



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KISII

CIVIL APPEAL NO. 32 OF 2019

IN THE MATTER OF AN APPEAL

BETWEEN

MANAGEMENT COMMITTEE

OROCHE DISPENSARY.....1ST APPELLANT

KISII COUNTY GOVERNMENT.....2ND APPELLANT

AND

JAMES OKONGÓ.....1ST RESPONDENT

ROSE OTUCHO.....2ND RESPONDENT

(Being an appeal from the Judgment of the Honourable Stephen Onjoro delivered on the 24th day of January, 2019 at Kisii CMCC ELC No. 104 of 2018).

JUDGMENT

INTRODUCTION

1. This Appeal arises from the Judgment of Honourable S. K. Onjoro, SRM, delivered on **24th January 2019** in CMELC No. 104 of 2018. In the suit in the lower court the Respondents sued the Appellant for trespass to land parcels number **KISII/WANJARE/BOKIAKUMU/1636, 7857 & 7858**. The Respondents sought *inter alia* an order of eviction against the Appellants as well as an injunction to restrain the Appellants from interfering with the suit properties. The Appellants filed a statement of Defence dated 16th October 2017 denying the Respondents' claims. On 20.9.2018, the parties entered into a consent that the Land Registrar and County Surveyor do visit the suit properties for purposes of ascertaining whether the Appellants had trespassed and blocked the Respondents from accessing land parcels number **KISII/WANJARE/BOKIAKUMU/1636, 7857 & 7858**. They were also expected to ascertain the extent of trespass on the suit properties if any and if the suit properties were blocked, they were required to open the access road to the suit properties so that the Respondents could access their parcels. The said officers were to file their report in court within 90 days.

2. Pursuant to the said consent order, the Land Registrar and County Surveyor visited the suit properties on 5th December 2018 in the presence of the parties and filed their report in court on 11th December 2018.

3. In the said report the Land Registrar and County Surveyor made the finding that the Appellants had trespassed onto the suit properties and blocked the Respondents from accessing their parcels as they had constructed a dispensary on the said parcel.

4. After the report was filed in court, the court in its brief judgment noted that the report which had been prepared pursuant to the consent of the parties indicated that there was encroachment by the Defendants on the suit properties. He therefore adopted the report as the judgment of the court and made the following orders:

a) The Surveyor's Report dated **10th December 2018** and filed in court on the **11th Day of December 2018**, be and is hereby adopted as Judgment of Court in favour of the Plaintiffs as herein under;-

(i) It is declared that Defendants herein to not have any lawful rights and/or interests over and in respect of **LR NO's. KISII/WANJARE/BOKIAKUMU/1636, 7857 & 7858**, or any portions thereof, otherwise referred to as the Suit Properties,

whatsoever and/or howsoever.

(ii) There be and is hereby granted an Order of Eviction against the Defendants herein, together with their Agents, servants and/ or any other person acting and/or claiming under the Defendants herein from **LR NO's. KISII/WANJARE/BOGIAKUMU/ 1636, 7857 & 7858** and/ or any portions thereof.

(iii) There be and is hereby granted an Order of **Permanent Injunction** restraining the Defendants either by themselves, agents, servants and/or anyone claiming under the Defendants from re-entering upon, trespassing onto, laying a claim to, cultivating, leasing, building on, interfering with and/or in any other manner, whatsoever dealing with the Suit Property or any portions thereof, that is, **LR NO's. KISII/WANJARE/BOGIAKUMU/ 1636, 7857 & 7858**;- any manner prejudicial and/or adverse to the rights and interests of the Plaintiffs.

(iv) Costs of the suit be borne by the Defendants.

5. Being aggrieved by the aforesaid Judgment, the Appellants lodged this Appeal raising the following grounds:

1. That the learned Magistrate erred in law and fact in relying on a report from the Kisii Land Registrar and consequently awarding the prayers sought by the Plaintiff in the Plaint, condemning the Defendants unheard contrary to article 25 (c) and 50 (1) of the Constitution of Kenya 2010 on a mention date.

2. That the learned Magistrate erred in law and fact in relying on the aforementioned report which was erroneous and consequently determined the subject lands in that particular suit.

3. That the learned Magistrate relied upon erroneous findings that the said Land Registrar's report dated 10th December 2018, had fully resolved the matter and went on to adopt the report as a judgment of the court without the Surveyor's report and testing the evidence thereof.

4. That the learned Magistrate erred in law and fact by holding the Defendant's case has not having been proved (sic) on a balance of probabilities, especially since the Defendants were not given an opportunity to be heard and argue their case and consequently dismissing the same with costs to the Plaintiff.

6. The Appellants prayed that the appeal be allowed, the judgment of the lower court be set aside and the case be sent back to the lower court for re-trial.

