Njoroge v Wangora (Environment and Land Appeal 12 of 2019)
[2022] KEELC 44 (KLR) (26 April 2022) (Judgment)

Neutral citation: [2022] KEELC 44 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ENVIRONMENT AND LAND APPEAL 12 OF 2019

MN GICHERU, J

APRIL 26, 2022

BETWEEN

ESTHER WAMBUI NJOROGE ..... APPELLANT

AND

EUNICE NJAMBI WANGORA ..... RESPONDENT

(This was an appeal arising from the judgment and Decree of C. Obulutsa, acting Chief Magistrate dated 20th January, 2015 in Civil Case Number, 11535 of 2003 at Milimani Magistrate's Court Nairobi.)

JUDGMENT

1. This Appeal arises from the judgment and Decree of C. Obulutsa, acting Chief Magistrate dated 20th January, 2015 in Civil Case Number, 11535 of 2003 at Milimani Magistrate's Court Nairobi.

2. In the Judgment, the Learned Trial Magistrate entered judgment for the Respondent, Eunice Njambi Wangora, who was formerly the Plaintiff, against the Appellant Esther Wambui Njoroge and Olkejuado County Council both of whom were the Defendants.

3. The judgment allowed the following prayers of the Respondent;

    a. A declaration that the Plaintiff is the exclusive owner of plot number 63 Residential at Ongata Rongai, the suit premises.

    b. An order that the first Defendant do demolish the structures encroaching into the suit premises.

    c. A permanent injunction restraining the Defendant or anybody claiming through them from dealing with the suit land in any manner.

    d. General damages of Kshs. 400,000/= for trespass.

e. Costs of the suit and interest.

4. In the amended Memorandum of Appeal, the Appellant listed 22 grounds of appeal. The grounds can be summarized into a handful namely,

   i. The learned trial Magistrate failed to appraise himself of the facts of the case including the extent of the encroachment, failure of the Respondent's application for injunction and did not allow highlighting of submissions in a case heard over a long time by different Magistrates.

   ii. Dismissed survey reports that had been admitted by consent, failed to analyze evidence deeply, ignored weighty defence evidence and accepted disowned evidence.

   iii. Failed to appreciate that the Appellant's occupation of her property from 1987 to 2003 was uncontroverted, that the Appellant's claim was time barred, that the award of Kshs. 10,000/= per month was erroneous and without justification and manifestly excessive.

   iv. Failed to identify the issues, lumped them together, introduced a new issue of dual allotte that was not canvassed at the trial, ignored some maps that had been relied upon by other colleagues and overlooked the fact that the Appellant had paid rates, obtained approvals for all development and exercised all her rights.

5. The Respondent's suit in the Lower Court was a simple one. She sought orders as per paragraph (3) above alleging trespass by the Appellant upon the suit land.

6. The Appellant in her defence and counterclaim dated 17/1/2006 disputed the Plaintiff's claim averring that she owned and occupied Plot Numbers 280 and 82 which bordered the Respondent's Plot No. 63. She added that the Respondent's husband, one Jacob Wangora trespassed onto her land and deposited building stones.

   She prayed for damages for the trespass, an injunction to restrain any encroachment and costs for the counterclaim.

   The second Defendant in the Lower Court filed a defence dated 14/1/2005 in which it was denied that the Respondent has title to the suit land and that he is a mere allottee with no locus to bring the action in the Lower Court.

7. At the trial, the Respondent gave oral evidence and called four witnesses who included Duncan Ndirangu Wang'ombe, John Dominic Obello, Jacob Wanyora and Rose Kitur.

   The sum total of the evidence of the five witnesses is that the Respondent was allocated the plot in 1977 by the County Council of Kajiado. It measured 100 X 100 feet. The plot was identified to her by an employee of the County Council. She occupied the plot by fencing it, erecting a site office, a house and a permanent toilet. These structures are still on the plot. In 2003, the Appellant trespassed on the suit premises prompting the filing of this suit.

8. On the part of the Defendants, the Appellant and one Wesley Sankayan Risanchu, the second Defendant's surveyor testified.

