



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL NO. E049 OF 2021**

**JOSEPH MITHIKA M'ITHULA.....APPELLANT**

**VERSUS**

**JACOB MUNG'ATHIA MUNORU.....RESPONDENT**

*(Being an appeal from the Judgment of Hon. T. Gesora (C.M.)*

*delivered on 11<sup>th</sup> March 2021 in Maua CM CC No.164 of 2011)*

**JUDGMENT**

1. The appellant in the trial court had sued for trespass and illegal construction on the frontal part of his **Plot No. 7** bordering the respondent's **Plot No. 133** measuring approximately 40 ft by 55 ft. He sought for declaration that he owned the aforesaid portion; mesne profits; general damages; demolition of the illegal structures and a permanent order of injunction barring/restraining any entry or continued developments thereof.
2. By a defence and counterclaim dated 22.8.2011, the respondent denied the claim, averred he had been in occupation and without objection on the alleged portion for over 30 years following lawful allocation by the defunct Maua Municipal Council, had effected developments thereon since 1981 whereof he had rented out the premises to third parties for over 15 years.
3. In his counterclaim, the respondent maintained that he was a bonafide owner, had improved his plot to a standard of bringing in a rental income of **Kshs. 130,000/=** per month and hence sought for re-compensation and loss of income on any stoppage of his works by the appellant.
4. The appellant adopted his witness statements filed on 19.1.2012. He produced minutes for Town Planning Housing and Markets Sub-committee dated 22.8.1984 as **P exh (1)**, a copy of letter dated 19.8.1998 as **P exh (2)**, minutes for Town Planning committee meeting on 5.8.1981 as **P exh (3)**, a letter dated 28.8.2004 as **P exh (4)**, a copy of letter from the clerk Municipal Council Maua dated 26.8.2004 as **P exh (5)**, plaint dated 13.9.2004 in **Meru CMCC No. 577 of 2004** as **P exh (6)**, demand letter from Kiautha Arithi Advocates to District Physical Planner dated 4.8.2012 as **P exh (7)**, a letter to District Physical Planner dated 21.8.2012 as **P exh (8)**, a letter from ministry of Land dated 28.8.2012 as **P exh (9)**, photographs as **P exh (10)** and sketch map as **P exh (11)**.
5. Pw1 stated his land was privately owned and not allotted by the council or surveyed by the County Government. He insisted the respondent was stopped by the court in putting up the fence but he ignored the court order.
6. PW2 and 3 adopted their witness statements dated 6.2.2018 and 11.9.2013 respectively. They associated their evidence with that of PW1. The respondent did not tender any evidence.
7. The appellant complaint in this appeal is that the trial court failed to find that the cause of action arose in August, 2011 instead of 1998 when the respondent commenced construction of structures on the suit land; ignored the appellant's pleadings, evidence, submissions and instead relied on an unpleaded or extraneous matters; relied on a purported survey report dated 2.2.2016 which had never been produced by any party and was not afforded an opportunity to subject the same to evidentiary.
8. In line with **Order 42 Rule 16 of the Civil Procedure Rules**, parties filed written submissions to this appeal dated 8.1.2021 and 27.1.2022 respectively. The appellant submitted the genesis of his claim was the commencement of construction of a stone wall by the respondent which encroached on his parcel of land leading to a complaint to the Municipal Council of Maua as per **P exhs 2, 4, 5 and 9**.
9. As a result of the encroachment, the appellant submitted his suit was not time barred since the cause of action arose in August, 2018 and

not in 1998.

10. Regarding the issue of the surveyor's report dated 2.2.2016, it was submitted parties were never given an opportunity to read, scrutinize and subsequently subject the same to evidentiary test.

11. Whereas it was admitted by the appellant that the court visited the **locus in quo** on 18.12.2012, he takes the view that the court was unable to confirm the precise boundaries between the two plots hence the order on 15.11.2012 for the Maua municipal Survey and the Physical Planner to visit the scene in the presence of the parties to establish the encroachment if any, after the plaint was amended to include **Plot No. 133**.

12. The appellant however has disputed that a scene visit was ever conducted as directed by the court on 2.12.2015. He has denied the contents and veracity of the report made by the principal surveyor on 2.2.2016 and the District Physical Planner to the effect that the respondent was allocated **Plot No. 133** and that there was no evidence of the alleged encroachment.

13. The appellant submitted that if any scene visit was ever conducted, he was not notified of the same, that he did not participate in the exercise, the purported report was not produced before court and lastly reliance on it without subjecting the same to scrutiny was unfair and contrary to the law.

14. Touching on the court failing to rely on his evidence, the appellant submitted that he produced sufficient evidence to show that the disputed wall was erected in 1998 despite the existence of a valid court order and which was within his encroached parcel of land as per **P exhs 10 and 11** the sketch plan.

