Mwasya v Mwendwa (Environment and Land Appeal E008 of 2021)
[2022] KEELC 13596 (KLR) (18 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13596 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITUI

ENVIRONMENT AND LAND APPEAL E008 OF 2021

LG KIMANI, J

OCTOBER 18, 2022

DICKSON IVUTHA MWASYA..... APPELLANT

-VERSUS-

PAUL MUTHENGI MWENDWA.....RESPONDENT

BETWEEN

DICKSON IVUTHA MWASYA ..... PLAINTIFF

AND

PAUL MUTHENGI MWENDWA ..... DEFENDANT

(An Appeal from the Judgment of Honourable John Aringo Senior Resident Magistrate Kyuso SRMCC ELC E001 0F 2020 delivered on the 15th day of November 2021)

JUDGMENT

1. The Appellant was the Plaintiff in Kyuso SRMCC ELC case E001 of 2020 and he filed this appeal from the Judgment of the Honourable John Aringo dated November 15, 2021 through the Memorandum of Appeal dated November 25, 2021 setting out the following grounds:

    1. That the trial magistrate erred in law and fact in failing to evaluate and analyze the evidence in support of the appellant's case.

    2. That the learned trial magistrate erred in law and fact and misdirected himself both in law and facts by failing to consider that the appellant was the registered owner and/or in possession of the Land Parcel no xxxx Kamuwongo Adjudication Section(suit property)

    3. That the trial magistrate erred in law and fact in failing to conduct an independent interrogation of the dispute without basing his decision on the land registrar and county surveyor relying completely on their findings of the report.

4. That the trial magistrate erred in law and fact by deviating from material facts of the substance of the matter.

5. That the trial magistrate erred in law and fact by considering the decision of the land registrar and the county surveyor as conclusive and making his decision basing his reasoning on their findings only.

6. That the learned trial magistrate erred in law and fact in deviating from the fact that the locus for litigation is land parcel no xxxx Kamuwongo Adjudication Section but not a boundary dispute.

7. That the learned trial magistrate erred in law and in fact by concluding that the dispute relates to boundary between the parties, which fact is not in the appellant pleadings.

8. That the learned trial magistrate erred in law and fact in making his reasons on presumption and pre-empting the legal owner of parcel no xxxx Kamuwongo Adjudication Section.

9. That the learned trial magistrate erred in law and fact and misdirected himself both in law and facts by fettering his wide discretion by taking into consideration extraneous and antecedents of the appellant on matters before the court action.

10. That the learned magistrate erred in law and fact and misdirected himself both in law and facts by failing to allow the parties herein an opportunity to be heard and determine the matter on merit.

11. That further, the learned trial magistrate erred in law and fact and misdirected himself by being misconceived about the legal owner of the of the property land parcel no xxxx Kamuwongo Adjudication Section subject to litigation.

2. Based on the foregoing grounds appeal the Appellant prays that this appeal be allowed and the judgment of the trial court be set aside and/or varied with costs of the lower court and the appeal.

3. The suit before the Trial Court was instituted through a Plaint dated September 22, 2020 where the Plaintiff claimed to have instituted the suit as a representative of one EMI a minor in whose name the suit land is registered. The Plaintiff claims to be the registered and sole proprietor of Land Parcel no xxxx Kamuwongo Adjudication Section. That on diverse dates in the month of March, 2021, the defendant's agents, proxies and assignees encroached onto his property by clearing the bush, grazing livestock, selling and disposing stones on the upper side of the hill and fencing the land. He therefore prayed for a permanent injunction against the Defendant and a declaration that the Land Parcel no xxxx Kamuwongo Adjudication Section belongs to him.

4. The Defendant denied the plaintiff's claim and stated that he sold the suit land to the plaintiff when it was unsurveyed. That boundaries were identified and the suit land fenced, and upon adjudication it was recorded and registered thereby leaving the other land bordering the suit land unsurveyed.

5. It was the Defendant's contention that he has been working on his unsurveyed piece of land and not the suit property. He further contends that the plaintiff's claim for boundary determination ought to have been dealt with by the Land's Office instead of filing suit.

