



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

Civil Appeal 45 of 2001

BETWEEN

MATHIU ELIJAH SOLO..... APPELLANT

AND

JOSEPH MURIIRA THAIMUTA..... RESPONDENT

(An appeal against the judgment of Senior Resident Magistrate (Mr. Gicheru) in Maua civil Case No. 135 of 1998 dated 19/4/2001)

JUDGMENT OF THE COURT

This is an appeal against the Judgment of the Senior Resident Magistrate, Maua in Civil Case No. 135 of 1998 dated 19th April, 2001. The appellant has set out nine (9) grounds of appeal as per the Memorandum of Appeal dated 25/4/2001, and duly filed in court on the same date.

By his plaint dated 1/9/1998, the Plaintiff (who is the Respondent herein) sued the appellant seeking the following reliefs from the Court: -

- (a) Permanent injunction restraining the defendant his agents and servants from trespassing into plot No. 5065 Kianjai Market.**
- (b) Eviction Order from Plot No.5065 Kianjai Market.**
- (c) Mesne profits and general damages for trespass.**
- (d) Costs and interest.**

At paragraph 4 of the Plaint, the Plaintiff averred that on 24th day of August, 1998, the Plaintiff discovered that the defendant was putting up a permanent commercial building on his (defendant's) plot and had trespassed into the plaintiff's plot by constructing more than 3 feet inside the plaintiff's plot occasioning loss and damage to the plaintiff. The plaintiff set out four (4) particulars of trespass by the defendant: -

- (a) Constructing a permanent building 3 feet inside the plaintiff's plot.**
- (b) Failing to observe and follow the boundary fixed by the land department.**
- (c) Destroying part of the boundary between the two plots.**

(d) Damaging the plaintiff's land.

The defendant (appellant herein) filed his defence on 18/9/98 and denied that the plaintiff was the owner of plot No.5065 as alleged and further denied all the particulars of trespass against him. The defendant averred at paragraph 7 of the defence that he bought a portion of land measuring 30 points from one M'Ikiugu M'Manga, and had the same finally transferred to him as plot number Kianjai/4472. The defendant averred further that no objection was lodged against the transfer so that by 1996, he started construction on the plot on which he put up a permanent commercial building along the Kianjai-Maua road without any interference until the month of August, 1998 when the defendant was sued by the plaintiff. The defendant also averred that the plaintiff's case did not disclose any reasonable cause of action.

From the record, the plaintiff's case is that on or about 21/7/98, he bought land parcel number 5065 measuring 0.10 acres from Jackson Kaunyangi M'Ikilungi. He produced a copy of the agreement for sale as exhibit No.1. He testified that the total purchase price was Kshs.250,000/= of which he paid Kshs.120,000/= in cash and the balance thereof of Kshs.130,000/= in kind by transferring 1.50 acres of land at Nairiri to the vendor. The plaintiff also produced a letter confirming that he was the owner of the said plot a Kianjai market as Exhibit 2.

The plaintiff testified further that after he bought the land, and paid fully for it, he was shown the dimensions on the ground by the surveyor in the Ministry of Lands, one John Wanyoike who testified as PW5. It was the evidence of PW5 that the actual measurements on the ground showed that the defendant had encroached onto the plaintiff's land by some 3 feet. According to the sketch plan produced by the plaintiff, it came out that the two plots 4472 and 5065 measured 5 metres each at the front. The sketch plan was produced as Exhibit 6.

It was also the plaintiff's case that the defendant carried out his construction without approval, and by two letters, one dated 15/9/96 and 14/8/98 respectively, which letters were produced as Exhibits 7 and 8 respectively, the defendant was warned against constructing without approval. In 1996, the defendant had to pull down the structure he had put up earlier because of having failed to make provision for storm waters which would have emptied onto the neighbours plot. The plaintiff alleged that at some point the defendant desired to resolve the dispute over the 3 foot encroachment but he later reneged on his proposal. The plaintiff had therefore no alternative but to sue him (defendant).

The plaintiff called five witnesses. Pw2 was James Mangi Maranya. He was the Kianjai Divisional Public Health Officer whose evidence was to the effect that the defendant put up his building on plot No.4472 without approval. Pw2 admitted however that both exhibits 7 and 8 do not disclose that the defendant had actually built on somebody else's land.

