



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC APPEAL NO 35 OF 2018

FRANCIS MUIRURI KAMUNYU.....APPELLANT

=VERSUS=

KENNEDY ORUMO ONG'ERA.....RESPONDENT

(Being an Appeal from the Judgment of Thika

Chief Magistrate Court (Honourable C A Otieno-Omondi

PM) delivered on 31/10/2018 in Thika CMC Civil Case No. 16 of 2013)

JUDGMENT

1. On 29/4/2013, **Francis Muiruri Kamunyu [the appellant]**, through a plaint dated 23/4/2013, instituted a suit in the **Chief Magistrate Court at Thika** seeking, among others, the following reliefs against the respondent: (i) an order for eviction of the respondent from land parcel number **Ruiru/Kiu Block 6/773**; and (ii) an order restraining the respondent against trespassing on, encroaching on or dealing with the said parcel of land in any manner. His case was that he sold to the respondent a plot measuring **50 feet x 100 feet** out of a parcel of land he described as "**Plot No. 551/L.R. 8867**" measuring **100 x 100 feet**, at a consideration of Kshs 270,000. He averred that the respondent paid him the agreed purchase price and he pointed out the plot to him and the beacons thereof. It was his case that the respondent, without any colour of right, unlawfully trespassed on and/or encroached onto his other piece of land, to wit, parcel number **Ruiru/Kiu Block 6/773** and illegally started constructing a house thereon. He contended that the respondent had failed to stop the construction and to move to his plot on parcel number "**551/LR 8867.**"

2. The respondent filed a statement of defence dated 2/5/2014. He denied

trespassing on the appellant's land and averred that the plot that he occupied was the very plot which the appellant identified to him and sold to him. He added that upon purchase of the 50 feet x 100 feet plot, he took possession and he had been in possession of the plot since 2008. He added that he commenced construction in 2010 on the very plot that the appellant had sold to him and the appellant had never raised any objection. He described the appellant's suit as a gimmick calculated to deny him continued occupation and defeat his title to the plot which he had sold to him. He urged the trial court to dismiss the suit.

3. Trial proceeded before **Hon C A Otieno – Omondi** who subsequently rendered a judgment dated 31/10/2018. The trial magistrate made a finding to the effect that the appellant had failed to demonstrate to the court that the land he sold to the respondent bordered parcel number **Ruiru/Kiu Block 6/773** and that the defendant had indeed encroached on parcel number **Ruiru/Kiu Block 6/773**. The learned magistrate held that the appellant had failed to present evidence to demonstrate that parcel No. 551 and parcel No. 773 abutted each other and that the respondent had encroached on parcel No. 773. Consequently, the learned trial magistrate dismissed the appellants suit.

4. Aggrieved, the appellant brought this appeal, advancing the following five verbatim grounds of appeal:

a) The learned trial magistrate erred in law and in fact by not appreciating that the plaintiff had practically proved his case on a balance of probability.

b) The learned trial magistrate erred in law and in fact in dismissing the plaintiff's suit when it was proved that the defendant constructed a house in the suit premises and not in his plot number 551/LR 8867 which he had purchased from the appellant.

c) The learned trial magistrate erred in law and in fact in not considering that the plaintiff had sold to the defendant a plot measuring 50x100 ft in plot number 551/LR 8867 and not in LR Ruiru/Kiu Block 6/773 and the document produced in court proved that to support his claim.

d) The learned trial magistrate erred in law and in fact in falling to

consider and/or even adequately appreciate the evidence of the appellant.

e) The learned magistrate erred in law and in fact in failing to allow the appellant to cross examine the respondent on his testimony.

5. The appeal was canvassed through written submissions dated 30/7/2021, filed by the firm of *Ndungu Mwaura & Co Advocates*. Counsel for the appellant identified the following as the two issues falling for determination in the appeal: (i) Whether the appellant proved his case on a balance of probability; and (ii) Whether the court erred in dismissing the appellant's suit despite proof that the respondent had constructed his house partially on the appellant's property.

6. On whether the appellant proved his case on a balance of probability, counsel for the appellant submitted that the burden of proof lies on the party who desires the court to decide in his favour. Counsel argued that the agreement for sale which the appellant produced duly "informed the court the specific delineation of the property". Counsel added that the appellant had taken "further steps to report the issue to the chief so as to amicably solve the problem". Counsel further submitted that the appellant invited the trial court to visit the *locus in quo* on 7/5/2018 but the visit was frustrated by the absence of the respondent's advocate.

7. On whether the trial court erred in dismissing the appellant's suit despite proof that the respondent had constructed his house partially on the appellant's property, counsel submitted that the respondent having purchased plot number "551/LR 8867" from the appellant, he had no right to encroach on "LR Ruiru/Kiu Block 6/77".