6. According to the proceedings before the trial court, before hearing of the suit commenced, Counsel for the Plaintiff Mr Mbaluka, applied to court to have a surveyor and the registrar visit the suit property, prepare and file a report in respect of land parcel Kitui/Kamuwongo/xxxx. The Trial Court considered the application and was of the view that the Land Registrar's and Surveyor's Report would

considerably dispose of the matter and gave directions that the said exercise be carried out and a report be filed in court. The report was eventually filed and both parties and their Advocates confirmed having perused the same. On October 18, 2021 when the matter was set for hearing Mr Mandela Advocate held brief for Mbaluka Advocate and he confirmed to the court that the surveyors report dated June 9, 2021 had been filed. He then prayed for the Court to adopt the said report and deliver judgment based on the report. The Defendant did not object to the application.

7. The Trial Court delivered judgment and held that the dispute largely touches on the boundary of the parties' parcels of land and an alleged trespass by the Defendant on the Plaintiffs land parcel xxxx. According to the joint Land Registrar's and Surveyor's report dated June 26, 2021, it was observed that parcels no xxxx and no xxxx are far apart and do not share a common boundary. The court confirmed that the suit property is registered in the name of EMI, who is the Plaintiff/Appellant's daughter and it measured 2.22 HA. That there was no dispute on this issue thus there was no need to make any declaration. The court further found that the boundary was intact with no traces of encroachment as alleged. The court found that in the circumstances, the main prayers sought had already been addressed. The suit was therefore dismissed with costs to the defendant.

The Appellant's Submissions

8. The Appellant's Counsel filed written submissions and reiterated his grounds of appeal and the claim before the trial court. He submitted that the Trial Court did not address the issues of unlawful activities/encroachment by the Defendant as raised pleadings and witness statements and only focused on the Defence.

9. Counsel for the Appellant stated that during to the Respondent's acts of infringement of the Respondent's right he reported the matter to the Police vide OB no 8/12/8/2020 and that if the evidence of the police and other witnesses would have been adduced in court the issues complained of would have come out clearly but the evidence was not adduced. The Appellant further contended that he had attached various documents in support of his claim such as sale agreement, map, photographs which were not considered.

10. The Appellant further submitted that the Respondent in his statement stated that he collected stones on his unsurveyed land contrary to evidence since the land is registered and title deed has been issued. The Appellant further complained that the court did not visit the site even though he had requested for it. The Appellant further submitted that the court erred in failing to analyze or take into consideration the evidence in support of his case and further deviated from material facts of the case.

11. It is the appellant's submission that the Trial Court misdirected itself in fact and law when it decided that the claim relates to a boundary dispute when there was no evidence tendered in support of such a claim.

12. Further, the Appellant submitted that the trial court relied on the presumption that the Respondent is the legal owner of Land Parcel no xxxx when there was no such evidence. Counsel for the Appellant highlighted their submissions before the Court on October 4, 2022 and stated that the Trial Court considered defence statements and made a lot of presumptions. Further that the court relied heavily on the Land Registrar's and Surveyor's report without taking the Appellant's evidence while concluding that the matter was a boundary dispute which was not the case.

Respondent's submissions

13. The Respondent appeared in person and made oral submissions before the Court on October 4, 2022, and stated that the Plaintiff's case in the trial court was a claim for Land Parcel xxxx but he did not know that land. He therefore asked the Court to send a surveyor.

14. The Respondent confirmed that the Surveyor then prepared the report and the Court entered judgment. He denied that he had cut down trees, grazed animals as alleged by the Plaintiff. He stated that the Land Parcel xxxx was far from his land and they are not neighbors with the Appellant. Therefore, according to the Respondent, the Appellant has no case.

15. The Respondent submitted that the trial court's judgment was satisfactory and that there was nothing he had done with Land Parcel xxxx. He prayed for the Appeal to be dismissed.

Analysis and determination

16. The role of an appellate court was stated in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] e KLR, where the Court of Appeal stated that;

> "[A]n appeal to this Court from a trial by the High Court is by way 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 reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect."

17. Similarly, in *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] e KLR, the same stated with regard to the duty of the first appellate court;

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze 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"

18. I have considered the pleadings and proceedings before the trial court, the Memorandum of Appeal and submissions of the parties and note that the Appellants Counsel in submissions did not deal with the grounds of appeal individually but consolidated them all. I propose to deal with the said grounds of appeal in the same manner and summarize them into the issue of whether the Trial Court erred and misdirected itself in law and fact by relying on the joint Land Registrar's and Surveyor's report dated June 29, 2021 to make its judgment and in declaring that this was a boundary dispute.

