Wainaina v Mungai (Environment and Land Appeal 14 of 2019)
[2022] KEELC 13415 (KLR) (26 September 2022) (Judgment)

Neutral citation: [2022] KEELC 13415 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL 14 OF 2019

BM EBOSO, J

SEPTEMBER 26, 2022

BETWEEN

SAMUEL NDUNGU WAINAINA ..... APPELLANT

AND

JOSEPH KARURI MUNGAI ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon G Omodho (SRM) delivered in Thika Chief Magistrate Court on 21/11/2018 in Thika CMC Civil Case No 352 of 2010)

JUDGMENT

1. Through a plaint dated 8/4/2010, Joseph Karuri Mungai [the respondent in this appeal] sued Samuel Ndungu Wainaina [the appellant in this appeal] in Thika CMC Civil Case No 352 of 2010. He sought the following verbatim reliefs against the appellant:

    a. Kshs 15,322.30

    b. Damages for trespass on the plaintiff's land parcel number Loc 16/ Kiarutara/365 by the plaintiff/and or his agents

    c. Costs of the suit.

    d. Interests on a, b and c at court rates

2. His case in the trial court was that he owned land parcel number Loc 16/Kiarutara/365 while Samuel Ndungu Wainaina [the appellant] owned an abutting parcel of land, Loc 16/Kiarutara/303. On or about 17/8/2009, his authorized agents cut down 15 trees from his parcel of land. Subsequent to that, the appellant maliciously reported to the nearby Police Station that he [the respondent] had illegally cut down his [the appellant's] trees. On a later date, the appellant illegally carried away the 15 trees and converted them into his own use. A valuation by the Gatanga District Forest Extension Officer

estimated the value of the 15 trees at Kshs 15,322.30. Consequently, he sought the above reliefs from the trial court.

3. The appellant filed a statement of defence and counterclaim dated 8/7/2009. He subsequently filed an amended statement of defence and counterclaim dated 24/6/2013, in which he denied the averments made in the respondent's plaint. His case was that between 1976 and 1978, he planted about 200 trees of different species on his parcel of land, Loc 16 Kiarutara/303. On several occasions, he obtained the prerequisite permits to fell and sell the trees. He added that on 17/8/2009, the respondent, together with his agents, without any requisite permit, trespassed onto his land and illegally cut down 12 trees on his [the appellant's] land. He reported the incident to the Police, leading to the initiation of criminal proceedings in Criminal Case No 682 of 2010. By way of counterclaim, he sought the following reliefs against the respondent: (i) General damages for trespass; (ii) Value of the trees – Kshs100,000; (iii) Interest; and (iv) Costs of the suit.

4. Trial proceeded before Hon G Omodho, Senior Resident Magistrate, who subsequently rendered a Judgment dated November 21, 2018. On the primary suit, the trial court made a finding in favour of the respondent. The trial court dismissed the appellant's counterclaim. The trial court made the following verbatim award in favour of the respondent:

> "(a) Kshs 15,322.30;
>
> (b) Damages for trespass on the plaintiff's land parcel number Loc 16/ Kiarutara/303 [sic];
>
> (c) Costs of the suit and interest."

5. . The trial court did not, however, assess the damages awarded to the respondent.

6. . Aggrieved with the Judgment, the appellant brought this appeal through a memorandum of appeal dated 8/2/2019. The memorandum of appeal was amended on October 26, 2021. The appellant advanced the following eight verbatim grounds of appeal:

> 1. The learned trial magistrate erred in law and fact in finding and holding that the letter from the forest extension officer produced by the plaintiff was sufficient evidence of the fact that the subject trees never belonged to the defendant.
>
> 2. The learned trial magistrate erred in law and fact in finding and holding that it is not in dispute that the plaintiff owns land parcel Loc 16/Kiarutara/303 while the defendant owns land parcel Loc 16/ Kiarutara/ 365.
>
> 3. The learned trial magistrate erred in law and fact in finding and holding that the plaintiff's demonstration of ownership of the land also demonstrated that the plaintiff owned the trees in question and that the defendant trespassed.
>
> 4. The learned trial magistrate erred in law and fact in dismissing the defendant's case without considering and placing sufficient weight on the testimonies, exhibits and submissions of the defendant and without analyzing the entire evidence on record thereby arriving at an erroneous decision.
>
> 5. The learned trial magistrate erred in law and fact in finding and holding that the defendant had not produced sufficient evidence to rebut the plaintiff's claim and support his counterclaim.

