the principles of law in the matter.
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> 3) The learned Senior Resident Magistrate erred in law in basing his judgment on matters that were either extraneous or unlawful.
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> 4) The judgment or Decree of the learned Senior Resident Magistrate in the matter is unlawful and unconstitutional in its effect and result.
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> 5) The finding by the learned Senior Resident Magistrate that the portion of land in dispute was part of the Respondent's land parcel known as NYANG'ORI/KAPSOTIK/932 and not land parcel

known as NYANG'ORI/KAPSOTIK/940 was outside the evidence on record.

6) The learned Senior Resident Magistrate did not act justifiably or judiciously in the circumstances of this case.

4. The Appellant prayed that this appeal be allowed, the order dismissing his suit in the Resident Magistrate's Court be set aside and be substituted with an order allowing his suit with costs and the orders sought in the subordinate court be granted.

5. Parties agreed to dispose of this appeal by way of written submissions which have been filed and are on record. It has been argued on behalf of the Appellant that the learned Magistrate's finding was not grounded on the evidence adduced in court. It was submitted that although the Appellant's case was founded on the fact that the Respondent was baking bricks on parcel NO. NYANG'ORI/ KAPSOTIK/ 940, the learned magistrate never addressed his mind at all on the issue of bricks in his judgment.

6. It was further argued that the issue of the shop was not the subject matter of the case but the learned magistrate's decision was informed more with the location or position of the shop rather than the site of brick baking which was the major complaint in the case. The learned magistrate, according to the Appellant, drove away from the evidence before him or never bothered about the evidence before him at all.

7. The Appellant also faulted the learned magistrate's finding that land parcel No. NYANG'ORI/KAPSOTIK/932 existed and that the land belonged to the Respondent without evidence. It was further argued that the land Registrar was never called to confirm the existence of land parcel No. NYANG'ORI/KAPSOTIK/932 and whether it belonged to the Respondent. It was also contended that the surveyor (DW2) never filed a survey map or sketch to prove that the two parcels shared a common boundary.

8. The view held by the Appellant is that the learned magistrate did not address himself to the applicable principles of law. The learned magistrate, according to the appellant, did not sum up the case and decide on the issues raised in the case including giving reasons for his decision. He faulted the learned magistrate for relying on the evidence of the surveyor without calling the land Registrar to testify on the ownership of the parcels of land.

9. It was further argued that it was wrong for the learned magistrate to send a surveyor on the ground midstream proceedings and that the record does not show when the surveyor visited the land and even then no report was filed in court. The surveyor was also faulted for not saying on which land the bricks were.

10. The Respondent on his part, supported the findings of the learned magistrate. It was submitted that the suit land belongs to the Appellant's father one SHISALA JIVERI and that the learned magistrate properly captured the evidence by the appellant. The Respondent further contended that it was the duty of the appellant to prove his claim against the respondent but that did not happen. According to the Respondent, the appellant never produced evidence to confirm that the Respondent had encroached on the disputed parcel of land.

11. According to the Respondent, the learned magistrate properly evaluated the evidence adduced before him and reached a conclusion that is supported by both evidence and the law. It was argued that the learned magistrate considered the evidence of the surveyor before reaching his conclusion. This was after parties agreed that the surveyor visit the land. The Respondent also accused the Appellant of omitting the report by the surveyor from the record of appeal, saying the Appellant was dishonest. He asked that the appeal be dismissed with costs.

