



REPUBLIC OF KENYA



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Mukhwana v Nzoia Sugar Company Limited & 10 others (Environment and Land Appeal 7 of 2019) [2024] KEELC 6778 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6778 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL 7 OF 2019
EC CHERONO, J
OCTOBER 11, 2024

BETWEEN

JOHN SILIKHANI MUKHWANA APPELLANT

AND

NZOIA SUGAR COMPANY LIMITED 1ST RESPONDENT

MIKE SITABUKA FWAMBA 2ND RESPONDENT

TOM BARASA MUTANDA 3RD RESPONDENT

JAMES WAFULA FWAMBA 4TH RESPONDENT

REUBEN MUTANDA SARIFF 5TH RESPONDENT

SIKUKU WAKHUNGU WANJUSI 6TH RESPONDENT

GEOFFREY NGANGA 7TH RESPONDENT

ISAAC BIOUKHA WANGORO 8TH RESPONDENT

RICHARD MUTANDA 9TH RESPONDENT

JOHN CHEMONGE 10TH RESPONDENT

MOSES MUTANDA 11TH RESPONDENT

(Being an appeal arising from the judgment delivered by Hon. E. N.Mwenda (SRM) in Bungoma CM's ELC Case No. 627 of 2004 on 5th March, 2019.)



JUDGMENT

Introduction

1. The Appellant filed a memorandum of appeal dated 10th April, 2019 challenging the judgment dated 5th March, 2019 wherein the court dismissed his claim where he had sought an injunctive relief, special and general damages for trespass.
2. A brief background of the case is that the Appellant was the Plaintiff and the Respondents were the Defendants in the former suit being Bungoma CM's ELC Case No. 627 of 2004. The substantive claim as contained in the plaint dated 22nd November, 2004 was for an order of a permanent injunction restraining the Respondents from trespassing onto land parcel no. East Bukusu/West Sangalo/1683 (herein referred to as the suit land), special damages of Kshs. 253,000/= and general damages for trespass. The 2nd to 10th Respondents entered appearance and filed their defence dated 20th January 2005 denying the Appellants claim and liability. The 11th Respondent equally filed his defence dated 23rd December, 2004 also denying the Appellants claim.

Parties Evidence

3. The Appellant called eight (8) witnesses. PW1 John Silikhani Mukhwana testified that he is the registered owner of land parcel no. East Bukusu/West Sangalo/1683 measuring 4 acres. He testified that on 7/4/2003 his worker reported to him that a caterpillar, KAP xxxx belonging to the 1st Respondent had trespassed through his land and was excavating a road through his farm destroying his crops, trees and fence which was estimated to cost Kshs. 253,000/=. He produced a title deed for the suit land, a motor vehicle search and payment receipt for the caterpillar KAP xxxx, minutes with the 1st Respondents management, receipts for costs of fencing the suit land, Environmental report, a map of the area and various demand notice. In cross-examination he denied being in the meeting at the Kanduyi DO's office which informed the opening of the road which was not official.
4. PW2 Joram Simidi testified that he was a caretaker of the Appellants farm. He stated that on 7/4/2003 a tractor, KAP xxxx from Nzoia Sugar Company was excavating on the Appellants land and that he asked the driver not to damage the crops and the fence until the Appellant returned. It was his evidence that on 8/4/2023 the area chief came and directed that the trees be removed. On cross-examination he testified that the excavator ploughed on the road at first leaving the trees but later uprooted the 2500 stems. He testified that there was an access road but was been ploughed and was constructed on.
5. PW3 Julius Nandwa testified that he prepared a report after a report was made on 15/4/2003 that his trees had been destroyed. He testified that he visited the suit land and confirmed that a road was dug and trees both indigenous and those for timber had been cut down. He confirmed that 300 pieces of 1 ½ years old had been cut down. He thereafter prepared a report based on the history, price of the seedlings, preparation of the land plus time and placed the cost at approximately Kshs. 50,000/=. There were also some eucalyptus trees assessed at Kshs. 166,000/=. The 100 indigenous trees were valued at Kshs. 100/= totaling to Kshs.10,000/= thus Kshs. 176,000/=. His report was produced as PExhibit 5a. On cross-examination he testified that he never took photos of the scene since he lacked the facility. He also testified that he did not interview the locals and the chief of the area.
6. PW4 Salim Wasike testified that he was working as a casual labourer in the Appellants farm when some men entered the compound and started pulling down the fence. In cross examination he testified that he did not witness the destruction of the alleged trees and that he did not know about an existing road.