Pw3 was George Kibithui Mukiira, a Surveyor with the Ministry of Lands and Settlement. He testified that he carried out measurements on the defendant's plot No.4472 and confirmed the same to be 5 metres at the front thereof and that these measurements tallied with the measurements contained in the records held by the Ministry of Lands. John Kariuki Jason testified as Pw4. He was the Demarcation Officer at Kianjai Adjudication Section. He was approached by the defendant to help establish the measurements of his plot No.4472, which he did on 8/10/98. The letter confirming the measurements dated 8/10/98 was produced as Exhibit 9. It was Pw4's evidence that when he took the measurements, he found that the defendant had encroached the plaintiff's land by 3 feet. He also confirmed that both plots numbers 5065 and 4472 measured 5 metres each at the frontage. He produced as Exhibit 10, the tracing for the two plots.

Pw5, John Wanyoike, a Surveyor with the Ministry of Lands and Settlement testified that he carried out survey works on 24/8/98 on the instructions of Pw4 and at the request of the plaintiff. Pw5 testified that on taking measurements, he found that the plaintiff's plot was less by 3 feet at the front where it was supposed to measure 5 metres. He also testified that he found out that the owner of the neighbouring plot, namely the defendant had encroached onto the plaintiff's land by one metre. That as a result of these measurements, he placed a pole at the place where the plaintiff's plot was supposed to

reach.

In his defence, the defendant testified that he owns plot No.4472 while the plaintiff owns plot No.5065 at Kianjai Market. It was his testimony that he bought his plot in 1989 from one M'Ikulungi Manga for Kshs.20,000= . He produced as defence exhibit 2 a copy of the agreement for sale. He also said that though they signed the agreement for sale, he did not know the measurement of the plot but he was shown the land by the demarcation officer. He also said that he knew of a complaint over the land.

He also said that the front of his plot was six (6) metres and that he knew that the plaintiff's plot was supposed to measure five(5) metres. The defendant also testified that according to the plan, his plot was twenty two (22) feet and that there were two (2) feet between his plot and the plaintiff's plot and further that the plaintiff was claiming another three feet apart from the two (2) free feet that separated their two plots. He said that the plan was approved by both the District Physical Planning Officer and the District Public Health Officer. He produced the plan as Exhibit 3. He admitted that the front part of his land is bigger than that of the plaintiff. Though he alleged that the plaintiff sued him wrongly, he still wanted the two plots (his plus plaintiff's) re-measured so that they could get the right measurements. It was the defendant's case that since he bought his land some ten (10) years before the plaintiff bought his, it was the duty of the plaintiff to check out his boundaries before the purchase. The defendant denied encroaching onto the plaintiff's land.

The defendant called one witness, Dw2, one M'ikilungi M'Manga. DW2 testified that he sold a plot measuring 0.30 acres to the defendant for which the defendant paid Kshs.30,000/=.

As the first appellate court, my duty is to reconsider and re-evaluate the whole evidence on record and to reach my own conclusion as to whether or not the conclusions reached by the learned trial magistrate were soundly made.

In his judgment, the learned trial Magistrate was satisfied that the plaintiff had proved his case against the defendant on a balance of probabilities. He established that the plaintiff had shown, both by documentary evidence and the evidence adduced by Pw2, Pw3, Pw4 and Pw5 that the defendant had indeed encroached on the plaintiff's plot by three (3) feet as alleged by the plaintiff. The learned trial magistrate also made a finding that the defendant did not know the size of the plot which he bought from Dw2 and further that the defendant's plot was either 6.71 or 6 metres at the front.