12. I have considered submissions filed on behalf of both parties and also examined the record of appeal. As this is a first appeal, it is my duty to analyse and re-assess the evidence and draw my own conclusions. This duty was laid down in the case of ***Selle -vs- Associated Boat Co. Ltd. [1968] EA 123***

and quoted with approval in the case of ***Macharia Mwangi Maina & 87 Others –vs- Davidson Mwangi Kagiri [2014] eKLR*** as follows;

***"An appeal from a trial by the High Court is by way of a 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 (Abdul Hamed Saif –vs- Ali Mohamed Sholan [1955] 22 E.A.C.A. 270)"***

13. The Appellant's evidence before the magistrate's court was that he was the legal representative of the estate of his late father **Kisala Chiveri**, who was the registered proprietor of parcel of land No. NYANG'ORI/KAPSOTIK/940. He produced a certificate of Search as P. Exh.1 as proof of this. According to the Appellant, the Respondent entered the suit land in January 2008. The Appellant found three people making bricks on the land and told him that they had been given authority by the Respondent who said the land was his, and the Respondent confirmed that it was him who was baking bricks. The appellant then decided to sue the respondent and obtained an injunction stopping the respondent from working on the land. He produced a Limited Grant as P.Exh. 2. The appellant claimed the land was his and wanted the respondent evicted from the suit land.

14. On cross-examination, the Appellant denied that the Respondent was his neighbour and said he did not know him. He also denied that the Respondent had bought land from his late father. The Appellant said that the Respondent had encroached about 100 meters, and had a permanent building on parcel No. NYANG'ORI/KAPSOTIK/940, in which a Posho Mill was being operated.

15. The Respondent on his part testified that, he is a neighbour to the Appellant where he has a commercial piece of land. He told the court that his land parcel No. NYANG'ORI/ KAPSOTIK/932 borders NYANGORI/KAPSOTIK/940 belonging to the appellant's father. He however denied trespassing onto parcel No. NYANG'ORI/KAPSOTIK/940. The Respondent further testified that the surveyor went to the ground and made a report. The defendant said that he was making bricks on his parcel of land NYANG'ORI/KAPSOTIK/ 932. The Respondent maintained that he was added 65 feet by one Bungei who had purchased it from Achezo Bongeli and that is where he was baking bricks.

16. The District Surveyor (DW2) testified that he visited the parcels of land Nyang'ori/Kapsotik/932 and 940 pursuant to a court order and carried out the survey; in the presence of both parties, Area Assistant Chief and District Land Registrar. According to this witness, the building was on parcel No. Nyang'ori/Kapsotik/932 and not 940. He produced his report as D.Exh. 1.

17. After considering the evidence adduced in court, the learned magistrate in a short judgment, dismissed the appellant's suit holding, that the appellant had not proved his case and that there was no evidence that Parcel No. NYANG'ORI/KAPSOTIK/940 was being interfered with. That is the judgment that the Appellant has challenged before this court.

18. The Appellant has attacked the learned magistrate's decision arguing that he failed to address his mind on the evidence tendered in court. The Appellant was the only witness who testified before that court. His brief testimony was that the Respondent had encroached onto his late father's land and started brick making thereon. He also said that the Respondent had been constructing a building on the parcel of land but was stopped by the appellant.

19. The learned magistrate at paragraph 3 of his judgment found at page 75 of the record of appeal, stated as follows;

***"It is the plaintiff's contention that the defendant has encroached onto land parcel No.***

***Nyang'ori/Kapsotik/940 but the defendant maintained that he did not encroach and that all his activities were on the land parcel No. Nyang'ori/Kapsotik/932 and this prompted me to send a surveyor one David Kombuor who filed his report indicating that the shop which was being claimed to be on the plaintiff's father's land Nyang'ori/Kapsotik/940 is actually on the defendant's land parcel No. Nyang'ori/Kapsotik/ 932 and that the land parcel No. Nyang'ori/ Kapsotik/940 is intact...."***

20. Looking at the evidence on record and the judgment of the learned magistrate as reproduced above, the learned magistrate correctly captured the issue that was before him. He summed up the contention between the parties and made a conclusion that he was not satisfied with the plaintiff's contention. The contention was about encroachment by the Respondent on parcel No. Nyang'ori/Kapsotik/940 which the learned magistrate captured. I am unable to agree with the Appellant's contention on the 1st ground of appeal that the learned magistrate did not address himself properly on the evidence. The Appellant simply failed to prove his case of encroachment before that court.