   In summary, the Appellant said that she bought two plots namely Ongata Rongai 82 and 280 which were residential and commercial respectively. This was in the year and the seller was Asaph Nduru. The land was transferred to her and she was issued with allotment letters.

   The first transfer was to her sister Emma and later to herself. She was issued with an allotment letter. She started paying the rates back then and to date she is still paying.

In 1996, the Appellant put up 16 residential houses on plot no. 82 together with toilets and bathrooms. She also built a butchery, boutique, bar and barber shops. They were all approved by the relevant authorities.

In 1999 after many years of occupancy, the Appellant received a notice to demolish the houses as they were allegedly built on a road reserve. She complied and moved away from the road reserve.

In the year 2002, the Appellant learnt that the Respondent was claiming there was encroachment on plot number 63 by her. The matter was resolved by the surveyor from the second Defendant, the County Clerk, the DC, councilors, chief, assistant chief and village elders.

The resolution was that the two plots namely 63 and 280 were adjacent to each other. Each party was to avoid encroaching onto the property of the other.

The evidence by the County Council Surveyor is that four distinct plots exist namely 63, 64, 82 and 280. The plan had been drawn as if they were one plot yet they were owned separately. Plots 63 and 280 were affected by the 60 metre wide Magadi road. Each allottee was advised not to encroach on the other's plot.

9. Counsel for the Appellant filed written submissions dated 13th May, 2021 while the Respondent's Counsel filed his on 2/12/2021.

I have carefully considered the entire record of appeal, the submissions by the learned Counsel and the case law cited therein. This being a first Appeal, it is the duty of this Court to review the evidence adduced before the Lower Court and satisfy itself that the decision was well founded.

In *Selle and another –vs- Associated Motor Boat Co. Limited and others* (1968) EA 123 this principle was enunciated thus;

> " .....this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court ...is by why of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither heard nor seen the witnesses and should make due allowance in this respect".

10. I find that the following issues come up for determination.

i. Whether the Respondent owns L.R. 63 Residential Ongata Rongai.

ii. Whether the Appellant owns L.R. 82 and 280 Ongata Rongai.

iii. Whether the parcels in (i) and (ii) above are the same entity or separate parcels.

iv. Whether there is any encroachment by either party on the land of the other.

v. Whether the Respondent proved her case on a balance of probabilities in the Lower Court.

On the first issue, I find that the Respondent owns L.R. 63 Residential Ongata Rongai. In making this finding, I relied on the evidence of the Wesley Sankanyau Risanchu (DW2). This witness not only represented the County Council of Olekejuado in the Lower Court case but he is also the surveyor. He was not alone when he determined that the plot exists. He was with a big team comprising of the local administration, the parties and other stakeholders.

He not only established that the plot exists but he also established that though it had been drawn as if it was just one plot, it encompassed other plots namely 82 and 280.

Further to the above, this witness represented the authority that allocated the plots to the Appellant and the Respondent. His evidence in this regard remained unchallenged by any other evidence.

On the second issue, I find that the Appellant owns L.R. 82 and 280 for the same reasons that I have given in determining the first issue.

Regarding the third issue, I find that the three parcels are separate entities. Again the same reasons for this finding as in the first and second issues apply.

On the fourth issue, I find that there is no encroachment by either party because the Appellant's land is separate from the Respondents and it has buildings approved by the County Council, the approving authority.

Finally on the final issue, it is obvious that the Respondent did not prove her case against the Appellant on a balance of probabilities because the allocating authority said that the plots are separate and even demarcated the boundaries.

The Magistrate who wrote the Judgment erred in finding that the Respondent had proved her case against the Appellant. Consequently, I allow the Appellant's Appeal dated 30th March, 2015 in the following terms;

(a) The judgment dated 20th January, 2015 in Civil Suit Number 11535 of 2003 is hereby set aside.

(b) An order is hereby issued dismissing the Plaintiff's/Respondent's aforesaid suit in its entirety.

(c) Costs to the Appellant.

Order accordingly.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 26 TH DAY OF APRIL, 2022.

M.N. GICHERU

JUDGE