REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC APPEAL NO. 7 OF 2019

STEPHEN OTIENO APIDI (suing as the administrator of the estate of the late)

MARIKO APIDO MIDIMO .....APPELLANT

VERSUS

PAUL OBIERO GUNGU ..... RESPONDENT

JUDGMENT

STEPHEN OTIENO APIDI (suing as the administrator of the estate of the late) MARIKO APIDO MIDIMO hereinafter referred to as the Appellant is appealing against the whole of the judgment of Hon J. O. Ongondo PM in Siaya CMC ELC No. 44 of 2018 on the grounds that the learned trial magistrate erred in law and in fact by failing to appreciate that the Respondent although having been afforded the opportunity to attend and adduce evidence to the contrary, failed to do so. That the Appellant's case remained uncontroverted.

Furthermore, that he Misconstrued the evidence facts that the disputed land East Alego/Olwa/1325 only measured 0.19 Ha instead of 1.08 Ha and therefore dismissing the surveyor's report as inconsequential and unable to assist the court determine the issue in the dispute.

Moreover, the learned magistrate erred by failing to find that the whole land parcel does not measure 0.19 Ha. It is the disputed portion described in the surveyor's report as located on the southern part and planted with eucalyptus that measures 0.19 Ha. The whole land measures 1.08 Ha as per its official search certificate that was produced as an exhibit in court and failing to find that the undisputed portion of the land parcel is the one that measured 0.89 Ha and the one that the court sanctioned surveyor recommended to be awarded to the Appellant.

The learned magistrate erred by dismissing the Appellant's suit because the surveyor's measurements of the disputed portion was found to be different from what the Plaintiff had pleaded and failing to take into consideration the submissions made by the Appellant. In a nutshell that the judgment was against the weight of the evidence.

The Appellant prays for the trial magistrate's judgment to be set aside in its entirety and judgment entered for the Appellant compelling the Siaya Land Registrar to extract the disputed portion of the land measuring 0.19 Ha from the Respondent's land and transfer it to the Appellant; a permanent injunction restraining the Respondent from trespassing or interfering with the Appellant's disputed portion measuring 0.19 Ha; and costs plus interest.

Brief Facts

The Appellant filed this suit as the administrator of the estate of his late father. He stated that his father was the registered owner of East Alego/Olwa/348 which shared a border with East Alego/Olwa 1291 which was initially registered in the name of the Respondent's late father. That upon the demise of the Respondent's father, the Respondent transferred Parcel 1291 to himself and in the process annexed land measuring 0.25 Ha belonging to the Appellant's father.

That the Appellant's father's attempt to settle the dispute was fruitless, prompting the Appellant's father to approach the Siaya Land Dispute Tribunal in Case No. Siaya/78/2004. The Tribunal ordered that parcel 1291 be resurveyed and the disputed portion planted with gum trees be returned to parcel 348. That the order was read and adopted in Siaya Magistrate Court Misc. Appl. No. 84 of 2005. That the Court ordered the executive officer to sign mutation forms on behalf of the parties to enforce the order.

That upon presentation of the forms to the lands office, the Appellant discovered that the Respondent had secretly, and in defiance of the court order, subdivided parcel 1291 into may pieces, and the disputed portion was now part of East Alego/Olwa/1325.

The Respondent's response was that it was the Appellant's father who had interfered with the boundary in the first place, prompting the Respondent to report the matter to the Siaya police station. That the Respondent did not appear before the Tribunal since he had a similar

case proceeding in Siaya Criminal Case No. 761/2005. The Respondent prayed in his counter-claim for the case be taken back to the elders and determined in the presence of the Land Registrar and qualified land surveyors; as well as general damages and costs of the suit plus interest.

At the hearing on 30th August 2018, the parties agreed by consent that a surveyor proceed to the ground, demarcated the parcel and file a report. The surveyor's report dated 24th October recommended "sub-division into two portions measuring 0.19 Ha for the Plaintiff and 0.89 Ha for the Defendant of the parcel East Alego/Olwa/1325. The court to facilitate the process of the sub-division and the Defendant to surrender the title deed to East Alego/Olwa/1325 to Land Registrar to enable him issue new ones for the resultant new parcels."

In his judgment, the learned trial magistrate held that there was no evidence that the mutation of the Respondent's parcel was done to assist the Respondent to grab land from the Appellant's father. The trial magistrate also noted that the Lands Dispute Tribunal did not indicate that the Appellant was entitled to 0.25 Ha but merely mentioned a portion planted with eucalyptus trees.

The trial magistrate held that the surveyor's report indicated that the disputed area measured 0.19Ha and therefore the magistrate was at a loss to comprehend where the surveyor would get the extra 0.89 Ha to give to the Respondent, and how the Appellant was claiming 0.25Ha. The magistrate dismissed the surveyor's report as irrelevant, lacking in clarity, accuracy and cogency. The magistrate contended that the Appellant should be contented with the 0.6Ha inherited from his father as indicated in confirmed grant. The trial magistrate dismissed the suit with costs to the Defendant.

Issues for Determination

Being a first appeal, the role to be played by the court is set out in in ***Selle and another v Associated Motor Boat Company Ltd and others*** **[1968] 1 EA 123**:

> "…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 allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ..."

It was also held in ***Mwangi v Wambugu*** **[1984] KLR 453** that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence.

WHETHER THE TRIAL MAGISTRATE MISAPPREHENDED THE SURVEYOR'S REPORT.

At the hearing of 30th August 2018, both parties were in agreement that the dispute was boundary dispute. They recorded a consent that the surveyor proceeds to the ground, demarcate the parcel and file a report. The surveyor's report was therefore crucial in determining the extent of the area comprising Parcel 1325, formerly part of Parcel 1291, in relation to Parcel 348. Both parties were present on the ground when the surveyor carried out the survey. The surveyor's report was not challenged by the Respondent when it was produced as evidence by PW2. The bone of contention arises in the trial magistrate's interpretation of the report and its relevance to his decision.

The trial magistrate held that the Lands Surveyor "indicated that the disputed area measured 0.19 Ha. He then concluded that the portion should be sub-divided into two portions with the Defendant taking 0.89 Ha and the Plaintiff 0.19 Ha. I am completely at a loss where the surveyor got the extra 0.89 Ha to give to the Defendant...." This was indeed a misapprehension of the report. The learned trial magistrate conclusion that the disputed portion formed the whole of Parcel 1325 was inaccurate.

The surveyor's report, as read with the drawing attached, clearly indicated that the disputed parcel comprised only a part of Parcel 1325 to the south under eucalyptus trees. It is this unfortunate misinterpretation that led the trial magistrate to the arithmetical conundrum he posed in his judgment, and his dismissal of the surveyor's report as irrelevant lacking in clarity, accuracy and cogency. The survey report concluded that the Appellant owned an area of 0.19 Ha within Parcel 1325 while the Respondent owned the residual 0.89 Ha of Parcel 1325. The trial magistrate ought to have been guided by this finding.

The only fault in the report was the recommendation of the issuance of new titles, yet the survey was done in the context of a dispute as to the boundary between Parcel 1325 and Parcel 348. The proper course of action in this case would be a rectification of the register to reflect the correct acreages of the two parcels as shown in the report, and for the County Surveyor to correct the boundary.The appeal ought to be, and is hereby allowed with costs.

DATED AT KISUMU THIS 28TH DAY OF JANUARY, 2021

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE