



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 38 OF 2019

JOSEPH EVANS KARUBIUAPPELLANT

VERSUS

PETER MUGAMBIRESPONDENT

*(Being an appeal from the Judgment of Hon. G.N. Wakahiu (C.M.) delivered on 27th December , 2018,
in Maua CMCC 109 OF 2007)*

JUDGMENT

A. PLEADINGS

1. The appellant through a further plaint dated 8.10.2005 sued the respondent in the trial court as the owner of **Parcel No. 5565 Amwathi/Maua** adjudication section bordering the respondent's **Parcel No. 6693**. His claim was that in April, 2003, the respondent encroached on his land and allegedly destroyed the existing boundary markings whereof he reported at Maua police station and was charged for interfering with the boundary. Subsequently, on or about 11.6.2007, the respondent erected a permanent house between 15-20 ft inside the appellant's property hence enclosing his latrine and denying him access thereof.

2. He sought for a permanent injunction stopping any further encroachment into and or illegal developments on his land; declaratory orders on the illegality of the encroachment and developments thereon, an order for the removal of the illegal structures and building on land and general damages for the wrongful acts.

3. The respondent denied that he had constructed and or encroached on the appellant's land as alleged or at all and opted to raise a preliminary objection that there was no consent to sue issued under **Sections 28 and 30 of Cap 284** and that the plaint raised no cause of action against him.

B. SCENE VISIT

4. Before the matter could proceed on 9.6.2008, an order was made for the District had surveyor to visit the scene and prepare a report.

5. By a report dated 17.6.2008 and recorded on the same day, the findings were that Parcel No. 5565 had all their scaled distance's inconsistent with the measured distances on the ground whereas Parcel No. 6693 had its scaled distances tally with the corresponding distances on the ground except one boundary which had an excess of 3 meters. The report had a rider that they could not make a recommendation since the area was still undergoing adjudication.

6. By an application dated 21.1.2009, the appellant sought for a revisit to the scene on the basis that the District land surveyor may have relied on an incorrect map sheet.

C. COURT VISIT

7. The court on 4.11.2009 allowed for the second scene visit. The court visited the **locus in quo** on 24.11.2010 in the presence of the parties, the District land surveyor Igembe South, Felix Mwehia a private surveyor for the appellant, S.M. Muigai, private land surveyor for the respondent and Julius Kipkorir, Land Adjudication Assistant Officer, Igembe.

D. EXPERT REPORT

8. The government land surveyor clarified that in fixed boundaries, they were mathematical boundaries and accurate on the ground whereas in general boundaries, maps were very erroneous and since the land was still under adjudication, errors were bound to be many and that even after the adjudication process was over, rarely would they use maps to solve boundary disputes.

9. In cross examination by the respondent's counsel, the District land surveyor stated that the three sketch maps relied upon emanated from the land adjudication office and that the discrepancies was because in survey principles, allowable errors were plus minus 5 metres for general boundaries which may arise because of tracing and scaling and that from his records, he could not tell the size of each of the parties' parcels of land both on the ground and on his record.

10. The officers were ordered after the scene visit to prepare a comprehensive report. Eventually, a copy was filed dated 29.3.2011.

E. TESTIMONY

11. The appellant adopted his witness statement dated 18.8.2014 and produced a land sale agreement dated 16.11.2018, an acknowledgement receipt for Kshs. 5,000/=, transfer letter dated 22.4.1989, a letter dated 12.5.2007, a statutory consent to sue dated 19.6.2007, petition of appeal in **Meru High Court Cr. Appeal No. 17 of 2007** and a field report dated 13.6.2008 as **P exh 1 – 7**.

12. In cross examination, the appellant stated the District land surveyors' report had indicated each of them had lost some land though he disagreed with the first report but according to him, the trial court had recorded the measurements showing his land had been encroached into which the respondent had never disputed.

13. The respondent adopted his witness statement dated 8.9.2014 and produced a land transfer letter dated 7.11.1989, a sketch map, a consent order dated 7.4.2008 to visit the scene for a report, order dated 9.6.2019, a ruling in **Maua Criminal Case No. 1600 of 2005**, a statutory consent to sue dated 19.6.2007, surveyor's report dated 17.6.2008 and a field report dated 29.3.2011 as **D exh 1 – 8** respectively.

14. In cross examination, the respondent stated even though at page 26 of the proceedings indicated he had encroached he had never disputed it.

