Wairegi v Mathenge (Environment and Land Appeal 9 of 2020)
[2022] KEELC 15275 (KLR) (9 December 2022) (Judgment)

Neutral citation: [2022] KEELC 15275 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ENVIRONMENT AND LAND APPEAL 9 OF 2020

JO OLOLA, J

DECEMBER 9, 2022

BETWEEN

MICHAEL NDERITU WAIREGI ..... APPELLANT

AND

NDUNGU MATHENGE ..... RESPONDENT

(This is an Appeal from the judgment of the Honourable W Kagendo, Chief Magistrate delivered in Nyeri CMCC No 151 of 1989 on February 19, 2020)

JUDGMENT

1. This is an Appeal from the judgment of the Honourable W Kagendo, Chief Magistrate delivered in Nyeri CMCC No 151 of 1989 on February 19, 2020.

2. By a plaint filed on an unclear date in 1989, Ndungu Mathenge (the respondent) had sought for judgment against Michael Nderitu Wairegi (the appellant) for:

   (a) A declaration that the defendant is a trespasser on the plaintiff's Mweiga/Block 2/ Ikumari/538;

   (b) An order that the defendant do vacate the suit premises together with his servants and agents;

   (c) A perpetual injunction to issue restraining the defendant, his agents and servants from encroaching or otherwise interfering with the suit premises;

   (d) General damages for trespass and

   (e) Costs of the suit and interest at court rates.

3. Those prayers were premised on the respondent's contention that he was the sole registered proprietor of the suit property and that the appellant had encroached on the same unlawfully and had started cultivating the same without any colour of right.

4. In his written statement of defence and counterclaim, the appellant denied the respondent's accusations stating that he was the registered proprietor of plot No Mweiga/Block 2/Ikumari/537 measuring 2.7 acres.

5. By way of his counter-claim, the appellant accused the respondent herein of trespassing onto his said parcel of land on March 3, 1988 or thereabout and proceeding to destroy the appellant's trees thereon. Accordingly, the appellant sought orders as follows against the respondent:

   (a) (The) plaintiff's suit be dismissed with costs;

   (b) An order that the plaintiff do vacate the defendant's portion of land (that) he has trespassed (onto);

   (c) (The) plaintiff to pay (for) the trees he has destroyed at (a) cost to be assessed by the Court;

   (d) Costs of this suit to (be awarded to) the defendant; and

   (e) Any other relief that the court may deem fit.

6. Having heard the matter and in her one-page judgment rendered on February 19, 2020, the Honourable W Kagendo, Chief Magistrate stated as follows:

> "Judgement
>
> This matter has a long twirling history.
>
> There are awards and judgments. The report by Mr Mwambia captures all the history. In as much as the respondent states that the issues of the earlier rulings have not been taken into account, I note it was not possible to do so on the ground.
>
> The proposal to share the disputed parcel equally is very reasonable and the report dated December 13, 2015 is adopted as a judgment of this court.
>
> Each side to bear their own costs."

7. Aggrieved by the said judgment, the appellant moved to this court and lodged his memorandum of appeal dated February 28, 2020 urging this court to set aside the said judgment and substitute the same with orders dismissing the respondent's suit and allowing his counter-claim on the grounds that:

   1. The learned magistrate erred in law and in fact in failing to consider the entirety of the record and evidence adduced;

   2. The learned magistrate erred in law and in fact in adopting the registrar's report which fell short of compliance with court orders;

   3. The learned magistrate erred in law and in fact in ignoring the fact that there were two conflicting maps of the suit land and that the registrar failed to disclose the map that he used;

   4. The learned magistrate erred in law and in fact that the court had ordered the dispute to be resolved using the original map that issued the original title deeds and thus ended up with a wrong judgment;

5. The learned magistrate erred in law and in fact in failing to consider the entirety of the facts surrounding the suit, thereby misleading herself into a wrong Judgment;

6. The learned magistrate erred in law and in fact in failing to consider the totality of the issues before him and the evidence tendered by the parties thereby misleading himself into a wrong judgment; and

7. That the entire judgment and subsequent decree is misleading and is against the weight of evidence and against the principles of a fair trial.

