Fona Fisheris Limited v Shahari aka Mzee Kassim (Environment and Land Appeal 3 of 2020) [2022] KEELC 4803 (KLR) (22 September 2022) (Judgment)

Neutral citation: [2022] KEELC 4803 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT AND LAND APPEAL 3 OF 2020

JO OLOLA, J

SEPTEMBER 22, 2022

BETWEEN

FONA FISHERIS LIMITED .... APPLICANT

AND

KASSIM SHAHARI AKA MZEE KASSIM .... RESPONDENT

(Appeal arising from the Ruling of the Honourable J. A. Sitati, Principal Magistrate delivered on 14th February, 2020 in Lamu PMELC No. 9 of 2019; Fona Fisheries Limited -vs- Kassim Shahari Ali (alias Mzee Kassim))

JUDGMENT

1. This is an appeal arising from the ruling of the Honourable J A Sitati, Principal Magistrate delivered on February 14, 2020 in Lamu PMELC No 9 of 2019; Fona Fisheries Limited v Kassim Shahari Ali (alias Mzee Kassim).

2. That ruling arose from the determination of a notice of motion application dated November 24, 2019 by which the appellant herein as the plaintiff sought an order that pending the hearing and determination of the suit, an injunction order be issued restraining the respondent/defendant by himself, his agents or servants from trespassing, entering, remaining on, constructing, alienating, working on or dealing with the parcel of land known as LR 12852/155 situated in Mokowe, Lamu.

3. Having heard the application and in the ruling delivered as aforesaid on February 14, 2020, the learned trial magistrate determined that the matter was essentially a boundary dispute and directed that the matter be placed before the land registrar for a determination in accordance with sections 18 and 19 of the *Land Registration Act*.

4. Aggrieved by that determination, the appellant lodged the memorandum of appeal herein dated March 5, 2020 urging that the determination be set aside on the grounds that:

1. The learned trial magistrate fundamentally erred in law and fact by holding that the dispute between the appellant and the respondent is a boundary dispute;
2. The learned trial magistrate fundamentally erred in law and fact by holding that the trial court did not have jurisdiction to deal with the suit;
3. The learned trial magistrate fundamentally erred in law and fact by ordering that the matter be placed before the land registrar for determination;
4. The learned trial magistrate fundamentally erred in fact and in law by failing to allow the appellant's application dated November 24, 2019.

5. As it were, a first appeal is by way of re-trial and this court as the first appellate court, has a duty to re-evaluate, re-analyse and reconsider the evidence that was placed before the court and to draw its own conclusions.

6. From the material placed before me, the appellant herein had instituted the suit against the respondent in the subordinate court seeking *inter alia* an order of injunction, orders of eviction as well as special and general damages for trespass to the suit property. Filed contemporaneously with the suit was the application dated November 24, 2019 by which the appellants sought an order of interim injunction to restrain the respondent from trespassing upon, entering, remaining on, constructing alienating or working on or in any manner dealing with all that property known as LR No 12852/155 situated at Mokowe in Lamu.

7. In a ruling delivered on February 14, 2020, the learned trial magistrate though satisfied that the appellant had made out a prima facie case against the respondent declined to grant the orders of injunction having also determined that the matter was essentially a boundary dispute. In accordance with that determination, the learned trial magistrate instead granted orders of status quo and directed that the matter be placed before the land registrar for a determination of the boundary dispute as provided under sections 18 and 19 of the *Land Registration Act*.

8. Having considered the requirements for the grant of an interlocutory injunction, the learned trial magistrate gives the rationale for his decision at the end of page 2 of his 5 page ruling thus:

> " After perusing the filed bundle of pleadings, it is clear to this court that the plaintiff has only established a prima facie case with a probability of success by adducing proof of ownership of his plot land reference 12852/155. The defendant does not dispute the fact that the plaintiff is the owner of land reference 12852/155 but argues on the other hand that the plaintiff was in the process of extending the perimeter fence into an adjoining parcel No 114 belonging to the defendant's benefactor. This means that the only issue that is doubtful at this stage is the full extent of the plaintiff's parcel of land and whether the plaintiff has extended the boundaries beyond what it is lawfully entitled to. This clearly makes the dispute to be about the exact lines of the plot boundary.
>
> By this finding that the dispute between the plaintiff and the defendant is a boundary dispute, the nature of the case automatically mutates from one that should be in the court to one that should be placed before the land registrar for determination and hearing under the provisions of section 18 and 19 of the *Land Registration Act* cap 300 ..."

9. I did however find considerable difficulty in coming to the same conclusion that there was a boundary dispute between the appellant and the respondent herein. The appellant herein had sued the respondent for interfering with its possession and use of the suit property. In response, the respondent

had contended that the perimeter wall being constructed by the appellant had encroached on another parcel of land not belonging to the respondent, but to another third party.

10. In his replying affidavit filed in the lower court on December 10, 2019 in response to the appellant's application, the respondent makes that clear at paragraph 4 thereof where the avers thus:

> 4. ...the only disagreement that i had with the plaintiff was that they wanted the wall be extended to a neighbouring property which does not belong to the plaintiff but which they had expressed an intention to purchase through me from the owner who is also my friend."

11. That position is repeated at paragraph 6 of the respondent's supplementary affidavit field in the trial court on January 22, 2020 wherein he deposes as follows:

> " That in particular the surveyors found that the plaintiff's perimeter wall as constructed has encroached on parcel LR No 114 which does not belong to the plaintiff and in respect of which I am a caretaker on behalf of the owner."

12. As it were, the respondent does not in those statements disclose the name of the alleged friend or owner of the said parcel of land. Nor does he exhibit a copy of the title to demonstrate that the same indeed exists. The respondent indeed has not exhibited any evidence of his appointment as his alleged's friend caretaker or any authority he has to interfere with the appellant's use of his land on behalf of the said friend or benefactor as the court put it.

13. In the absence of any claim of trespass against the appellant by the alleged owner of the said parcel number LR No 114, there was no basis upon which the trial court could properly conclude that there was a boundary dispute between the parties. Indeed having satisfied himself that the appellant had on the basis of documentation produced made out a *prima facie* case with a probability of success, there was no basis for the court to decline to grant the injunction as there was no evidence placed before him that the respondent owned any plot adjacent to the appellants on which there was a boundary dispute.

14. The respondent does not deny that he has been interfering with the construction going on the parcel of land registered under the appellant's name. The appellant avers at paragraph 12 of the plaint that the respondent's actions have caused it huge financial losses, loss of business opportunity and damages. Given the respondent's failure to produce any evidence of its interest on the appellant's property or the adjacent parcel of land it was clear to me that the balance of convenience tilts in favour of the appellant as it is likely to suffer irreparable injury following the acts of the respondent who is acting on behalf of an undisclosed proxy.

15. In the circumstances herein I am persuaded that the appeal has merit. The ruling delivered on February 14, 2020 by the Honourable T A Sitati, Principal Magistrate in the said suit in the subordinate court is hereby set aside. The same is hereby substituted by an order allowing the notice of motion dated November 24, 2019 in terms of prayer Nos 3 and 4 thereof with costs.

16. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 22ND SEPTEMBER, 2022.

In the presence of:

No appearance for the Appellant

No appearance for the Respondent

Court assistant - Kendi

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J. O. OLOLA

JUDGE