6. The learned trial magistrate erred in law and fact by failing to quantify the damages for trespass awarded to the plaintiff thereby promoting uncertainty between parties.

7. The learned trial magistrate erred in law by failing to give notice of the delivery of judgement to the defendant and/or his advocates on record and by pronouncing judgement in their absence.

8. The learned trial magistrate erred in law and fact in proceeding to hear and determine the matter which primarily is a boundary dispute issue noting that the felled trees fell in a disputed boundary area and further noting that matters relating to boundary disputes fell within the jurisdiction of the Land Registrar hence rendering the lower court's judgement null and *void ab initio*.

7. The appellant prayed that this appeal be allowed; the judgment and decree of the Chief Magistrate Court in Thika CMC Civil Case No 352 of 2010 be set aside; and costs of the appeal be awarded to him.

8. The appeal was canvassed through written submissions dated 1/11/2021, filed by the firm of Daniel Henry & Co Advocates. Counsel for the appellant faulted the trial court for making a determination based on the letter from the Forest Extension Officer, contending that the said letter did not authoritatively establish the fact that the trees belonged to the respondent. It was the position of counsel that the said letter majorly recognized the existence of a boundary dispute and recommended the resolution of the boundary dispute. Counsel contended that given that the author of the letter was not called as a witness, the said letter was of no probative evidential value.

9. Counsel for the appellant further faulted the trial court for awarding the respondent general damages on account of alleged trespass by the appellant on land parcel number Loc 16/Kiarutara/303. Counsel submitted that the said parcel belonged to the appellant, hence there was no factual basis for the award of general damages for trespass.

10. Counsel further argued that ownership of the two respective parcels of land was not in dispute and could not be the basis for making a finding to the effect that the trees in question belonged to the respondent. Counsel contended that the trial court failed to consider the evidence led by the appellant, which demonstrated that the appellant was the owner of the trees. The appellant faulted the trial court for finding that the appellant had failed to adduce sufficient evidence in support of the counterclaim. Counsel contended that the appellant had led evidence to prove that he owned the trees which he felled and sold. He added that the appellant had led evidence to establish the value of the trees in the counterclaim. Counsel contended that the trial court ignored the appellant's evidence.

11. Counsel for the appellant further submitted that the trial magistrate's decision to award general damages but fail to quantify the damages brought more confusion than clarity and promoted uncertainty between the parties.

12. Lastly, counsel for the appellant contended that the trial court had no jurisdiction to hear and determine the dispute, arguing that the suit related to a boundary dispute which, under Section 18 of the *Land Registration Act* 2012, fell within the mandate of the Land Registrar. Counsel urged the court to allow the appeal.

13. The respondent opposed the appeal through brief written submissions dated November 22, 2021, filed by M/s Karanja Kangiri & Co Advocates. Counsel for the respondent identified the following as the

two issues that fell for determination in the appeal: (i) Whether the learned magistrate had jurisdiction to hear the matter; and (ii) To whom did the trees subject of this appeal belong.

14. On whether the trial magistrate had jurisdiction to hear the dispute, counsel submitted that the dispute before the trial court was not a boundary dispute but purely a suit for recovery of damages occasioned by trespass by the appellant. Counsel contended that the boundary dispute had been resolved through a surveyor's report dated 3/9/2009.

15. On ownership of the felled trees, counsel submitted that the surveyor's report dated 3/9/2009 established that the felled trees did not belong to the appellant and that they belonged to the respondent. Counsel added that the appellant failed to establish that the felled trees belonged to him. Counsel added that whereas the appellant had all along insisted that he planted the felled trees between 1976 and 1978, he did not specify where he planted them. Counsel contended that even if the appellant planted the trees, he planted them on the respondent's land. Counsel argued that the trial magistrate made a proper finding. Counsel urged the court to uphold the findings of the trial court.