7. PW5 Reuben Sitati testified that the Appellant informed him that there his property had been invaded and he (PW5) went to Bungoma Police Station where he reported the issue and was accompanied by the police to the Appellants farm. In cross-examination he testified that there were marks on the said land showing that it had been surveyed.
8. PW6 Beatrice Makokha testified that he was the Divisional Agricultural Officer attached to Kanduyi Division. It was his evidence that he prepared a report concerning crop compensation for the Appellant who had made a report about the incident. He testified that he found that nappier grass, mango trees and sisal had been destroyed by a tractor. He valued the damage at Kshs. 9,960/=. The nappier grass was valued at Kshs.37,000/=, the damaged are which was 348 square metres was valued at Kshs. 5,220/=, 6 mango trees valued at Kshs.3,000/=, 87 stems of trees each at Kshs. 20/= totaling to Kshs. 1,740/= . He presented the rubber-stamped reports. On cross examination he testified that he prepared the report in place of the Extension Divisional Coordinator who was on leave. It was his evidence that the report was done two days after the damage was done. He testified that there was an existing road and the damage was on the area where the road was.
9. PW7 Kizito Wekesa testified that he was a surveyor with the Survey department Bungoma. He testified that according to the map of Bungoma District E. Bukusu/W.Sangalo, 34th Edition dated 16/10/2007 there is no access road between E.Bukusu/W.Sangalo/ 1682 and 1683. The map was produced as PExhibit 7. On cross examination he testified that he has come across instances where the map does not agree with the details on the ground. He testified that the land registrar had issued summons to fix a boundary.
10. PW8 Fred M. Mageni testified that he was the Land Registrar. It was his evidence that visited the suit land and confirmed that there was an existing road provided in the area map.
11. The Respondents called 4 witnesses. DW1 Mike Fwamba testified that he was the Chief of West Bukusu Location. It was his evidence that he did not inspect the creation of an access road on the Appellants parcel. It was his evidence that a 10-meter road was demarcated back in the year 1976 when the suit land was owned by Tom Barasa Mutanda. In cross-examination he testified that the Appellant bought the land in the year 1996. He testified before the access road was opened and a bridge built by the 1st Respondent, the Land Registrar visited the site to ensure the boundary of the suit land was not interfered with. It was his statement that there were no trees that were damaged.
12. DW2 Hilary Kibondo testified that he was the Transport Manager of the 1st Respondent and that he had been asked to maintain an existing road from Namirembe to West Sangalo so as to access farms in the area better.
13. DW3 James Wafula Fwamba denied entering the suit land and causing any damage as alleged. He testified that the road in issue was in existence before the Appellant purchased the suit land. The road was re-opened and a bridge constructed over River Kisichele to enable the 1st Respondent access farms in the area. It was stated that a land surveyor and registrar initially visited the area and ensured there was an access road on the ground.
14. DW4 Richard Mutanda and DW5 Moses Mutanda Fwamba testified denying the Appellants claim and reiterated the evidence of the other witnesses.
15. Upon considering the evidence as presented the Trial Court delivered its judgment dismissing the Appellants claim with costs to the Respondents. This is the judgment that is subject to this appeal.



16. Directions on the appeal were given that the appeal be canvassed by way of written submissions. Pursuant to the directions, the Appellant filed written submissions dated 11th May, 2024 and the Respondent at the time of preparing this judgment had not filed his submissions.

The Appellants Case.

17. The Appellant's case is contained in the grounds of appeal in the memorandum of appeal as follows:
- a. The learned trial magistrate erred in law and in fact in disallowing the Appellants claim against the cogent evidence that the Appellant was the absolute registered owner of Parcel No. E. Bukusu/W.Sangalo/1683.
 - b. The learned trial magistrate erred in law and in fact when he held that the Respondents cannot be held liable for damage of crops planted on an alleged public road against overwhelming evidence that the said crops had been planted on the Appellants land Parcel No. E. Bukusu/W.Sangalo/1683 and not on a public road.
 - c. The learned trial magistrate erred in law and in fact when he held that the access road in dispute had been in existence since 1976, against the cogent evidence of the Appellant that the said access road was initiated and put in place in 2003 by the Respondent herein.
 - d. The learned trial Magistrate erred in law and in fact when he disregarded the evidence of PW7 who clearly in evidence testified that as per map dated 34th edition of 16th April, 2003 there as no access road on land parcel No. E. Bukusu/W.Sangalo/1683.
 - e. The learned trial magistrate erred in law and in fact in believing the evidence of the Land registrar who visited Land Parcel No. E.Bukusu/W.Sangalo/1683 in enforcement of court order issued on 29th January, 2010 and register indeed the Land Registrar did not comply with the said court order but engaged into trivial issues.
 - f. The learned trial magistrate erred in law and in fact in misrepresenting and applying the common law doctrine of access by necessity and the creation of easements by prescription.
 - g. The learned trial magistrate erred in law and in fact in making a declaration that there was no trespass on Land Parcel no. E. Bukusu/W.Sang'alo/1683 when the alleged access road is on a private land.
 - h. The learned trial magistrate erred in law and in fact in declaring that the community had been using the road for over 28 years with a legitimate expectation that the road of access and easement over the land cannot be extinguished when there was no counter-claim filed against the Appellant by the Respondents.
 - i. The learned trial magistrate erred in law and in fact in disallowing the Appellants claim for costs for damaged crops, trees and fence of Kshs. 253,000/= and general damages for trespass against the 1st and the 2nd Respondents when there was no evidence on record rebutting and or challenging the said Appellant's claim.
 - j. The learned trial magistrate erred in law and in fact in allowing DW1 to DW5 to testify in their defence case yet they had not complied with the law as required.
 - k. That the entire judgment is contrary to the veracity of evidence and issues that arose both in pleadings and evidence by parties in court.