8. The respondent filed written submissions dated 2/7/2021 through the firm of *Moses Nyambega & Co advocates*. Counsel submitted that the appellant had failed to demonstrate that the respondent had constructed a house on a portion of land other than the one which the appellant sold to him. Counsel added that the respondent had demonstrated that he took possession of the plot sold to him by the appellant, measuring 50 feet x 100 feet in 2008 and commenced construction thereon on the basis of the terms of the sale agreement, pending actual registration of his interest in the said plot. Counsel contended that the allegation of encroachment was made long after the respondent had finished construction.

9. Counsel for the respondent submitted that the appellant had not controverted the respondent's evidence in the trial court and argued that the plot measuring 50 feet x 100 feet properly belonged to the respondent. Counsel urged the court to dismiss the appeal and award the respondent costs of the appeal.

10. I have considered the entire record of the trial court together with the parties respective submissions in this appeal. I have also considered the relevant legal framework and the prevailing jurisprudence on the key issue falling for determination in this appeal. The appellant itemized five grounds of appeal. His counsel condensed the five grounds of appeal into two issues which were more or less similar in the sense that they both focussed on the trial court's finding on the question of proof. The respondent's submissions similarly focused on the question of proof. Taking into account the five itemized grounds of appeal and the parties' respective submissions, the key issue which falls for determination in this appeal is whether the trial magistrate erred in finding that the appellant had failed to prove his case to the required standard of proof.

11. This court is invited to exercise jurisdiction as the first appellate court. The principle that guides a first appellate court when exercising jurisdiction is well settled. The Court of Appeal outlined the principle in the case of *Susan Munyi v Keshar Shiani (2013)eKLR* as follows:-

"As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions."

12. The same principle was outlined in *Abok James Odera t/a A J Odera & Associates v. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR* as follows:

"This being a first appeal, we are reminded of our primary role as

a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

13. **Sections 107** of the **Evidence Act** is clear on who bears the burden of proof in a trial. **Section 107** of the Evidence Act provides thus:

"(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 any fact, it is said that the burden of proof lies on that person."

14. The appellant was the claimant in the trial court. He bore the evidential burden of proof. Secondly, there was common ground that the appellant sold to the respondent a plot measuring 50 feet x 100 feet. Thirdly, there was common ground that the respondent paid and the appellant received full purchase price for the said plot. Fourthly, there was no contestation about the fact that the respondent took possession of the 50 feet x 100 feet which the appellant sold to him. The only issue for determination was whether the respondent had encroached on the

appellant's land, parcel number **Ruiru/Kiu Block 6/773**. The appellant contended in the trial court that the respondent had encroached onto his land instead of sticking to the 50 x 100 feet which the appellant had sold to him.

15. Given the nature of the issue which arose for determination in the trial court, it was the duty of the appellant, as the claimant, to present to the court survey or/and any other relevant evidence relating to the precise boundaries of the plot which he sold to the respondent. Secondly, it was the duty of the appellant to demonstrate to the court that the 50 x 100 feet plot which he sold to the respondent was not part of parcel number **Ruiru/Kiu Block 6/773** and that it was an abutting parcel which he (the appellant) owned. Thirdly, given that parcel number **Ruiru/Kiu Block 6/773** is a surveyed and registered piece of land, it was the duty of the appellant to procure a determination of the precise boundaries of the said parcel by the Land Registrar in terms of the requirements of **Section 18** of the **Land Registration Act** and present that determination as part of his evidence to the trial court. The appellant did none of the above.

16. In his evidence in chief, the appellant told the trial court that he subdivided his land and sold to the respondent a plot measuring 50 by 100 feet. He added that the respondent took possession and commenced construction on the land but the construction went beyond the 50 x 100 feet plot he had sold to the respondent. He further testified that the respondent went beyond plot No. 551 and encroached into Plot No 773. It was therefore his duty to present to the court evidence relating to the titles of the two parcels and the precise boundaries of the two plots. He did not tender that evidence. In the circumstances, the trial court had no evidence on which to make a finding in favour of the appellant.

17. The appellant faulted the trial court for failing to allow him the opportunity to cross-examine the respondent. The court record reveals that the respondent gave his sworn evidence- in- chief on 17/8/2018. Counsel for the appellant was in court on the morning of that day when the court confirmed that defence hearing would proceed. Counsel for the appellant subsequently elected not to attend the hearing later in the day. No application was subsequently presented to the trial court seeking leave to cross-examine the respondent. In the circumstances, there is no proper basis for faulting the trial court for the appellant's failure to cross-examine the respondent.

18. In light of the foregoing, it is my finding that the trial court did not err in finding that the appellant had failed to prove his case to the required standard. The result is that I find no merit in this appeal. The appeal is hereby dismissed. The appellant shall bear costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 22ND DAY OF FEBRUARY 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Kiarie for the Appellant

Mr Mose Nyambega for the Respondent

Court Assistant: Lucy Muthoni