



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 178 OF 2003

LEWIS KIUNGU MWABONU.....APPELLANT

VERSUS

PETER KAMAU.....RESPONDENT

JUDGMENT

This appeal lies from the Judgment of the lower Court in Chief Magistrates Civil Case Number 5199 of 1999.

The grounds are that the learned trial magistrate erred in holding that the appellants claim, “**had come too late in the day**” in complete disregard of the basic proposition that the acts of the Respondent constituted a continuing trespass.

That the learned trial magistrate reached a verdict on lateness of the appellants claim in absence of any plea of limitation. The plaintiff had sought for orders

- (a) That the Defendant do at his own cost demolish the offending part of his house currently standing on the plaintiffs plot and deliver vacant possession thereof to the plaintiff.
- (b) The Defendant be ordered to pay general damages and/or property for illegal Trespass/occupation till vacant possession of his offended part of the plaintiffs plot is realized.

It is common ground that the appellant purchased plot number 1413 Sec. VI mainland North on the 22nd day of September, 1987.

It is his evidence that he started staying on the said plot from the year 1977 but on lease. At that point in time the Defendant had already constructed his house.

Sometimes in the year 2000 the plaintiff sought services of a surveyor to determine the boundaries of his plot LR NO. 1413/VI/MN Changamwe. He was able to relocate all the beacons but one which fell inside a property owned by one Peter Kamau the Defendant in this case. Its upon that discovery that he decided to bring up this suit.

I do concur with the contention by Counsel for the Respondent that as the plaintiffs plot was registered under the registration of titles Act Cap 281 the purchaser should have ensured that the proprietor (Vendor) complied with the provisions of section 31 of the Act which required that proper description of the land be given.

It was at the stage of purchasing the land in question that he should have sought the services of a surveyor so as to ascertain the land on the ground. The Appellant concedes that the time he started staying in the plot in question in 1977 he found when the Defendant had already constructed his house. When he was purchasing the plot in the year 1987 the Respondents house was still in situ. He cannot be heard to say that there was encroachment to his plot thirteen (13) years after purchasing the plot.

I find no good reason to fault the finding of the learned trial magistrate.

This appeal lacks merit and it is dismissed with costs.

Judgment delivered dated and signed this **24th** day of **February, 2014** in open Court.

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M. MUYA

JUDGE

24TH FEBRUARY, 2014

In the presence of:-

Learned Counsel for the Appellant absent

learned Counsel for the Respondent Mr. Gathuku

Court clerk Musundi