



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL NO. 118 OF 2019**

**JOSEPHAT MBURUGU.....APPELLANT**

**VERSUS**

**SILAS MWITI MUGWIKA.....RESPONDENT**

*(Being an appeal from the Judgment of Hon. J. Irura (P.M.)*

*delivered on 2<sup>nd</sup> October, 2019 in Nkubu PMCC No. 96 of 2013)*

**JUDGMENT**

**A. PLEADINGS**

1. The appellant as the registered owner of **L.R No. Nkuene/U-Mikumbune/1547** sued the respondent for unlawfully encroaching, trespassing and remaining on his land. He sought for permanent orders restraining the respondent from entering, encroaching, occupying and or in any way whatsoever interfering with his ownership, occupation and possession of the suit land.
2. The respondent refuted the claim and pleaded he owned his own **Land Parcel No. Nkunene/U-Mikumbune/1032** bordering the appellant's parcel of land. He averred it was the appellant who had allegedly, illegally and or unlawfully blocked and or grabbed public land.
3. In his counterclaim, he averred that the appellant had since 2013 blocked an access road serving his parcel of land, and grabbed public land in total regard of the area map boundaries. He prayed for an order for the appellant to unblock the road of access to **Parcel No.'s 1032, 1033 and 1174**.
4. The appellant replied to the defence and put a defence to the counterclaim. He denied the alleged blockage of the public access road or grabbing of any public land.
5. The parties complied with **Order 11**, filed list of witnesses, list of documents and list of issues.
6. The trial court on 27.5.2015 made an order directing the Land Registrar and surveyor to visit the scene and determine the correct boundary and file a report.
7. The District Land Surveyor visited the suit parcels of land on 11.12.2018 in the presence of the parties. The observations were that the original boundaries had been tampered with after **L.N No. Nkuene/U-Mikumbune/219** was subdivided into **Parcel No's 1032 and 1034**. Further, the report noted there were inconsistencies between the ground and the map distances hence the need to amend the map (RIM) to reflect what was on the ground.

**B. TESTIMONY**

8. The appellant testified that the respondent was his neighbor owning **L.R No. 1037** which bordered his **Parcel No. L.R 1547**. He stated the respondent had trespassed into his land leading to a boundary dispute at land registrar's office. He produced the application for a boundary dispute as **P exh 1** and a copy of the receipt as **P exh 2**. He prayed for an order restraining the respondent from interfering with his land by observing the original boundary.
9. The respondent denied the alleged trespass to the appellant's land and sought for the court to visit the **locus in quo** and make observations. On the status.

10. In cross examination, the respondent admitted there was a boundary separating his land and that of the appellant though the appellant had allegedly fixed a permanent gate on the public road.

11. The court after hearing the evidence ordered for a scene visit in the presence of the County surveyor to align the boundaries and file a report. The County surveyor and the land surveyor attended court on 26.7.2019 and presented the report. The County surveyor's report showed that upon taking measurements on the ground, it was observed that the applicant's gate was built on a public road, and that part of the land was on the public road. The land registrar explained the anomaly could have been caused by survey errors. The two officers recommended the appellant move the gate to the point which was marked on the ground in line with the map.

### **C. JUDGMENT**

12. In its judgment, the trial court dismissed the appellant's case and entered judgment in favour of the respondent as per the counterclaim triggering the appeal herein.

### **D. THE GROUNDS OF APPEAL**

13. The appellant faults the trial court for:- finding him to have trespassed into the respondent's land; misconstruing what trespass was hence arriving at the wrong decision; awarding damages which were neither pleaded nor prayed for; awarding colossal damages instead of nominal damages contrary to law; failing to find that if there was any alleged trespass, the same was on a public road and not on the respondent's land and that the government being a custodian of public land had not complained and lastly ruling against the weight of the evidence.

14. This being a first appeal, the court is obliged to re-evaluate, rehearse and re-assess the pleadings, evidence and come up with its own findings and conclusion while aware it did not hear the witnesses testify and observe their demeanor. See **Peters –vs- Sunday Post Ltd. (1958) EA 424.**

### **E. THE APPEAL**

15. The appellant's claim was that the respondent had allegedly encroached on his land **L.R No. Nkuene/U-Mikumbune/1547**. He sought for a permanent injunction to stop any further encroachment or occupation of his land by the respondent.

16. On the other hand, the respondent denied the contents of the plaint, stated he owned **P.N. Nkuene/U-Mikumbune/1032** bordering the appellant's land which he could not access since the appellant had allegedly blocked his access road with a permanent gate in an effort of grabbing the public road. He counterclaimed for the re-opening of the blocked access road through a mandatory injunction plus costs and interest.

17. The appellant denied the contents of the counterclaim as to the blockage and denied grabbing of any public land.

### **F. SUBMISSIONS ON THE GROUNDS OF APPEAL**

18. The appellant submits there were no pleadings or evidence tendered that he had trespassed into the respondent's parcels of land hence the finding of trespass was erroneous.

