Aloo v Achiego (Environment and Land Appeal 21 of 2021)
[2022] KEELC 14457 (KLR) (27 October 2022) (Judgment)

Neutral citation: [2022] KEELC 14457 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ENVIRONMENT AND LAND APPEAL 21 OF 2021

AY KOROSS, J

OCTOBER 27, 2022

[FORMERLY KISUMU ELC APPEAL NO. E3 OF 2021]

BETWEEN

FREDRICK ONYANGO ALOO ..... APPELLANT

AND

WILKISTER ATIENO ACHIEGO ..... RESPONDENT

(Being an Appeal from the judgment of the Principal Magistrate Honourable Mr. J.P.Nandi delivered on 18/12/2020 in Bondo ELC Case Number 18 of 2018)

JUDGMENT

Background of the appeal

1. This case has been in the court corridors for close to 7 years and its journey can be traced to a plaint dated 23/06/2015 that was filed in the ELC court in Kisumu. When the Magistrate's courts were gazetted to hear and determine ELC cases, it was transferred to Bondo Law courts.

2. In an amended plaint dated 24/04/2019, the respondent contended that the appellant in the year 2015, encroached and trespassed on her parcel of land known as North Sakwa/Nyawita/5823 ("suit property") which measured 0.51 hectares. She averred that the respondent had put up structures on it and was even cultivating it. She averred that her plea for intervention from the local administration against the appellant from continuing to trespass on the suit property fell on deaf years. She averred that the appellant's actions had caused her loss and damage which she particularised.

3. She sought inter alia, (i) a declaration that she owned the suit property (ii) injunctive orders be issued restraining the appellant from trespassing on the suit property and (iii) eviction, general damages, costs and interests.

4. The appellant entered appearance and filed an amended defence dated 22/03/2019. He denied the averments in the plaint and averred that the suit property originally emanated from land parcel no. North Sakwa/Nyawita/495 while his parcel of land no. North Sakwa/Nyawita/7799 originally emanated from North Sakwa/Nyawita/491. The original parcels adjoined each other.

5. The appellant averred that the respondent was not the registered owner of the suit property and she lacked locus standi to institute the suit. He asserted that the respondent's suit was unmerited, an abuse of the court process and incompetent. He prayed for the suit's dismissal with costs to him.

6. After the parties had testified and closed their respective cases, the trial magistrate in his judgment found inter alia; the respondent was the registered owner of the suit property and the appellant had encroached on the respondent's parcel of land by 0.017 hectares and granted the respondent the reliefs sought in her claim.

Appeal to this court

7. Dissatisfied with the above judgment, the appellant filed a memorandum of appeal dated 10/01/2021 which raised 10 grounds. In his submissions, he abandoned some of his grounds. Upon appraising the grounds, it is my considered view that they can be condensed as follows;

    a. The Learned Magistrate erred in law and fact by entertaining the respondent's claim yet by virtue of Sections 18 and 19 of the *Land Registration ACT*, he did not have jurisdiction;

    b. The Learned Magistrate erred in law and fact in relying on the respondent's survey report yet by virtue of Section 35 of the *Evidence ACT*, the respondent was not the maker thereof and thus denied the appellant the opportunity to cross examine the maker;

    c. The Learned Magistrate erred in law and fact by failing to appreciate the totality of the evidence on the survey reports produced by the parties;

    d. The Learned Magistrate erred in law and fact by awarding the respondent general damages of Ksh. 300,000/- without setting out the measure, special facts and circumstances of the case to arrive at such an award; and

    e. The Learned Magistrate erred in law and fact by disregarding the doctrine of precedent.

8. The appellant sought the following reliefs; the appeal be allowed with costs. The lower court judgment be set aside and be substituted with a dismissal with costs to the appellant.

Parties' submissions

9. The parties disposed of the appeal by way of written submissions and as directed by the court, they filed their respective rival submissions.

10. The appellant's counsel Mr.Liko filed his written submissions dated 10/07/2022 in which he submitted on the consolidated grounds of appeal.

11. On the 1st ground, it was Counsel's submission that pursuant to Section 18 of the *Land Registration ACT*, fixing of boundaries and settlement of boundary disputes was the preserve of the Land Registrar. The parcels of land in dispute; the suit property and the appellant's parcel of land known as North Sakwa/Nyawita/7799 were registered under the repealed Registered *Land ACT* and their boundaries were to be determined from the ground and not the Registry Index Map (RIM). In that regard,

Counsel cited the case of *Ali Mohamed Salim v Faisal Hassan Ali* [2014] eKLR where Angote J expressed himself thus;

> " Under Section 18 of the repealed Registered *Land Act*, the Director of Surveys was required to prepare and maintain a series of maps for every registration district. The type of survey that generated the registry index maps is what was known as "general boundaries" which has been defined in section 18(1) of the *Land Registration Act*, 2012 to mean "the approximate boundaries and the approximate situation only of the parcel." Indeed, most of the titles under the repealed Registered *Land Act* were issued on the basis of the general boundaries, meaning that such parcel of land had no fixed beacons".
>
> He also relied on the several other authorities which were of a similar position including the Court of Appeal decision of *Azzuri Limited v Pink Properties Limited* [2018] eKLR.