15. This being a first appeal, the court is mandated under **Section 78 of the Civil Procedure Act** to rehear, rehearse and re-evaluate the record and come up with its independent findings and conclusion while mindful that the trial court had the occasion to hear and assess the demeanor of the witnesses. See **Peter -vs- Sunday Post [1958] E.A. 424.**

16. The issues commending themselves for this court's determination are:-

*i. Whether or not the appellant proved encroachment of his Plot No. 7 by the respondent's Plot No. 106 and or 133 Maua Municipality to the extent of 40ft by 55 ft.*

*ii. If as a result of the alleged encroachment, the appellant suffered any loss and or damage.*

*iii. If the appellant was entitled to the reliefs sought.*

*iv. If the respondent proved allocation of Plot No. 106 and 133.*

*v. Whether the respondent's developments were within his plot.*

17. On order to prove ownership of **Plot No. 7**, the appellant tendered minutes allocating him the plot dated 22.8.1984, his request for the removal of the wall dated 19.8.1998, and 25.8.2004, a plaint filed in **Meru CMCC No. 577 of 2004**, a request for a PDP made through his lawyer dated 4.8.2012 and 27.8.2012, and lastly photographs indicating the developments.

18. On the other hand, the respondent attached to his list of documents a letter of allotment dated 2.2.1999, part-developed plan, fixed survey report by Government survey dated 14.8.2007, letter of confirmation of ownership of the plot from the Municipal Council of Maua dated 25.10.2011, an objection letter dated 7.10.1997 from the District Commissioner Nyambene District to the Commissioner of Lands Nairobi, letter dated 23.9.1997 from the District Physical Planner forwarding the PDP to the Commissioner of Lands Nairobi, letter dated 6.1.2006 from the Municipal Council of Maua to the Commissioner of Lands confirming the ownership of **Plots No's 106 and 133**.

19. The record of appeal indicates that on 18.10.2012, the trial court visited the **locus in quo** and noted that the parties were disputing about half of the plot on the frontal part facing Kanuni state. Following this visit, the appellant sought for another scene visit in the presence of the relevant officers to establish the boundaries between **Plot No. 7 and 133**. The trial court made an order dated 15.11.2012 for the Maua Municipal surveyor and Igembe South District physical planner in the presence of parties and their private surveyors to visit the scene, take measurements and establish who was encroaching on the other's plot.

20. From the record, it is not very clear whether the report was filed and brought the attention of parties by the court. Similarly, it is not clear if at the time PW1, PW2 and PW3 testified on 12.1.2020, the scene visit report was in the court.

21. Be that as it may, it is trite law that parties are bound by their pleadings and issues flow from pleadings. See **Stephen Mutinda Mule – vs- Independent Electoral and Boundaries Commission & Another [2014] eKLR.**

22. What the appellant had pleaded was that his **Plot No. 7** had been interfered with by the respondents who had built on his **Plot No's 107 and 133** Maua since his stone wall trespassed into the appellant's plot to an extend of 40ft by 55 ft.

23. In the defence and counterclaim dated 22.8.2011, the respondent averred he had only developed on his allotted plots as per approved plans for over 30 years with no complaints from the appellant.

24. In a reply to defence dated 12.9.2011, the appellant at paragraph 4 averred that there had always been a dispute over the **Plot No. 7** since

1998 when the respondent illegally put up the brick wall. In defense to the counterclaim, the appellant averred he had no claim over **Plot No. 106** but illegal developments of the respondent touching on **Plot No. 7**.

25. The appellant has faulted the trial court for finding that his cause of action arose in 1998. In his view, the cause of action arose in August 2011, when the alleged construction occurred as per paragraph 5 of the amended plaint.

26. It is a fact that the appellant pleaded at paragraph 5 of the amended plaint that encroachment on his plot allegedly occurred in August 2011. However, in the reply to the defence and defense to the counterclaim he admitted the alleged trespass occurred in 1998 after the brick wall was put up. This fact is confirmed by the appellant's own exhibits **P exh (2) (4), (5) and (6)**, the plaint at paragraphs (4) and (7) and though his own supporting affidavit and annexures to the application dated 15.2.2011 in which he stated at paragraph 7 that way back in 1980, the respondent requested him to put up a gate in order to access his **Plot 106** but he refused. However, the respondent went ahead and erected a wall on his **Plot 7** prompting him to file **Meru CMCC No. 577 of 2004** for trespass and was issued with an order on 16.9.2004 by Hon. J. Omburah stopping any construction on a portion measuring approximately 40 ft by 55 ft on **Plot 7**. He averred he was unable to serve the respondent who had allegedly left for United Kingdom until he came back on August, 2011, resumed further developments at an alarming speed hence the rush to file a fresh suit since the earlier one had been dismissed for want of prosecution.

27. So, looking at the pleadings, the appellant's claim was based on trespass which allegedly took place in 1998. **Section 3 of the Trespass Act Cap 403** defines trespass as an illegal entry into someone's property without his consent or authorization and remaining therein. Trespass may take various forms. It may be one time or a continuing trespass.