I have myself carefully considered the evidence on record, the submissions by learned counsel on both sides, the judgment by learned trial magistrate and the reasons thereof, and I am satisfied that the conclusions reached and findings made by the learned trial magistrate were sound. The evidence on record is clear that the appellant did not know the measurements of the plot that he bought from Dw2. There is also evidence that by the time the defendant started construction on his plot, he had no plan and that after he got the plan approved in 1998, he did not carry out any further construction after a court order was issued stopping the same. It was also the evidence of the defendant when he was cross-examined at the locus in quo that before he started construction, he removed the beacons, and even by the time of the hearing of the case before the learned trial magistrate, the beacons were not in place. It came out clearly from the evidence on record that even as the defendant began the construction, he knew neither the size of his own plot nor that of the plaintiff and I believe that this lack of knowledge on the part of the defendant led to him to encroach on the plaintiff's plot by the three (3) feet which were confirmed by Pw5 to be part of the plaintiff's plot.

During the hearing of this appeal, Mr. C. Kariuki for the appellant submitted that between 1996 when the defendant started the construction and 1998 when the construction was stopped by the court order, the vendor, Dw2, had raised no complaint to the construction. With respect to Mr. Kariuki, I do not believe that the vendor had any reason to complain. The plaintiff who had an interest in the plot complained immediately he realized that there was encroachment on his plot which he had bought from Dw2.

The defendant also complained that the court failed to allow the appellant to get the services of an

independent surveyor. I have carefully considered the evidence on record and I am fully satisfied that the evidence adduced by Pw3, Pw4 and Pw5 was reliable evidence, and it was evidence that was not displaced by the defendants and his only witness, Dw2. The plaintiff took steps to get government officers to confirm the measurements on the grounds for both his own plot and that of the defendant. The defendant also got Pw4 to ascertain the measurements on the ground. It was as a result of the defendant's request to Pw4 that Pw5 visited the locus in quo during which visit, Pw5, confirmed the plaintiff's complaints against the defendant's appellant namely that the defendant had encroached onto the plaintiff's plot by three (3) feet. Even on 22/10/98 when Pw4 went to re-measure the plot, the defendant was present and Pw4 confirmed that the measurements which had been taken by Pw5 were correct. The submission by Mr. C. Kariuki that the defendant was not present when Pw4 went to the site for remeasuring is therefore not true.

I have considered each of the nine (9) grounds of appeal set out in the Memorandum of appeal and find that on the basis of the evidence adduced by the plaintiff in the lower court, none of those grounds has any merit. In my view, there was sufficient evidence upon which the learned trial magistrate made the findings that he did in favour of the respondent/plaintiff. Ground two (2) of the grounds is particularly unmeritorious in view of the fact that it is the appellant/defendant who caused Pw4 to arrange for Pw5 to take the fresh measurements of the plot and it was also at the instance of the defendant that Pw4 again went to the site on 22/10/98 and carried out fresh measurements despite the fact that Pw5 had already done so.

The defendant's defence was that he did not know the measurements for his plot; that he built without plans and that he removed the beacons when his construction work started. The learned trial Magistrate considered the appellant's defence. The trial Magistrate's portion of the judgment dealing with the defence reads in part: -

“The defendant did not seem to know the exact dimensions of his plot. In fact in his evidence in chief, he said that he was not aware of the measurements either at the rear or at the front. He said this on 9/3/01 when he testified. Later the same day in the same examination in chief, he said the front is 6 metres.”

The learned trial Magistrate also proceeded to note that the defendant's evidence was shaky and that the defendant did not seem to know what he was saying. I am satisfied therefore that the learned trial magistrate fully considered the appellant's defence which he found incapable of displacing the plaintiff's case against him.

Having considered the evidence on record, I am satisfied that the learned trial Magistrate was not capricious in granting the reliefs sought by the plaintiff against the defendant. In any event I also find that the defendant/appellant was the author of his own misfortune, He commenced construction without authority and even when he had been made to bring down his earlier structure for non-compliance with the regulations, he proceeded to construct again, and this time too without authority. Although it is true that injunctions are discretionary remedies, the same will not be granted to a party who is in court with dirty hands. The appellant/defendant did not have clean hands when he appeared before the court. The learned trial magistrate was thus right in granting the order of injunction against the defendant/appellant decision and I see no reason to interfere with that decision.

In the result, I find no merit in this appeal and I accordingly dismiss the same.

The Respondent shall have the costs of the appeal. It is so ordered.

Dated and delivered at Meru this 28th day of July 2005.

RUTH N. SITATI

JUDGE

28.7.2005