12. On the 2nd ground, it was Counsel's submission that contrary to the provisions of Section 35 of the *Evidence ACT*, the respondent did not call the maker of the survey report that she produced as evidence. Counsel relied on several authorities including Rosemary Wanjiru Kungu v Elijah Macharia Githinji [2014] eKLR and David Ndung'u Macharia v Samuel K Muturi & another Nairobi HCCC No. 125 of 1989. In the former, Odunga J stated thus;

> " ...without the defence calling witnesses who could be cross-examined on the documents produced by the defence rendered the same of very little, if any, weight at all..."

13. On the 3rd ground Counsel submitted that from the evidence adduced, the appellant's and respondent's survey reports which were produced were at variance. The appellant's surveyor's report demonstrated that there was encroachment in the ground but from the map, there was no encroachment. The respondent's report showed that there was encroachment on the ground but it did not make a finding on the map. Further, no evidence was led that there existed a road between the two parcels of land. He relied on several authorities including the Court of Appeal decision of Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR where the court expressed itself as follows;

> " ... the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case"

14. In opposition, the respondent's Counsel Mr. Lawi Ogutu filed his written submissions dated 4/08/2022. On the 1st ground, he submitted that it was never pleaded that the issue in dispute was a boundary dispute and the parties were bound by their pleadings; trespass and or encroachment. He contended that the trial court had jurisdiction. It was Counsel's contention that the issue of boundary was an afterthought and made to hoodwink the court.

15. On the 2nd ground, he submitted that the respondent had proved her case pursuant to Section 107 (1) and (2) of the *Evidence ACT*. That the respondent's surveyor's report was produced in court and the appellant never objected to its production and being expert evidence, it did not bind the court. It was Counsel's view that the trial court did not err in its findings. Counsel relied on the case of *C.D. Desouza v B.R. Sharma* (1953) 26 KLR 41 P.42 where the court stated thus;

> " In *Des Raj Sharma v Reginam* (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification, and the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence."

16. On the 3rd ground, Counsel submitted that the respondent had proved that the appellant had encroached on a public road and the suit property and the appellant intentionally obliterated the public road with the main intention of encroaching on the suit property. That the appellant's evidence was a clear demonstration of this and the survey reports filed by the parties affirmed this position. Further, Counsel submitted that the insets filed by both surveyors were the same because they emanated from the same map sheet. Counsel submitted that though the survey report produced by the respondent depicted a clear position of the ground situation, the appellant's survey report was bereft of pertinent information including failing to demonstrate the existence of physical features including a road.

17. On the 4th ground, Counsel submitted that an award of damages was discretionary and therefore they should not be disturbed.

18. On the 5th ground, Counsel submitted that the appellant's submissions were an academic exercise because they introduced issues not pleaded and were therefore inconsequential. Counsel, did not deem it fit to procure any authorities to this court.

Analysis and determination

19. This being the first court of appeal, this court is reminded that the task at hand is to reappraise, reassess and reanalyse the evidence as asserted by the parties and to establish if the findings reached by the Learned Trial Magistrate should stand and give reasons if they do not. This court has power to frame issues it considers pertinent for the determination of a dispute between the parties. The Court of Appeal in the case of *Ratilal Gova Sumaria & another v Allied Industries Limited* [2007] eKLR expressed itself on the role of a 1st appellate court follows:

> " This being a first appeal we are obliged to reconsider the evidence, re-evaluate it and make our own conclusions, but as we do so it must be remembered that we have neither seen nor heard the witnesses – see *Peters Vs. Sunday Post Ltd* [1958] E.A. 424. *Selle & Another Vs. Associated Motor Boad Co. Ltd. & Others* [1968] E.A. 123 and *Ephantus Mwangi & Another Vs. Duncan Mwangi Wambugu* [1982-88] 1 KAR 278. In the last case HANCOX JA (as he then was) put it thus at p. 292 of the Report: -
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> > "A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding he did."".

20. Having considered the lower court record, the memorandum and record of appeal and the issues proffered by the respective Counsel's submissions, the court will decide on its condensed grounds of appeal in a sequential manner.

> I. The Learned Magistrate erred in law and fact by entertaining the respondent's claim yet by virtue of Sections 18 and 19 of the *Land Registration ACT*, he did not have jurisdiction

21. Section 18 of the *Land Registration ACT* states as follows:

> " 18 (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel land have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.

(3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:

Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the *Survey Act*, (Cap. 299)"

22. From the evidence that was adduced before the trial court, it was evident that the suit property and North Sakwa/Nyawita/7799 were registered under the repealed Registered *Land ACT* which was replaced by the *Land Registration ACT*. Section 21(2) and (4) of the repealed ACT stipulated thus;

"21

(2) Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary.

(3) .....

(4) No Court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section."