19. Did the trial court err in determining the suit relying on the joint Land Registrar's and Surveyor's report? The Appellant contends that the Trial Court denied them an opportunity to present their witnesses for hearing through oral evidence. However, from the record of proceedings before the Trial Court on May 19, 2021, Counsel for the Plaintiff Mr Mbaluka made an application to the court for a surveyor and a land registrar to visit the suit property and prepare and file a report, which application was not opposed by the Defendant. The court then issued an order dated the same date directing that "The Surveyor and Land Registrar prepare a report and map for parcel Kitui/Kamuongo/xxxx exhaustively setting out the proprietorship and boundaries. The Defendants and the Plaintiffs to share costs of the surveyor/Registrar report equally" Once the court confirmed that the said report dated May 19, 2021 was filed; the suit was set down for hearing on October 18, 2021. On the said date Mandela Advocate holding brief for Mbaluka Advocate for the Plaintiff prayed that the court adopts

the report and proceeds to deliver the judgment based on the report. The court proceedings of October 18, 2021 and the order of the court are instructive. The court made the order that "Following the application by Counsel for the Plaintiff for court to deliver judgement based on the report and no-objection by the defendant. Matter to proceed to judgment. Judgment on November 15, 2021"

20. The mode of hearing in civil suits is provided for in Order 18 rule 2 of the *Civil Procedure Rules* as follows:

> 2. Unless the court otherwise orders—
>
> (1) On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.
>
> (2) The other party shall then state his case and produce his evidence, and may then address the court generally on the case. (3) The party beginning may then reply.

21. The court can thus order a departure from the normal procedure of hearing a suit and in the instant case the court ordered a departure based on an application by the Appellant with the agreement of the Respondent. The Appellant cannot therefore come to this appellate court claiming that he was not heard when it was on his application that the alternative procedure was adopted.

22. In my view the parties to the suit herein agreed and adopted a procedure for determination of the suit by opting to proceed without calling any of the parties and/or witnesses and further without relying on any of the documents filed in court save for the report dated May 19, 2021. This in my view amounted to a consent order which the court accepted and endorsed and the same was binding to all the parties. In the case of *Flora Wasike v Destino Wamboko*[1982 – 88] 1 KAR 625 the Court of Appeal held that a consent is binding on the parties and like a contract it can only be set aside on grounds of fraud or mistake. In *ET v Attorney General & another* [2012] eKLR it was gain held that:

> " A compromise agreement is a contract whereby the parties make reciprocal concessions in order to resolve their differences and thus avoid litigation or to put an end to one already commenced. When it complies with the requisites and principles of contracts, it becomes a valid agreement which has the force of law between the parties. 41. When a compromise agreement is given judicial approval, it becomes more than a contract binding upon the parties."

23. The agreement to conduct the trial as endorsed by the court was binding on the parties and I see no reason to interfere with the procedure. There was no indication in the procedure adopted that the court was to consider, evaluate and analyze the evidence in support of the Appellants case and to conduct an independent interrogation of the dispute. In my view it was not open to the court to carry out such an exercise which was outside of the agreed terms and procedure for determining the suit. I therefore find that the trial court did not err in considering in his judgement the surveyor/Registrars report only. Indeed the Counsel for the Appellant previously on August 23, 2021 indicated to the court that he had perused the report. It is to be concluded that he knew its contents at the time he applied to have the court adopt the same. The same Counsel cannot turn around and fault the trial court for relying on the same report.

24. Further, the court could not consider analyze and evaluate the pleadings, witness statements and documents filed in court as if they were evidence adduced in court. In my view the claims made by parties in their pleadings and the statements of witnesses remained mere allegations unless the parties

themselves were called to testify in court and prove their claims through the normal process. In the case of *CMC Aviation Ltd v Kenya Airways Ltd (Cruisair Ltd)* Madan JA held:

> " The pleadings contain the averments of the three parties concerned. Until they are proved, or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. As stated in the definition of "evidence" in section 3 of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven. Averments in no way satisfy, for example, the following definition of "evidence" in Cassell's English Dictionary, p 394:
>
> Anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.
>
> The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.
>
> In the Australian case, Re Williams Bros Ltd (1928) 29 SRNSW 248, Harvey CJ said: "To give evidence in my opinion means to make statements on oath before a person duly authorised to administer an oath."

25. It is noted from the pleadings that the Appellants claim was that the Respondent encroached on his land by clearing bushes, grazing livestock, selling and disposing of stones and fencing the land. The Respondent denied the claim and stated that he had been working on his own land. These are claims that could only be determined by way of evidence. The parties themselves agreed to forego the process of calling witnesses and the trial court could not interrogate contested issues of facts in the circumstances of this case.

