



Daughters of Zion Group ((Suing through Judith Omwocha - Chairlady, Mary Moraa - Secretary & Mabel Okwisa -Treasurer)) v Oruthwa (Legal Representative of Jackline Kwamboka Onger) & another (Environment and Land Appeal E32 of 2021) [2022] KEELC 14992 (KLR) (24 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14992 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E32 OF 2021**

A OMBWAYO, J

NOVEMBER 24, 2022

BETWEEN

DAUGHTERS OF ZION GROUP (SUING THROUGH JUDITH OMWOCHA - CHAIRLADY, MARY MORAA - SECRETARY & MABEL OKWISA - TREASURER) APPELLANT

(SUING THROUGH JUDITH OMWOCHA - CHAIRLADY, MARY MORAA - SECRETARY & MABEL OKWISA -TREASURER)

AND

SETH MOCHACHE ORUTHWA (LEGAL REPRESENTATIVE OF JACKLINE KWAMBOKA ONGERI) 1ST RESPONDENT

VIONA MORAA OMBEGA 2ND RESPONDENT

(Being an Appeal from the Judgment /Decree of Hon R K Ondieki (SPM) dated 10th May 2021 in Kisumu Chief Magistrate Court ELC No 161 of 2018)

JUDGMENT

Brief Facts

1. The respondents herein filed a suit against the appellants *vide* a plaint dated January 20, 2016 where it was averred that the 1st respondent is the registered owner of land known as LR Kisumu/Kanyakwar “B” /2700 while the 2nd respondent is the registered owner of LR Kisumu/Kanyakwar “B” /2701 as they jointly purchased LR Kisumu/Kanyakwar “B” /1091 from Tabitha Maroko which they subdivided into two parcels that is LR Kisumu/Kanyakwar “B” /2700 and LR Kisumu/Kanyakwar “B” /2701.



2. It was alleged that since the purchase of the suit parcels, the respondents have been in exclusive use, possession and occupation, management and control to the total exclusion of the appellants herein. That the
3. Appellant through its officials and/or agents threatened to forcibly take over physical possession of the suit property and trespassed upon the suit property and threatened the proprietary rights of the respondents as the registered owners of the suit properties.
4. It was further averred that the 1st respondent herein had already put down construction materials and the suit property is partly developed and is secured by a fence and a gate. That the appellants' actions are a nuisance and interfering with quiet possession and peaceful enjoyment of the respondents' proprietary rights of the suit property and if not restrained by the court, it will interfere with the respondents' projects of developing the suit property and they will suffer loss and damage.
5. The respondents herein therefore prayed for:
 1. A permanent injunction restraining the appellants, their servants, and/or employees, legal representatives or otherwise howsoever from entering upon, interfering howsoever with the respondents' quiet enjoyment, possession and occupation of LR Kisumu/Kanyakwar "B" /2700 and LR Kisumu/Kanyakwar "B" /2701.
 2. A declaration that the respondents are entitled to exclusive and unimpeded right of use, occupation and access of LR Kisumu/Kanyakwar "B" /2700 and LR Kisumu/Kanyakwar "B" /2701.
 3. General damages for any trespass.
 4. Costs of this suit.
6. The appellants herein filed a statement of defence dated June 6, 2016 denying each and every allegation raised by the respondents.
7. The matter came up for hearing before the trial court and judgment was entered in favour of the respondents herein.

Grounds of Appeal

8. Aggrieved by the decision of the lower court, the appellants herein filed a memorandum of appeal on May 27, 2021 which was based on the following grounds:
 1. That the learned magistrate totally misdirected himself in the evaluation of the facts/evidence produced before him, especially with regards to whether the plaintiff had indeed proved acts of trespass as against the appellants and wrongly shifted the burden of proof to the appellants without any basis.
 2. That the learned magistrate erred in law in finding that the plaintiff had proved their case on a balance of probability, yet no iota of evidence was produced to indeed prove any acts of trespass on the part of the appellants.
 3. That the learned magistrate erred in law by finding that the appellants had was that the suit parcel ought to have been elsewhere and failed to consider the defendant' evidence in its totality especially their denial of ever trespassing onto the respondent's parcel of land.