23. Parcels of land falling within the repealed ACT ordinarily had a general boundary. Title documents under these regimes usually had the words approximate area. From these provisions of law, if a boundary dispute arose and the boundary was not fixed, the land registrar on an application had to determine and establish a fixed boundary by marking the boundary and fixing beacons. If the boundaries were fixed and there was encroachment, then trespass would suffice. In my humble opinion, the surveyors' reports could not form a basis of establishing or deciding where the fixed boundary lay, nay, these reports were expert reports and shedded light on the extent of encroachment.

24. As submitted by the appellant, this position of law had been upheld in a line of court decisions. In the case of Azzuri Limited v Pink Properties Limited (Supra), the court in upholding the superior court decision stated thus on the role of the land registrar and a surveyor's report;

"This means that under the aforesaid provisions, boundary disputes pertaining to lands falling within general boundary areas must be referred to the Land Registrar for resolution; while disputes pertaining to lands with fixed boundaries may be investigated and possibly resolved simply through a surveyor"

25. From the record, I have been unable to trace the appellant's witness statement and it would seem the appellant never adopted any statement and this court will rely on his oral testimony.

26. The undisputed facts are that the suit property originally emanated from land parcel no. North Sakwa/Nyawita/495 while the appellant's parcel of land no. North Sakwa/Nyawita/7799 originally emanated

from North Sakwa/Nyawita/491. The two original parcels adjoined each other. The appellant and respondent are relatives; the appellant's father and respondent's husband are step brothers.

27. The claim was on an alleged trespass. The respondent neither sought the court's intervention in resolving a boundary dispute nor did the defence plead a boundary dispute. The defence never sought for the plaint to be struck out for want of jurisdiction. Pleadings closed and the hearing proceeded as if the dispute was on trespass.

28. From these provisions of law and evidence adduced, this court is not in doubt that the issues in dispute are both on boundary and trespass. The claim for trespass was competently before the trial court. But for trespass to accrue, the boundaries had to be fixed first. In this case between North Sakwa/ Nyawita/7799, the public road and the suit property.

29. From the evidence, it seems the two parcels of land are not contiguous and there is a public road in between. However, the appellant had allegedly obliterated the road and encroached on the suit property. What happens if one institutes a trespass case then it emerges that it was filed prematurely before the boundary was fixed?

30. Ordinarily, courts may direct the land registrar and the surveyor to visit the suit property for purposes of demarcating and fixing the boundary between the parties herein and further, to establish the extent of trespass before they can proceed with the hearing of the trespass case.

31. The Court of Appeal in the case of Nguruman Limited v Shompole Group Ranch & another [1994] eKLR stated that parties can submit themselves to the registrar once it emerges that their claim hinged on a boundary dispute and trespass. In this case, Kwach J in interpreting Section 21(4) of the repealed *Land Registration ACT* held as follows;

> "If the intention was to prohibit even the institution of a suit then this should have been expressly stated as has been done in section 30(1) of the *Land Adjudication Act* (cap 284) which uses the words "no person shall institute and no Court shall entertain". The issue in this case was trespass, a matter which the magistrate had jurisdiction to deal with...The magistrate could not of course entertain the suit until and unless the boundary had been determined by the Land Registrar"

32. In view of the foregoing, I find that the trial magistrate erred in proceeding with the suit without the boundary being fixed first by the land registrar. I am of the view that the court ought to order the land registrar to fix the boundary between North Sakwa/Nyawita/7799, the public road and the suit property before the case is heard afresh by the trial court. In this way, justice will be seen to have been done to all parties and the issue will be resolved once and for all.

33. If the land registrar establishes that either party had encroached on the public land, woe unto him or her! public land is for use by all and sundry and cannot be "grabbed", annexed or used for private purposes. I need not say more on the other grounds of appeal.

34. Based on the reasons given, I ultimately find that this appeal is merited and because the appellant and respondent are close family relations and neigbours, each party shall bear their respective costs of this appeal. The costs of the impugned original trial court judgment shall be at the discretion of the magistrate who shall retry the suit. I express hope that the matter shall be expedited for hearing.

35. I hereby set aside the entire judgment and decree of the trial magistrate. and make the following orders;

    a. Within 3 months from the date of this judgment, the Bondo subcounty land registrar or any other land registrar as shall be designated with the assistance of a designated government

surveyor shall visit the suit property and North Sakwa/Nyawita/7799 for purposes of demarcating and fixing the boundary between North Sakwa/Nyawita/7799, the public road and the suit property and file their respective reports at Bondo Principal Magistrate Court within 30 days from the date of the visit.

b. Upon the Bondo sub county land registrar or any other land registrar and a designated government surveyor filing their reports, the case shall be set down for hearing afresh.

c. An order of status quo is issued pending the hearing and determination of the main suit.

d. Parties are to bear their own costs of this appeal.

DELIVERED AND DATED AT SIAYA THIS 27TH DAY OF OCTOBER 2022.

HON. A. Y. KOROSS

JUDGE

27/10/2022

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform;

In the Presence of

Mr. Liko for the appellant

Mr. Lawi Ogutu for the respondent

Court assistant: Ishmael Orwa