F. GROUNDS OF APPEAL

15. The appellant complained the trial court erred in law and in fact by:- holding the appellant at the scene visit was unable to show any encroachment into his land yet the private land surveyor showed an encroachment to the extent of 6 metres whereas the government land surveyor indicated an encroachment of 4.5 meters; holding the appellant had failed to enjoin Ezekiel Kobia who had allegedly sold him the land; holding he had failed to enjoin the District land adjudication and settlement officer yet it was not necessary for he had no claim against the office, more so when a government land surveyor and a land adjudication officer visited the **locus in quo** to assist the court and made a finding that there was an encroachment into the appellant's land by 4.5 meters and lastly by addressing his mind to the statement

by the wife of the appellant who did not testify in the trial for she had long passed on before the hearing.

G. WRITTEN SUBMISIONS

16. In written submissions dated 18.11.2021, the appellant submitted the record of appeal at page 39 indicated there was an encroachment his parcel land and the same position appears at page 88 and 89 of the record of appeal.

17. It was submitted that the trial court disregarded the District land surveyor's report who were experts yet they were not controverted by any other expert report. Reliance is placed on **Mbogo –vs- Shah [1968] E.A 93 and Sammy Mbogo –vs- Andrew Abuyeka Angatia & another [2017] eKLR** on the proposition that where a court misdirects itself on matters which the court should not have cited upon or failed to take into considerations matters which it should have taken into consideration and arriving at a wrong conclusion, an appellate court should interfere with the exercise of the discretion especially in this case when there was evidence of encroachment.

18. Secondly, it was submitted there was no need to sue the seller of the land to the appellant. Reliance was placed on **Civicon Ltd v-s- Kivuwatt Ltd & 2 Others [2015] eKLR** since he was not going to be affected by the dispute and was not a necessary party hence the trial court was in error to make such a finding.

19. Thirdly, the appellant faulted the trial court for blaming the appellant for not enjoining the District land adjudication and settlement officer since he had no claim against him. Reliance was placed on **Order 1 Rules 10 (2), 9 Rule1 and Hussein Sharrif Omar –vs- Diamond Trust Bank Ltd [2014]** on the proposition that striking out a suit on non-joinder of a party was contrary to the overriding objection of **Civil Procedure Rules and Article 159 of the Constitution.**

20. Fourthly, the appellant submitted the trial court was in error in referring to a statement of a dead person who did not testify contrary to **Order 18 Rule 3 Civil Procedure Rules.** Reliance was placed on **Elijah Somboriot Cheruiyot & 3 Others –vs- Anthony Kiarie Waithaka & 3 Others [2016] eKLR.**

21. The respondent submitted that the land surveyor's report was emphatic that they could not tell the size of the parties' respective parcels of land since both were inconsistent on the ground.

22. The respondent submitted Ezekiel Kobia was a necessary witness who could have shed light why if he sold 0.20 acres to the appellant, how comes it was only 0.10 acres which was recorded and registered under his name failure of which the inference to be drawn was that the appellant did not know how much land was sold to him and by extension he could not know how much land he owned.

23. Additionally the respondent submitted the custodian of records of adjudication was the land adjudication officer and the failure to join him or call him as a witness was fatal to the appellant's claim.

24. Lastly the respondent submitted parties were bound by their pleadings as held in **Chalicha FCA Ltd. –vs- Odhiambo & 9 others [1987]. KLR 182** and that the court could not close its eyes on witness statements on the court file.

H. ISSUES FOR DETERMINATION

25. The issues commending themselves for determination are:

i. If the appellant proved his claim seeking for a permanent injunction and a declaration of encroachment, removal of developments on the alleged encroached portion and the general damages for the wrongful acts.

ii. If the trial court applied the correct law to the pleadings and evidence.

iii. If the appeal has merits.

26. This being a first appeal, the court is mandated to rehearse, rehear and re-appraise itself on the lower court record and come up with its own independent findings and conclusions bearing in mind that the trial court had occasioned to hear the witnesses first hand. **See Peter –vs- Sunday Post Ltd (1958) EA 424.**

I. IMPROPER RECORD OF APPEAL

27. Times without number, the court has reiterated the law on the preparation of a record of appeal in line with **Order 42 Rule 13 Civil Procedure Rules**. In this appeal, the appellant has failed to follow the law and include every record proceedings and documents in the primary file. Further, the record is not paginated and or numbered hence making the work of the court very painstaking.