28. In this instance, the appellant alleged it started in 1998 after a stone wall was erected, subsequently in 2004, the same escalated and thereafter in 2011 the respondent allegedly started constructing a commercial structure while there was pendency of a court order.

29. In my considered view, the appellant was alleging a continuous trespass which took a series of acts and was alleged to be permanent in nature. See **Muthiora –vs- Marion Muthama Kiara (Suing on behalf of the Estate of Erastus Muthamia Kiara - Deceased) (Civil Appeal 43 of 2017) [2022] KECA 28 (KLR) (4 February 2022) (Judgment)**. Every continuous trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues.

30. On the other hand, the respondent was alleging that he was validly occupying the land out of ownership. In my view therefore, such a claim was and remains distinct from a claim for recovery of land hence could not be said to be time barred. See **Eliud Njoroge Gachiri –vs- Stephen Kamau Ng'ang'a [2018] eKLR**.

31. In **Isaack Ben Mulwa –vs- Jonathan Mutunga Mweke [2016] eKLR**, the Court of Appeal held that it was a well settled principle that continuous injuries to land caused by maintenance of tortious acts create separate causes of action barred only by the running of statute of limitation against each successive act.

32. The appellant was clear that they were litigating over the issue in 2004 before the Chief Magistrate's court. So if he came to the trial court in 2011, it means even if the claim was on recovery of land, 12 years had not lapsed in line with either **Sections 4 or 7 of the Limitation of Action Act**. See **Mtana Lewa –vs- Kahindi Ngala Mwangandi [2015] eKLR**.

33. Coming to the second issue of the survey report, the trial court visited the locus quo and ordered for a scene visit by both the District land surveyor and District physical planning officer to take out measurements and establish which plot had encroached on the other after a request by the appellant.

34. In **Amosam Builders Developers Ltd –vs- Betty Ngendo Gachie & 2 others [2009] eKLR** the court held, the evidence of experts must always be considered alongside all other evidence before the court while in **Stephen Kanini Wangondu –vs- The Ark Limited (2016) eKLR** it was held, expert evidence did not trump all other evidence and neither could it exist in vacuum or with mathematical precision and must be tested against all other evidence.

35. In **Azzuri Limited –vs- Pink Properties Limited [2018] eKLR**, the court held that any survey report must meet the general boundary survey standards and methodology.

36. The court in **Josephat Mburugu –vs- Silas Mwiti Mugwika [2022] eKLR** cited with approval **Elizabeth Wambui Githinji & 29 Others –vs- Kenya Urban Boards Authority & 4 Others [2019] eKLR** where the court held that, like in all other professions, the highest standard and competency was required, by surveyors save for permissible errors in measurements which are acceptable so long as there was an effort to comply with the **Survey Act** and the **Rules** made thereunder.

37. The appellant feigns ignorance of the surveyor and physical planner's report dated 2.2.2016. He submitted that the report was neither produced nor brought to his attention. Unfortunately, the record of appeal indicates a page 145 that it was the appellant who made the request on the basis that after the earlier scene visit by the court on 18.10.2012, there was need for the Maua Municipal survey and Igembe South District physical planner to visit the scene and find out about the encroachment.

38. In my view therefore, the appellant is estopped from denying that he was not party to the said request and report. Similarly, the appellant failed to bring a contrary report to challenge the experts report that there was encroachment of his plot, see **Azzuri (supra)**.

39. The appellant's claim was for trespass and on encroachment on his **Plot No. 7** by the respondent who it was alleged had erected a stone wall structure or building on his **Plot No. 133 and 106**.

40. It was incumbent upon the appellant to table evidence to prove the exact measurements and boundaries of his **Plot No. 7** vis a vis **Plot**

**no. 106 and 133.** It was not enough for the appellant to allege trespass without producing any expert reports to establish if indeed there had been any encroachment by the respondent.

41. The burden of proof was upon the appellant to establish if indeed he had made a complaint to the physical planner and county surveyor to come and affix the boundary if at all there was a long ranging dispute since 1998. In absence of documentary evidence backing the appellants pleadings and oral evidence including ownership of his plot my finding is that the appellant was unable to prove his claim to the required standards. He was therefore not entitled to any of the reliefs sought in his plaint.

42. Turning to the respondent's counterclaim, other than the pleadings the respondent failed to tender any evidence in support of his claim. It is trite law where a party fails to call evidence in support of its case the party's pleadings remain unsubstantiated. See *Trust Bank Ltd -vs- Paramount Universal Bank Ltd and 2 others, Milimani HCCC Civil Suit No. 1243 of 2001.*

43. In view of the foregoing the appeal herein lacks merits. The same is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 30<sup>TH</sup> DAY OF MARCH, 2022**

**In presence of:**

Atheru for appellant

Mbogo for respondents

**HON. C.K. NZILI**

**ELC JUDGE**