19. Secondly, the appellant submits the court granted an award for mesne profits without evidence of either trespass or any basis in fact and in law.

20. Thirdly, it is submitted the respondent had only prayed for an injunction and that the expert report attributed the error to survey personnel hence the directions that he moves the gate to the correct position.

21. The respondent submits the appellant had failed to substantiate his claim against him over encroachment and or trespass in line with **Section 3 (1) of the Trespass Act Cap 294**. He relies on **Duncan Nderitu Ndegwa –vs- Kenya Power & Lightening Ltd & Another [2013] eKLR, Rhoda S. Kiilu –vs- Jiangxi Water & Hydro Power Construction (K) Ltd [2019] eKLR, Entick –vs- Carrington [1765] EWHC KB 198 and Ntukusoi Ole Letiria –vs- Ruth Ngonyo Kangethe [2019] eKLR.**

### **G. BURDEN OF PROOF**

22. It is trite law that parties are bound by their pleadings and issues flow from pleadings.

23. The appellant based his claim on alleged encroachment and or trespass on his parcel of land by the respondent who was his neighbor. In order to be entitled to a claim for permanent injunction, the appellant ought to have proved that indeed there had been illegal entry into his land by the respondent in a manner degrading his land. He had to bring a surveyor's report to show that the respondent had made an illegal entry into his land and that there was no justification for the same.

24. In **Kenya Power & Lightening Company Ltd –vs- Sheriff Molana Habib [2018] eKLR**, the court held a permanent injunction which is also known as perpetual injunction is granted upon merits of the case after the claim has been tendered and that it restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.

25. The appellant did not produce any title deed to his land indicating the acreage and or extent of the alleged encroachment by the

respondent. Other than the application for a boundary dispute and a receipt thereof, the appellant produced no report to back his claim over any encroachment or illegal occupation of his land by the respondent.

26. On the other hand, the respondent insisted that he had not encroached on the appellant's land as alleged or at all. On the contrary, the respondent testified it was the appellant who had erected a gate on an access road serving his **Parcels No. 1032, 1033 and 1034**.

27. Having closed their evidence, the trial court was left with no option than to make an order dated 28.11.2019 for land registrar and land surveyor to visit the locus in quo and determine the correct boundary between **P. No's 1032 and 1547**, correct boundary and furnish the court with a report.

28. Though the land registrar and the land surveyor attended court on 26.7.2019 and reported their observation and findings, none of the parties sought for leave to cross-examine the two about their report.

29. The court eventually ordered that the report to be formally filed as a court record. Parties were also ordered to file written submissions.

30. In the report, there was a finding that the respondent's parcel of land correlated with the ground and the Registry Index Map. Its boundaries were intact and well defined on the ground whereas the appellant's land had encroached onto the road reserve by approximately nine metres hence blocking the respondent access to his land with approximately five meters.

31. The appellant's gate was also found to have been erected on a road reserve wherein power transmission lines passed.

32. The recommendations of the two officers was that the appellant relocates his gate to the end point of the access road and that parties to maintain the boundaries as fixed by the officers from the date of the visit.

33. The court on 21.8.2019, confirmed to the parties that the report was already filed in court. Similarly, none of the parties raised any issues over the credibility, authenticity, reliability, correctness and or probative value of the report. Further, none of the parties produced or sought to rely on a different report other than the one dated 19.8.2018.

34. Additionally, the parties did not make any comments about the report in their written submissions especially the respondent's filed on 21.8.2019.

35. The appellant in ground 1, 2, 5 and 6 of the appeal complains the court erred in finding he had trespassed into the respondent's parcels of land as a result of which it erroneously and without basis proceeded to find him liable to pay colossal damages.

36. **Section 3 (1) of the Trespass Act Cap 294** defines trespass as including entry into, remaining on or erection of any structure on or cultivation, tilling, grazing or permitting of stock to be on a private land without the consent of the occupier.

37. In **Black Law Dictionary 11<sup>th</sup> Edition Thomson Reuters Page 667 encroachment** is defined as infringement of other's right, interference with or intrusion onto another's property. **Trespass at page 1810 – 1811** is defined as wrongful entry on another's land which may take the form of continuing, innocent, permanent, ab initio.

38. Looking at the evidence by the parties against the survey/land registrar's report, it is evident that none of the parties tendered any evidence to show any illegal entry of each of them to their respective parcels of land. None of the parties called any evidence to demonstrate how much of their land had been encroached upon by their adversary and for how long.

39. The report of the land surveyor/land registrar was clear that the two parcels of land remained intact on the ground and on map save that the appellant had encroached into the road reserve to the extent of nine meters whereof he had erected a permanent gate hence effectively blocking the respondent from accessing his parcels of land by five meters.