28. Be that as it may, the appellant's claim was that he owned 0.10 acres as recorded by land adjudication officer(s) but had bought 0.20 acres as Parcel No. 5565 bordering the respondent's father. He averred the respondent had trespassed into his land.

29. However, at paragraph 4 of the plaint, the appellant pleaded the respondent owned Parcel No. 6693 at the rear side. He pleaded after the alleged encroachment, land adjudication officers were sent to fix the proper demarcation points, which once again, were violated, vandalized and or erased by the respondent. The appellant did not call the land adjudication officers who had earlier on fixed the demarcation marks otherwise they would have shed light on where the boundary was before 11.6.2007.

30. The appellant had alleged in his pleadings that the acreage which was sold to him was more than what was recorded to him. He did not call any evidence from the person who sold the parcel to him to clarify the boundaries at the time with the neighbours, so as to found a basis for his averments that the respondent had interfered with boundaries and by extension encroached on his land.

31. The court in its discretion and with the consent of parties ordered for the District land surveyor and the land adjudication officer to visit the locus in quo. After the appellant was dissatisfied with the initial District surveyor's report, a request was made and the court visited the land in the presence of the said officers as well private land surveyors called by the respective parties.

32. The appellant has faulted the finding by the trial court that there was no encroachment yet from the court notes of the scene visit, it was indicated otherwise. It is the appellant's submissions that the trial court ought to have entirely relied on the finding of the aforesaid officers' expert reports as captured during the scene visit and a compiled report thereafter.

33. In **Kagina –vs- Kagina & 2 Others Civil Appeal No. 21 of 2017 [2021] KECA 242 KLR 3.12.2021 (judgement)**, the court held it was trite principle of evidence that the opinion of an expert whatever the field of expertise was worthless if not founded upon a substratum of facts which are proved exclusive of the expert's evidence to the satisfaction of the court according to the appropriate standard of proof. It went on to state a court may find that an expert's opinion was based on illogical or even irrational reasoning and reject it and that a judge may give little weight to an expert's testimony where he finds the expert's reasoning manifestly illogical or speculative or internally contradictory as to be unreliable.

34. Further, the court stated the experts' process of reasoning must therefore be clearly identified so as to enable the court to choose which of the competing hypothesis is the more probable.

35. Again, the court held that where it was confronted with issues of admissibility or otherwise of expert's opinion, the court was enjoined to apply caution before accepting and acting on such expert's evidence.

36. Similarly, the court stated it should only do so in instances where there was sufficient demonstration that the expert opinion was the independent product of the expert's own work arrived at in a manner uninfluenced by any extraneous factor as to the form or content; or was also objective and an unbiased

opinion arrived at on matters within the expert's own expertise and lastly that the report contained the truth and nothing but the whole truth.

37. In *Kiruga –vs- Kiruga & Another [1988] eKLR*, the court held an appellate court could not properly substitute its own factual finding for that of a trial court unless there was no evidence to support the finding or unless the Judge was plainly wrong.

38. There is no dispute the trial court visited the **locus in quo** after the initial report was discounted and or discredited by the appellant on the basis that the District land surveyor/adjudication officer may have relied on a wrong map sheet. The officers visited the **locus in quo** together with the court and pointed out the differences between general boundaries and the fixed boundaries' and the errors/margins allowable in the process. The government land surveyor qualified his opinion given the adjudication process was still going on. He was of the view that the errors on the boundary could still be rectified and or clarified by the land adjudication officer.

39. The government land surveyor stated the **Survey Act** was yet to be applicable in the dispute until the adjudication process was completed.

40. So the trial court in applying the principles set out in the *Kasina case (supra)* admission of expert opinion above was faced with a situation where the expert reports were inconclusive and or qualified under the circumstances of the facts obtaining. It was therefore within the discretion of the trial court to look at the entire evidence of the parties in totality and not merely rely exclusively on the expert evidence. The District land surveyor was emphatic that the land was still governed by **Land Adjudication Act and Land Consolidation Act**. His expert evidence was subject to the role and mandate of the land adjudication officers still undertaking the finalization of the adjudication process.

41. It was critical for the appellant to call the land adjudication officers and the initial owner of the suit land to pinpoint where exactly the boundaries/demarcation point were prior to the alleged encroachment, by the respondent.