4. The learned magistrate failed to properly evaluate, appraise and/or analyze the evidence and submissions advanced by and/or on behalf of the appellant and thereby mistook and/or misconceived the crux of the appellants' case thus arrived at the wrong decision.
 5. The learned magistrate erred in law by finding that the appellants had trespassed onto the respondents' parcel of land without establishing by evidence if indeed the appellants who owned parcel Kisumu/Kanyakwar "B"/1133 had trespassed onto the respondents' parcel of land being Kisumu/Kanyakwar "B"/2700 and 2701 or vice versa.
 6. The learned magistrate erred in law in finding that the respondent had proved their case on a balance of probability yet they have been in possession of their parcel since 2008 and it is the respondents who trespassed thereon and not vice versa.
 7. That the learned magistrate erred in law in finding that the respondent had proved trespass by presenting registered index map while the appellant did not produce a map which is a misdirection as registered index map cannot prove trespass.
 8. That the learned trial magistrate erred in law in failing to find that the respondents were estopped by their conduct from turning their back on the consent filed in court on July 19, 2016 directing the lands registrar and the Kisumu County lands surveyor to visit the disputed parcels of land and establish the physical position of the said parcels, which report was never submitted in court to prove trespass by appellants into the respondent's land.
 9. That the learned trial magistrate erred in law in failing to find that by virtue of section 3 (4) of the *Evidence Act*, cap 80, the fact of trespass was not proved and thus no adverse finding could have been found as against the appellants.
 10. That the learned trial magistrate erred in law by shifting burden of proof to the appellants without any basis and wrongly found that the respondents had discharged their obligation when they had not done so.
9. The appellants therefore prayed for orders that the appeal be allowed, the judgment and decree of the trial court dated and delivered on May 10, 2021 be set aside and the plaintiff suit be dismissed with costs. That the costs of this appeal and the costs incurred in the trial court be granted to the appellant. The appeal was canvassed by way of written submissions as directed by this court. I have perused the file and do confirm that parties herein failed to file submissions as directed by the court.

Analysis and Determination

10. This court has considered the memorandum of appeal and the evidence on record and the submissions filed by the parties herein and is of the view that the main issue for determination is whether the trial magistrate erred in law in finding that the respondents proved their case on a balance of probability.
11. When the matter came up for hearing at the trial court, PW1 testified that the respondents herein jointly bought land parcel number Kisumu/Kanyakwar "B" /1091 from one Tabitha Maroko at Kshs 1,000,000/=. The respondents then subdivided the property into land parcel number Kisumu/Kanyakwar "B"/2700 and 2701 for the 1st and 2nd respondents respectively and proceeded to register the same in their favour.
12. DW1 Judith Kemunto who is the chairperson of the 1st appellant adopted her statement as evidence in chief. In her statement, she stated that the 1st appellant is a women group formed in 2008 whereby they have an investment portfolio and that they bought land parcel number Kisumu/Kanyakwar "B"/1133 and registered it in the name of the group. It was the appellant's case that in 2015, one George Oira



trespassed onto the appellant's suit parcel and built a mabati structure together with a pit latrine prompting the appellants to sue him vide Kisumu CMCC 417 of 2015 Daughters of Zion Women Group v George Oira. It was stated that later on, the respondent's herein made claims that land parcel number Kisumu/Kanyakwar "B"/2700 and 2701 are physically in the same place where land parcel number Kisumu/Kanyakwar "B"/1133 is located.

13. The trial magistrate was able to point out the fact that the respondents herein had produced documents to show that they are the registered owners of land parcel number Kisumu/Kanyakwar "B"/2700 and 2701. The appellants on the other hand failed to produce documents to show how they acquired land parcel number Kisumu/Kanyakwar "B"/1133. The main issue for determination was that where the respondents claim the physical location of land parcel number Kisumu/Kanyakwar "B"/2700 and 2701 is also where the appellants claim the location of land parcel number Kisumu/Kanyakwar "B"/1133.
14. Although the title to land parcel number Kisumu/Kanyakwar "B"/1133 shows that the same is registered in the name of the appellants, the appellants herein failed to show how they acquired the said title. There is no Agreement for Sale to prove that indeed the appellants bought the land parcel number Kisumu/Kanyakwar "B"/1133 from Everline Onyango and Tom Otieno. There is also no consent to transfer from the Land Control Board. I have scrutinized a copy the green card annexed by the appellant and do confirm that the same has been altered to read 1100 from the original typed 1091. The entry numbers 2,3,4 and 5 in the green card are also altered in the sense that they are handwritten yet entry number 1 in the said green card is typed and was made in the year 2005.
15. I agree with the findings of the trial magistrate that the respondents herein proved their case on a balance of probabilities as the appellants did not produce any map to show where their parcel of land is located. The appellants should have taken necessary steps to call the Land Registrar and the District Land Surveyor so that they could ascertain the physical location of the appellants' parcel of land.
16. This court therefore dismisses this appeal with costs to the respondents and upholds the decision of the trial court.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 24TH DAY OF NOVEMBER 2022.

A O OMBWAYO

JUDGE