7. Owing to the prevailing COVID-19 pandemic the court directed that the appeal be canvassed by way of written submissions and despite being granted ample time, the Appellants only filed their submissions on 5th October, 2020. Due to the failure of the Appellants to file their submissions on time, the Respondents were unable to file their submissions before the judgment date. I must however hasten to add that the Appellants were purely to blame for the Respondent's failure to file their submissions as the matter was mentioned several times and the Respondents indicated that they were waiting to be served with the Appellants' submissions before they could file theirs. On the date of judgment the Respondents confirmed that the Appellants had not yet served them with their submissions.

ISSUES FOR DETERMINATION

8. The key issue for determination in this appeal is whether the adoption of the Land Registrar's report as a judgment of the court by the trial magistrate was erroneous and if so, whether the case should be sent back to the lower court for re-trial.

ANALYSIS AND DETERMINATION

9. In his submissions, learned counsel for the Appellants has contended that by adopting the Land Registrar's Report without giving the Appellants a chance to interrogate and challenge the same, he deprived the Appellants of a chance be heard.

10. He cited the case of **Agip Kenya Ltd –vs- Highlands Tyres Ltd (2001) eKLR** where the Court held as follows:

“The process of the judicial system requires that all parties before the court should be given an opportunity to present their cases before a decision is given. As Lord Cairns bluntly put it;- (23)”

“One of the first and highest duties of all, courts is to take care that the act of the court does no injury to any of the suitors and when the expression ‘Act of the Court’ is used it does not mean merely the act of the primary court, or if any intermediate court of appeal, but the act of the court as a whole from the lowest court which entertains jurisdiction over the matter up to the highest court which finally disposes of the case”.

*“The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. It is fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. If this principle be not observed, the person affected is entitled, **ex debito justitiae**, to have any determination which affects him set aside”.*

11. Counsel further cited **Article 50** of the Constitution which states that;

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

12. It was his contention that the above constitutional guarantee ought to be upheld and enforced by the Court by granting the parties an opportunity to be heard. He urged the court to exercise its appellate powers and remit the matter back to the trial court for hearing.

13. I have carefully considered the proceedings, judgment, Grounds of Appeal and Appellants' submissions. It is not in dispute that the dispute herein was referred to the Land Registrar and County Surveyor pursuant to consent recorded in court on 20th September 2018. Pursuant to the said consent, the Land Registrar and County Surveyor visited the Suit Properties on 5th December 2018, in the presence of the parties, took the ground measurements and made the following findings:

FINDINGS:

“The suit parcels appear on sheet number 9 Bogiakumu registration section.

Parcel number Bogiakumu 7857 and 7858 are registered in the name of James okongo.

Parcel number 1636 is registered in the name of Rose Orucho.

The Defendant's parcel Bogiakumu 323 is registered under the Gusii County Council reserved for Oroche Nursery School.

From scaled map distances correlated with measured ground distances, it was observed that:

- 1. The total encroachment by the defendant into the plaintiff's land was 0.2076 Ha*
- 2. The encroachment on parcel number Bogiakumu/1636 is 0.0315Ha*
- 3. The encroachment on parcel number Bogiakumu/7858 is 0.0826Ha*
- 4. The encroachment on parcel number Bogiakumu/7857 is 0.0935Ha*

The said access to the parcels of the plaintiffs towards the stream could not be opened as there was a permanent building hosting the Dispensary blocking this access. There was also a slap (sic) of concrete foundation on parcel Bogiakumu/7858 being undertaken by the 1st defendant.

14. The findings of the Land Registrar and County Surveyor are clear and precise. The fact of encroachment is well captured and the dimensions of the said encroachment are provided. It is on this basis that the trial magistrate rendered his equally concise judgment in which he adopted the said report as the judgment of the court and granted prayers 1, 2 and 3 in the plaint. Was the said judgment erroneous? I think not. Did it resolve the issues in dispute? Yes it did. I do not think that a hearing in face of such clear findings was necessary nor would it have resulted in a different conclusion.

15. Sections 1A and 1B of the Civil Procedure Act enjoin the court to adhere to the overriding objective of the Act which is as follows:

Section 1A. Overriding Objective

(1) The overriding objective of this Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The court shall in the exercise of its powers under this Act or in the interpretation of its provisions, seek to give effect to the overriding objective specified in subsection (1)

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objective of the Act and to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.

Section 1B. Duty of the Court

(1) For the purpose of furthering the overriding objective specified in section 1A, the court shall handle all matters presented before it for the purpose of attaining the following aims:

(a) The just determination of the proceedings;

(b) The efficient disposal of the business of the court;

(c) The efficient use of available judicial and administrative resources;

(d) The timely disposal of the proceedings, and all other proceedings in the court at a cost affordable by the respective parties; and

(e) The use of suitable technology.”

16. The judgment of the trial court was wholly in conformity with the overriding objective of the Civil Procedure Act. It was long enough to cover the issues raised and short enough to dispose of the same in a just, expeditious, efficient and cost effective manner. I therefore see no valid reason to interfere with it and I dismiss the appeal with costs to the Respondents.

Dated, Signed and Delivered at Kisii this 9th day of February 2021.

J.M ONYANGO

JUDGE