42. Turning to the issue of the District land adjudication and settlement officer, the appellant was complaining that the land sold to him and the one recorded in his favour by the land adjudication office was less in acreage. This was a allegation against the office statutorily required to be the custodian of vital documents on land ownership in general and in particular the land adjudication register.

43. The appellant was questioning the adjudication process and its records yet he did not enjoin the office as a party. The land adjudication officer(s) who had fixed the boundary initially were not also called as a witness to produce their said report as the first responders after the dispute arose. The land adjudication registers were also not availed before the court to assist it to make a clear finding.

44. It was therefore in my view unfair to seek to question, condemn and impugn on the adjudication registers' records of the District land adjudication officer without them being parties to the suit. See *John Mwau Mwangela & 2 Others –vs- Daniel M. Ndivo [20198] eKLR*.

45. In this case, the dispute was on the size and boundaries of parcels of land still under adjudication. The same fell under the determination of a land adjudication officer. There is no evidence that the appellant objected to the boundary and the size of his land before escalating the dispute to court. See *Sylvester Okumu Ochami –vs- Maxwel Tabu Abala & Another [2015] eKLR*.

46. Looking at the proceedings of 24.11.2010, it is obvious the government land surveyor noted the inconsistencies on the ground as opposed to the map sheet. He could not remember the boundary which he had based his measurements on the previous scene visit. According to him, he had initially relied on the information supplied by the parties. The map sheet he was relying on that day had changed from the one he had used previously and could not tell when the changes had been effected on the map. So in essence, during the court scene visit, the map sheet and the position on the ground were not tallying.

47. The District surveyor's report of 17.6.2008 did not indicate any encroachment at all but there was now a turn of events which according to the District land surveyor, was because the adjudication process was still ongoing and the land adjudication officers had the mandate to change the maps.

48. So the question the appellant had to answer was whether given the inconclusive expert report(s) and evidence coupled with ongoing adjudication process, he had established any encroachments on his land or not.

49. In my considered view, the mandate to ascertain interests and rights on land falling under adjudication belonged to the land adjudication officer and the bodies so mandated by law and not the court. This was the finding of the court in **Tobias Ochola Osidi & 13 Others –vs- Cyprianus Otieno Ogalo & 6 Others (2013) eKLR**. My finding is that the appellant had failed to establish his claim to the required standards.

50. The appellant has complained the trial court erred in relying on a witness statement of a deceased wife to the appellant.

51. Under **Section 33 of the Evidence Act**, statements written or recorded of admissible facts made by a person who is dead are by themselves admissible. See **Paul Rigiri Muthiora –vs- Zachary Muriki Joseph [2021] eKLR**. The appellant is the one who filed the witness statement. He did not seek to withdraw it. See **Ngoingwa Co. Ltd –vs- Dorcas Wanjiku Ikinu [2018] eKLR**. It was a statement of facts. The respondent did not object to it nor has there any evidence of the prejudice occasioned to the parties been tendered. After all, it was his own witness statement.

52. The purpose of the filing witness statement is to give a fair notice of the case which has to be met by the opposite party. See **Susan Kanini Mwangangi & another –vs- Patrick Mbithi Kavita [2019] eKLR**.

53. The witness statement was file alongside the plaint in line with **Orders 3 and 11 of the Civil Procedure Rules**. It was not a surprise to the appellant. I do not therefore see how the reliance on the appellant's own witness statement breached his fundamental rights as to fair hearing. It was in my view within the discretion of the trial court to read all the pleadings in the court file. See **Alphonse Munene Mutinda –vs- Ethics and Anti-Corruption Commission [2020] eKLR**.

54. Further, the appellant agreed to proceed with the pleadings and statements filed in support of his case. He cannot turn around and complain on reliance on his documents and witness statements. See **Mourine Mukonyo v Embu Water and Sanitation Company [2020] eKLR, Elijah Ngugi Njoroge –vs- Irene Wamuyu Gacheru & Another [2020] eKLR**.

55. Consequently, I come to the conclusion that the court was right in finding that the appellant had failed to prove his case to the required standards.

56. The appeal therefore lacks merits and is hereby dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

THIS 9TH DAY OF MARCH, 2022

IN PRESENCE OF:

C.P. MBAABU FOR APPELLANT

MUKANGURU FOR RESPONDENTS

COURT ASSISTANT - KANANU

HON. C.K. NZILI

ELC JUDGE