16. I have read and considered the original record of the trial court together with the record of appeal. I have also considered the parties' respective submissions, the relevant legal frameworks, and the applicable jurisprudence. Parties to this appeal did not agree on a common statement of issues to be determined by the court. Taking into account the grounds of appeal set out in the memorandum of appeal together with the parties' respective submissions, the following are, in my view, the six key issues that fall for determination in this appeal: (i) Whether the trial court had jurisdiction to hear and determine the dispute in the primary suit and in the counterclaim; (ii) Whether the trial court erred in awarding the respondent general damages in relation to trespass on parcel number Loc 16/Kiarutara/303; (iii) Whether the trial court erred in finding that the respondent in this appeal had proved the claim in the primary suit; (iv) Whether the trial court erred in finding that the appellant in this appeal did not prove his counterclaim; (v) Whether the trial court erred in awarding general damages to the respondent against the appellant without quantifying the general damages; and (vi) What orders should be made in relation to costs. I will dispose the six issues sequentially in the above order. Before I dispose them I will outline the general principles upon which this court exercises jurisdiction as a first appellate court.

17. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal 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."

18. The above principle was similarly 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."

19. The first issue is whether the trial court had jurisdiction to hear and determine the dispute giving rise to this appeal. The appellant contends that what was before the trial court was a boundary dispute and that under Section 18 of the *Land Registration Act*, boundaries disputes are to be heard and determined

by the Land Registrar. The respondent does not agree with that contention. The respondent contends that the boundary dispute had been resolved and what was before the trial court was a claim for damages arising from trespass to land.

20. The dispute that the trial court was seized of is to be gleaned from the plaint, the defence and the counterclaim. The respondent was the plaintiff in the trial court. His pleadings were that he owned land parcel number Loc 16/Kiarutara/365 and that on 17/8/2009, his agents felled 15 trees from the said land. Subsequently , the appellant entered the said land and carried away the said trees. The trees were allegedly valued at Kshs 15,322.30. The two key reliefs which the respondent sought from the trial court were the sum of Kshs 15,322.30 and general damages for trespass to land. It is therefore clear from the respondent's statement of claim that his claim was not a boundary dispute. Indeed, evidence was placed before the trial court indicating that the boundary relating to the parcels of land owned by the two parties to this appeal had been determined by the Office of the Land Registrar through the assistance of the local Survey Department.

21. Did the counterclaim raise a boundary dispute? The appellant's counterclaim was that he owned land parcel number Loc 16/Kiarutara/303. On 17/8/2009, together with his agents, the respondent, without any requisite permit, trespassed onto the said land and illegally cut down 12 trees on the land. The key reliefs which the appellant sought were general damages for trespass to land and Kshs 100,000 - being the value of the 12 trees. It is again clear from the appellant's counterclaim that the claim in the counterclaim was not a boundary dispute.

22. Given the above pleadings and the subsequent evidence that was placed before the trial court, there was nothing to suggest that the jurisdiction of the trial court had been ousted by Section 18 of the *Land Registration Act*. Contrary to the appellant's contention that the court lacked jurisdiction by dint of Section 18 of the *Land Registration Act*, there was evidence placed before the trial court indicating that the Land Registrar had already made a determination relating to the boundary of the parcels of land belonging to the parties to this suit. Consequently, my finding on the first issue is that the trial court had jurisdiction to hear and determine the dispute in the suit giving rise to this appeal.

23. The second issue is whether the trial court erred in awarding general damages against the appellant on account of trespass to land parcel number Loc 16/Kiarutara/303. The trial court made the following disposal orders in the impugned Judgment:

> "(a) Kshs 15,322.30;
>
> (b) Damages for trespass on the plaintiff's land parcel number Loc 16/ Kiarutara/303;
>
> (c) Costs of the suit and interest."

24. From the parties' pleadings, parcel number Loc 16/Kiarutara/303 belonged to the appellant. The respondent's parcel was number Loc/Kiarutara/365. It was therefore an error for the trial court to make an award for damages against the appellant on account of trespass on "the plaintiff's land parcel number Loc 16/ Kiarutara/ 303". The least that was expected of the respondent was to make an application for review of the impugned Judgment on account of the above clear error. Without saying much, my finding on the second issue is that the trial magistrate made an error in making an award of general damages against the appellant for trespass on land parcel number Loc 16/Kiarutara/303.

25. The third issue is whether the trial court erred in finding that the respondent in this appeal had proved the claim in the primary suit. The appellant has challenged the trial court's finding on the question of proof on many aspects. One of them is the respondent's averment in paragraph 5 of the plant that

his authorized agents [the respondent's authorized agents] are the ones who cut the 15 trees that were subsequently carried away by the appellant illegally. The averment reads thus:

> "On or about 17/8/2009 the plaintiff's authorized agents cut down some trees on the plaintiff's land numbering about 15."