21. The Appellant has also complained that the learned magistrate's judgment was based on extraneous matters namely the shop that was said to be on the plaintiff's father's land, but which was not the issue before court. The learned magistrate was also faulted for finding that the Respondent was the proprietor of parcel No. Nyang'ori/Kapsotik/932. The Respondent had pleaded at paragraph 6 of his Defence as follow;

***"The Defendant avers that during the lifetime of the plaintiff's deceased father he purchased a portion of land from one JORAM BUNGE in 1976 who had also bought the same from the plaintiff's said deceased father and the Defendant also directly bought a portion from the plaintiff's deceased father who voluntarily during his lifetime sold to him the same in 1980 and thereafter incorporated all the parcels and obtained one title known as land parcel No. NYANGORI/KAPSOTIK/932 in 1984."***

Despite this averment, the Appellant had testified in cross-examination, that he did not know the Respondent and that he was also not aware of the existence of parcel No. Nyang'ori/Kapsotik/932. He however admitted that, ***"He (Respondent) has encroached about 100 metres. There is a building in Kapsotik/940. The building is permanent. It has two doors. It is a business premises. The (defendant) built it in a year I cannot recall..."*** This is an admission that the Respondent had been on the land much earlier than January 2008. The Appellant also admitted that there had been several boundary disputes involving their parcel of land and other neighbours. He however did not say whether parcel No. 932 was one of them.

22. It is strite law that in civil matters, it is the duty of the person suing, in this case the Appellant, to prove his case on a balance of probabilities because "he who asserts must prove." This duty is well captured in Section 107 of the Evidence Act (Cap. 80) Laws of Kenya which provides as follows;

***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 facts it is said that the burden of proof lies on that person."***

Section 3 (4) of the same Act further provides as follows;

***S. 3 (4) "A fact is not proved when it is neither***

***proved nor disproved."***

23. The Appellant alleged that bricks were being backed on their land. Apart from his evidence which did not clearly prove this allegation, there was no other evidence to help the court make a determination on this. The Respondent's counsel requested the court to visit the scene but counsel for the Appellant opposed this. The court on its own motion ordered that the surveyor (DW2) to visit the land and he testified in court that the shop was on parcel on parcel No. Nyang'ori/Kapsotik/932 and not on

Nyang'ori/Kapsotik/940 as had been claimed by the appellant. This witness's evidence did not mention whether the bricks were being backed on parcel No. Nyang'ori/Kapsotik/940 or 932. Unfortunately, that report is not part of the record of appeal and no explanation was offered why it was omitted.

24. With the kind of evidence on record, I do not think the learned magistrate would have reached a different conclusion other than the one he reached. The Appellant failed to satisfy the court that there was sufficient evidence to prove encroachment on land parcel Nyang'ori/Kapsotik/940 and lead the learned magistrate to reach a conclusion that was favourable to him. The only way the appellant could prove his case, was to tender concrete, tangible and credible evidence, which he did not do.

25. It has also been argued on behalf of the appellant, that the learned magistrate's judgment and decree is unlawful and unconstitutional. The learned magistrate considered the evidence that was before him and made a determination based on the evidence on record. The Appellant did admit in cross-examination, that surveyors had gone to the area about five (5) times to sort out boundary disputes over Nyang'ori/Kapsotik/940 but was not clear about the other parcels that were involved. The conclusion that can be drawn from such evidence is that there are boundary disputes involving the Appellant's parcel of land and his neighbours. But between the Appellant and Respondent, the evidence on record did not unequivocally point out on which parcel of land the activities complained of were taking place.

26. Given the nature of this matter, the evidence on record and the decision reached by the learned magistrate, I do not see what is unlawful or unconstitutional about the learned magistrate's decision. The Appellant did not prove his case as require and the learned magistrate reached a correct decision. I am satisfied that although the learned magistrate may have not analysed each witness's testimony, given that the witnesses were brief, his judgment met the legal threshold. Consequently, the Appellant's Appeal is dismissed with costs.

***Dated and delivered at Kakamega this 24th day of February, 2015***

**E. C. MWITA**

**J U D G E**