8. This being the first appellate court, this court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. As was stated in *Selle & another v Associated Motor Boat company Limited & another* [1968] EA 123:

> " A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand."

9. From the record herein, the dispute herein was initially referred to arbitration by a panel of elders chaired by the District Officer Mweiga on January 9, 1990. In their determination dated April 25, 1990, and read to the parties on May 22, 1990, the panel of elders unanimously recommended that the court should order the Land Registrar Nyeri to show the disputants their correct portions and boundaries on the ground.

10. The said decision was however set aside on October 23, 1991 following an application by one of the parties. Subsequently on June 10, 1992 when the parties appeared before the Honourable LW Gitari, Resident Magistrate (as she then was) the respondent's counsel, one Mr Mathenge addressed the court as follows:

> " This matter had at one time been referred to arbitration. An award was set aside, I have looked at the plaint and noted that the contention of the plaintiff is that he is the registered proprietor of the land. The defendant is the registered proprietor of Mweiga/Ikumari/537. The plaintiff's parcel is 538. The dispute is the boundary. The Registered Land Act provides that the boundary can only be determined by the Land Registrar assisted by the District Surveyor and then other issues be determined in court."

11. The court record further reveals that one Miss Gitonga appearing for the appellant had no objection to the suggestion and responded as follows:

> " I agree as far as the boundary is concerned. As regards other issues the court is to determine."

12. On that account, the court granted orders as follows:

> " By consent the issue of the boundary between Land Parcel No Mweiga/Ikumari 537 and Mweiga/Block 2/538 to be determined by Land Registrar Nyeri assisted by the District Surveyor. The Land Registrar to submit his finding in court on or before August 12, 1992. Parties to meet any incidental expenses equally."

13. For some inexplicable reason, that report was not filed in court until some 27 years later. In his report dated December 13, 2018 and filed in court on March 29, 2019, the Land Registrar Nyeri one JM Mwambia having made certain observations concluded as follows:

> "Conclusion and recommendation
>
> Since the Registry Index Map (RIM) provided less acreage for both parcels as compared to the ground situation, it was concluded that it could not be used to adequately settle the dispute.
>
> It was also noted that the ownership of the contested area measuring 0.34 ha. could not be established using the RIM simply because giving the entire portion to the plaintiff Ndungu Mathenge would leave the defendant, Michael Ndiritu Wairegi with 0.82 ha. though his registered land is 1.094 ha. His registered land would be less by 0.244 ha.
>
> At the same time giving the portion to the defendant would maintain the status quo leaving the plaintiff with 0.19 ha he occupies on the ground.
>
> Ruling
>
> The disputed portion of 0.34 ha be shared equally so that the plaintiff gets 0.19 ha + 0.17 ha. making a total of 0.36 ha. The disputed boundary was marked accordingly and parties asked to cause the amendments of Registry Index Map (RIM) to conform to the decision."

14. That then was the recommendation that the learned trial magistrate adopted as the judgment of the court.

15. As a matter of fact, the report by the Land Registrar was dated December 13, 2018 and not December 13, 2015 as erroneously stated in the judgment and decree of the court. From a perusal of the record, it was apparent from the consent order recorded by the parties on June 10, 1992 that other than the determination of the boundaries of the two adjacent parcels of land belonging to the disputants, there were other issues which the parties required to be resolved.

16. The appellant had for instance sought to have compensation for some trees that were said to have been destroyed and it was also apparent that the parties ought to have been given a chance to cross-examine the Land Registrar as to the aspects of the report and whether indeed it conformed to the consent order as recorded.

17. In the circumstances herein, I am satisfied that the learned trial magistrate fell into error in adopting the report of the Land Registrar dated December 13, 2018 to have settled the entire dispute herein.

18. In the premises, I hereby set aside the judgment rendered on February 19, 2020 and direct that the matter be heard afresh by another magistrate other than the Honourable W Kagendo, Chief Magistrate.

19. The costs shall be in the cause.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 9TH DAY OF DECEMBER, 2022.

In the presence of:

Ms Miriti holding brief for Gitonga Muthee for the appellant

Mr Muchiri wa Gathoni for the respondent

Court assistant - Kendi

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JO Olola

JUDGE