26. The respondent subsequently filed a written witness statement which he adopted during trial. The witness statement contained the following contradictory evidence regarding the felling of the 15 trees:

> "That on or about 17/8/2009 the defendant without my authority told his agents to cut down trees on my land parcel number Loc 16/ Kiarutara/ 365."

27. It is clear that the evidence of the respondent was not in tandem with his pleadings relating to the felling of the 15 trees. On this ground alone, there was no proper basis for finding liability on part of the appellant.

28. That is not all. Assuming that the respondent's authorized agents are the ones who felled the trees that were subsequently carried away by the appellant illegally, did the respondent lead evidence to suggest that there was lawful felling of the alleged 15 trees by his agents? One such piece of evidence would have been a permit authorizing the respondent to fell the 15 trees. None was tendered as evidence.

29. Besides the foregoing, the trial court relied on the letter dated 24/9/2009 from the Gatanga District Forest Extension Office to the Officer Commanding Station, Kirwara Police Station. The letter reads as follows:

> "RE: ALLEGED ILLEGAL CUTTING OF TREES
>
> MR SAMUEL NDUNG'U WAINAINA'S FARM
>
> L/R NO LOC 16/KARUTARA/303
>
> Your office letter dated 23rd August 2009 on the above named subject refers;
>
> Yesterday the September 23, 2009, I visited the above named farm accompanied by one Corporal Kioko of your station. The undermentioned observations were made:
>
> i. There is a long standing boundary dispute between Mr Wainaina and his neighbor on the western side of the farm.
>
> ii. It is important that the boundary dispute be officially solved to determine who is the right owner of the alleged cut and partially removed trees.
>
> iii. Apparently, the trees belong to the neighbor on the western side of the farm and is not the complainant in this case.
>
> (Signed)
>
> F. W. GAKUNJU
>
> FORESTER GATANGA"

30. It is clear from the above underlined parts of the letter that the author of the said letter was not sure who the rightful owner of the trees in contention was. My interpretation of the letter is that the author expressly stated that it was not possible to tell who the rightful owner of the trees in the dispute was. Secondly, the letter did not identify the alleged "neighbour on the western side of the farm". Without

saying much, the letter had no probative evidential value to inform the finding which the trial court made.

31. The totality of the foregoing is that there was no proper basis for finding the appellant liable for the alleged torts. Put differently, the trial court erred in finding that the respondent had proved his claim in the primary suit. That is my finding on the third issue.

32. The fourth issue is whether the trial court erred in finding that the respondent had not proved his counterclaim. The gist of the appellant's counterclaim was that on 17/8/2009, the respondent and/or his agents trespassed onto his land and unlawfully felled twelve (12) trees valued at Kshs 100,000. Did the appellant prove this claim. In my view, he did not. He led evidence to the effect that he reported the matter to the police, and the police carried out investigations. A third party is the one who was found culpable and charged. The said third party was not joined as a defendant in the counterclaim. In my view, given the above evidence and circumstances, the trial magistrate properly disallowed the appellant's counterclaim against the respondent.

33. The fifth issue is whether the trial magistrate erred in failing to quantify the general damages awarded to the respondent. The final award of the trial court has been reproduced in one of the preceding paragraphs. It is clear from the award that although the trial court awarded the respondent general damages, he did not quantify the general damages. This was clearly an error. As a trial court that had found general damages merited, the trial magistrate ought to have assessed the general damages. By awarding general damages without assessing them, the trial court failed to conclusively settle the question relating to general damages.

34. On costs, the error leading to this appeal are attributable to the trial court. Secondly, the appeal succeeded on some grounds and failed on others. Taking the above into account, parties will bear their respective costs in this appeal and in the trial court.

Disposal Orders

35. In the end, this appeal is partially allowed and is disposed in the following terms:

    a. The Judgment delivered in Thika CMC Civil Case No 352 of 2010 on November 21, 2018 by Hon G. Omodho is partially varied and is substituted with the following disposal orders:

        i. An order dismissing both the primary suit by the plaintiff and the counterclaim by the defendant in the said suit.

        ii. An order that parties shall bear their respective costs of both the primary suit and the counterclaim.

    b. Since the errors leading to this appeal were committed by the trial magistrate, parties shall bear their respective costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 26TH DAY OF SEPTEMBER 2022

B M EBOSO

JUDGE

In the Presence of: -

Ms Nyamu for the Appellant

Ms Mugo for the Respondent

Court Assistant: Sydney