



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC APPEAL NO. 5 OF 2019

DOMINIC SIMBA ARASA.....APPELLANT

VERSUS

CAROL CONSTRUCTION ENGINEERS.....RESPONDENT

(Being an appeal from the judgment of Hon. J. Wanjala Senior Principal Magistrate, delivered on the 2nd day of March 2011 in SPM Case No.19 of 2010)

JUDGMENT

INTRODUCTION

1. This appeal arises from the judgment of Hon. J. Wanjala SPM delivered on the 2nd day of March 2011 in SPM Case No.19 of 2010. In the said suit the Appellant who was the Plaintiff in the lower court sued the Respondent for trespass in respect of land parcel number EAST KITUTU/BONYAMONDO 1/838 which is registered in the Appellant's name. The Appellant alleged that on or about the 20th day of September 2005 the Respondent had unlawfully entered into his land, constructed structures and committed wasteful acts thereon thereby depriving the Appellant of the use and enjoyment of his land and occasioning him loss and damage.
2. The Respondent filed a Defence in which he denied the Appellant's allegations and stated that the Appellant's claim was an afterthought as he had sat on his rights since 2005.
3. After taking the evidence of both parties, the trial Magistrate dismissed the Plaintiff's case noting that even though the Appellant was the registered owner of the suit property, he had not demonstrated satisfactorily that this land included the portion of land that was occupied by the Defendants as a camp. Secondly, she observed that when the case was filed in court the Defendant was no longer occupying the suit property as the site had been handed over to the Divisional Officer Manga in February 2010 and it would be futile to issue an Injunction and eviction order against the Defendants who are no longer in occupation of the suit property.
4. Being dissatisfied with the Judgment, the Plaintiff filed a Memorandum of Appeal raising a number of grounds. The gist of the Appeal is that the learned trial Magistrate failed to appreciate the evidence that was adduced in court and erred in holding that the portion that the Defendant had previously occupied as camp did not form part of the Appellant's land.
5. The Appeal was canvassed by way of written submissions and even though the parties were granted adequate time to file their submissions, only the Appellant filed their submissions.
6. The main issue for determination is whether the Appellant had proved trespass against the Respondent.
7. Having evaluated the evidence adduced by the Appellant in the lower court, it is not in dispute that the Appellant is the registered owner of land parcel number EAST KITUTU/BONYAMONDO 1/838 as evidenced by the title deed produced as an exhibit. According to the said title deed the suit property measures 0.456 of an acre. The Appellant alleged that the Defendant had illegally occupied his land between 2005 and February 2010. However, he does not state the acreage of the portion that was allegedly occupied by the Defendant. It is also not clear why the Appellant did not file the suit when the Defendants were still in occupation of the suit property. Instead, he filed suit 5 years from the time the Defendants allegedly trespassed onto the suit property and a few months after they had left.
8. DW1 testified that the place they were told to use as a camp site was previously occupied by the Ministry of Public Works and it had some structures and machinery belonging to the said Ministry. He produced a letter by the County Council of Nyamira requesting the Ministry of Public Works to allow them to use the site. For the three years they occupied the site, the Appellant never interfered with them. When they finished their project, they handed over the site to District Officer, Manga.
9. DW2 testified that he was the chairman of Magombo Market when the Appellants were engaged to construct the market in 2005. He told

the court that the site that was given to the Respondents had been occupied by the Ministry of Public Works since the sixties. It was his testimony that the Appellant's land borders the site that was previously occupied by the Respondent and the two plots separated by a fence consisting of trees planted by the Ministry of Public Works. He explained that the plot belonging to the Ministry of Works was well fenced with trees. He said that his land borders the Appellant's land and each of the plots is well demarcated and fenced.

10. In order to prove his case in the lower court, the Appellant was expected to demonstrate that he was the registered owner of the suit property and that the Respondent had unlawfully entered therein without his consent. He was required to file his claim within 3 years from the date of the alleged trespass or demonstrate that the acts of trespass were continuous. Furthermore, he was required to demonstrate the extent of encroachment which he failed to do.

11. From the evidence on record, it is clear that the suit was neither filed within the statutory period prescribed by the Limitation of Actions Act nor did the Appellant prove that the Respondent was still in occupation and that the acts of trespass were therefore continuous. It is common ground that at the time the suit was filed in February 2010, the Respondent had completed its project and handed over the site to the District Officer Manga. The Appellant also failed to demonstrate the extent of the alleged encroachment by the Respondent.

12. In view of the foregoing, I cannot fault the trial Magistrate for arriving at the conclusion that the Appellant had failed to prove his case on a balance of probabilities. Accordingly, I find no merit in the appeal and I dismiss it. Since the Respondent did not bother to file its submissions, each party shall bear its own costs.

Dated, signed and delivered at Kisii this 9th day of February 2021.

J.M ONYANGO

JUDGE