40. The recommendation by the report was that the appellant relocates his gate to the end point of the access road. As noted, above, none of the parties disputed the aforesaid report and or produced a contrary report.

41. As the saying goes, **FANSUS IN UNO FALSUS IN OMNIBUS** false in one thing false in everything, the appellant had built his case on quicksand and cannot therefore blame the court for finding that he had failed to prove any of his legal rights to land that had been infringed by the respondent.

42. As held in **Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 others [2003] eKLR**, a party seeking an injunction has to prove his rights has been infringed so as to call the other party for rebuttal. The appellant failed to prove any invasion of his land by the respondent both through oral and documentary evidence.

43. As regards the counterclaim, the respondent had pleaded that the appellant was the one encroaching on a road reserve and blocking an access road to his parcels of land by erecting a permanent gate. The respondent insisted he had formally complained to the area chief and invited the court to visit the **locus in quo** to establish the status.

44. The surveyor report vindicated and lend credence to the claim and evidence by the respondent that he had not encroached on to the appellant's parcel of land and instead there was encroachment of the road access.

45. The respondent did not allege and or call evidence that his parcels of land had been encroached upon by the appellant. There was no

pleading and evidence tendered by the respondent in support of a claim for mesne profits or general damages against the appellant.

46. The appellant did not contest or seek to invalidate the surveyor/land registrar's report as regard encroachment on a road reserve. Similarly, the respondent did not dispute that the report had failed to find any trespass to his land by the appellant.

47. Given that the court has found no iota of evidence linking the appellant with trespass into the respondent's land, I find no basis of a finding that the appellant is liable for any damages which in any event were never pleaded nor prayed for in the counterclaim.

48. The respondent did not tender evidence on any loss or damage arising from the blockage of the access road by the appellant. There was no evidence called to show the loss the appellant had subjected the respondent to. No members of public were called to corroborate the respondent's evidence and perhaps claim any public interest.

49. The land registrar alluded to the fact that there may have been survey errors at the time the appellant allegedly erected his gate. Whereas the appellant did not seek for any clarification on that issue, a definition of trespass above also includes a concept called innocent trespass. There was no evidence tendered by the respondent that the appellant in erecting his gate was reckless, negligent and or deliberately ignored known boundaries.

50. **Section 21 of the Surveyors Act** states a surveyor shall carry out every survey in a manner to ensure survey accords in all respects with the **Act** and shall be reasonable for the correctness and completeness of every survey carried out by him or under his supervision.

51. **Regulation 26 of the Survey s 1994** provides, a surveyor shall be personally responsible for the accuracy, fidelity and completeness of every survey presented by him for the approval of the director.

52. In *Elizabeth Wambui Githinji & 29 Others –vs- Kenya Urban Roads Authority & 4 Others [2019] eKLR*, the court held like in all professions, the highest standard and competency is required, permissible errors in measurement is acceptable so long as there is an effort to comply with the elaborate procedures laid down under **Regulations 56, 60 and 91 of the Survey Rules**.

53. The respondent did not call any evidence on the width of the access road and or establish if the appellant ignored any directives from the Public Health Officer or a Road Engineer in erecting the gate or perhaps that a notice under **Section 91 of the Traffic Act Cap 403 Laws of Kenya** was ever served upon the appellant for encroachment on road and damage to the access road.

54. The respondent did not enjoin under the Kenya Roads Act any of the custodians of the access road or for that matter the County Government involved. In absence of that, my finding is that the respondent did not plead for nor pray for mesne profits. Similarly, he did not tender any evidence in support of such a claim.

55. In *Chief Land Registrar & 4 Others –vs- Nathan Tirop Koech & 4 Others [2018] eKLR*, the Court of Appeal held that it is upon a party to place evidence before the court upon which an order of mesne profits could be made. The defence did not mention any figure at all. The written submissions by the respondent did not allude to any claim for mesne profits.

56. The appellant should therefore not be made to pay a sum which he was neither notified of so as to counter it in the reply to defence nor was he given a chance to cross-examine the respondent if at all any evidence, (which does not appear on the record) was ever produced before the trial court.

57. Further, mesne profits in *Karanja Mbugua & Another –vs- Marybin Holdings Co. Ltd [2014] eKLR* was termed as special damages which must not only be pleaded but also be proved in line with **Order 21 Rule 13 Civil Procedure Rules**.

58. The respondent was not entitled to any damages at all. See *Stephen Njuguna Kiragu & Another –vs- Kenya National Highways Authority [2018] eKLR*.

59. In the premises, I find the appeal with merits. The same is allowed and the lower court suit dismissed as well as the counterclaim.

60. Each party shall bear its own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU  
THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2022**

**IN PRESENCE OF:**

**KIRUAI FOR RESPONDENT- PRESENT**

**KIMATHI KIARA FOR APPELLANT – PRESENT**

**COURT ASSISTANT - KANANU**

**HON. C.K. NZILI**

**ELC JUDGE**