26. On the question of ownership of the suit land the trial court found that it was not in contention by any of the parties that the Land Parcel no xxxx Kamuwongo Adjudication Section is registered in the name of EMI who was the Appellant's daughter. From the pleadings it is clear that ownership of the suit land is not disputed and the trial court did not make any finding on ownership. The court stated that "The Parcel no xxxx is registered to the Plaintiff's daughter as claimed and there is no dispute, hence no need to make any declarations." I find that nothing arises on the ground of appeal raised by the appellant on ownership of the suit land since the same is not contested.

27. The issue in contention was whether the Respondent had encroached onto Land Parcel no xxxx Kamuwongo Adjudication Section. The trial court found on this issue "that the report is very clear that there is no trespass or encroachment as alleged. In the circumstances the main prayers sought is already addressed..." The Surveyor and the Registrar's report had come to the same finding and stated that "Boundary: The suit property's boundary is still intact with no traces of encroachment" In my view the trial court cannot be faulted for having come to the same conclusion since the surveyor and the Registrar's report was based on a visit to the suit land in the presence of the parties and having received representations from them on the dispute at hand.

28. The Appellant further contends in his grounds of appeal that the trial court erred in concluding that the dispute relates to boundary between the parties which fact was not in the Appellants pleadings. It is noted in the Defence filed, the Defendant claimed that he sold the suit land to the plaintiff when

it was unsurveyed. That boundaries were identified and the suit land fenced, and upon adjudication it was recorded and registered thereby leaving the other land bordering the suit land unsurveyed. It was the Defendant's contention that he has been working on his unsurveyed piece of land and not the suit property. Looking at the claim in the plaint and the defence I do not fault the trial court for finding that the issue in contention was largely a boundary issue. Indeed this may be the reason that led Counsel for the Appellant to seek directions that the Surveyor and Land Registrar visit the land and file a report in respect of the suit land. However, the Surveyors/Registrars report and in the Respondent's submissions before this court, the Respondent stated that he sold to the Appellant land parcel xxxx and that he did not know the suit parcel of land and he has never encroached on it. In the end it is not clear whether the Respondent sold to the Appellant parcel of land the xxxx or xxxx. It is further not clear who the registered owner of land parcel 2674 is.

29. Further the report showed that the two parcels of land Kitui/Kamuwongo/xxxx and xxxx are far apart and do not share a common boundary. In the end I surmise that the trial court found and determined the real issue in controversy between the parties which was whether the Respondent had encroached on the suit land. The trial court found that land subject of the Plaintiffs claim was no 2711 and there was no evidence of encroachment. On this finding the trial court cannot be faulted.

30. It is my considered view that had the Appellant desired due consideration of evidence beyond the surveyor/Registrars report he would have sought to take the matter to full trial. Parties and their legal advisers ought to take the advice of the Court of Appeal in *James Njoro Kibutiri v Eliud Njau Kibutiri* 1 KAR 60 [1983] KLR 62; [1976-1985] EA 220 that the ingenious lawyers are advised that short cuts are fine, as long as you are absolutely sure they won't land you in a ditch. In *Lehmann's (East Africa) Ltd v R Lehmann & Co Ltd* [1973] EA 167 it was held that:

> " The supposed short-cuts in procedure almost always confuse and obscure the true issues and almost always result in prolonged litigation and unsatisfactory decision. However, if the parties to a civil suit agree to adopt a certain procedure and the judge, however wrongly permits such a course, then there is little that a Court of Appeal can do other than seek to make the best of an unsatisfactory position."

31. In conclusion, it is my opinion that the Trial Court's Judgment was sound as it settled the matters in controversy following the adopted procedure. The trial court did not misapprehend the facts or the law and did not act on wrong principles in reaching its conclusions. As was held in the case of *Kneller & Hancox Ag JJA in Makube v Nyamuro* [1983] KLR, 403-415, at 403 where it was stated as follows:-

> " A Court on appeal will not normally interfere with the finding of fact by a 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 principles in reaching his conclusion." There is therefore no need to interfere with the Trial Court's judgment in my view.

32. I therefore find that the Appeal herein lacks merit and the same is hereby dismissed with costs to the Respondent.

DELIVERED, DATED AND SIGNED AT KITUI THIS 18TH DAY OF OCTOBER 2022

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Judgement read in open court and virtually in the presence of-

Musyoki: Court Assistant

Mbaluka Advocate for the Appellant

Dickson Ivutha Mwasya Appellant present

Paul Muthengi Mwendwa Respondent present in person.