18. The Appellant submitted that the Respondents did not produce any evidence to counter his claim and the Trial Court therefore arrived at an erroneous decision. He submitted that on his part, he established through evidence that he was the registered owner of the suit land wherein he had planted crops and trees and also put up a fence which were destroyed and damaged by the 1st Respondents agents to maintain a non-existent access road. He urged the Court to set aside the trial courts orders and allow his claim.

The Respondent's Case

19. The Respondent through their written submissions dated 25th July, 2024 oppose the appeal. They submitted on three issues. On the first issue, it was submitted that through their witnesses, it was confirmed that the access road in question has been in existence since 1976. It was further their argument that this position was confirmed by the land registrar who testified that there existed an access road on the ground and that the boundaries of the two adjacent properties were intact and did not need to be re-established. On the second issue, it was submitted that since the portion in issue was a public road which was in existence even before the Appellant purchased the suit land, he cannot claim for any damage as a result of re-establishing the said public road. On the third issue, it was submitted that from the foregoing, the Respondents cannot be said to have trespassed upon the Appellants land since the portion in issue is a public access road.

Issues For Determination

20. My mandate as the first appellate Court is to analyze and evaluate the evidence on record afresh and to reach my own independent decision. In doing so, I must bear in mind that the trial Court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for that. This duty was well stated in *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123.
21. It is also settled law that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in *Mbogua Kiruga v Mugecha Kiruga & another* [1988] eKLR where the Court of Appeal held:-
- “An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.”
22. I have read the Memorandum of Appeal, the Record of Appeal, written submissions filed by the parties and the court record generally and although the Appellant raised eleven (11) grounds of appeal, I am of the considered view that the Appeal may conclusively be determined on the following three grounds: -
- a. Whether there was trespass by the Respondents and if an Order of Permanent Injunction should issue.
 - b. Whether the Appellant is entitled to the reliefs sought
 - c. Whether the trial court erred in allowing the evidence of the respondent's witnesses.



Whether there was Trespass by the Respondents and if an Order of Permanent Injunction should Issue

23. In the primary suit, the appellant sought for a permanent injunction against the Respondents claiming that the Respondents had trespassed upon his land. On grounds 1,2,3,4,5,6,7,8 and 11 of the appeal, the Appellant complains that the trial court erred in finding that the Respondents had not trespassed into his parcel of land and caused damage therefore the trial court erroneously and without basis proceeded to dismiss his claim.
24. The Appellant based his claim on alleged encroachment and or trespass on his parcel of land by the Respondents jointly and severally who he claimed opened a road through his land and damaged his crops, trees and fence whose cost was placed at KShs. 253,000/=. In order to succeed in a claim for permanent injunction, the Appellant ought to have proved that indeed there had been illegal entry into his land by the Respondent in a manner degrading his land. The Appellant bore the burden of proof and it was incumbent upon him to show that the Respondents had made an illegal entry into his land and that there was no justification for the same.
25. Section 3 (1) of the *Trespass Act* Cap 294 defines trespass as including entry into, remaining on or erection of any structure on or cultivation, tilling, grazing or permitting of stock to be on a private land without the consent of the occupier.
26. In *Black Law Dictionary* 11th Edition Thomson Reuters Page 667 encroachment is defined as infringement of other's right, interference with or intrusion onto another's property. Trespass at page 1810 – 1811 is defined as wrongful entry on another's land which may take the form of continuing, innocent, permanent, ab initio.
27. In consideration of the evidence presented by the parties, it is not in contention that the Appellant is the registered owner of land parcel no. East Bukusu/West Sangalo/1683 measuring approximately 1.6 ha which he purchased from one Thomas Barasa Mutanda in the year 1993-1994. He asserted that the road opened by the Respondents was non-existent and that they are guilty of trespass and liable to compensate him for the resulting damages. On the other hand, the Respondents insisted that they had not encroached on the Appellant's land as alleged or at all. On the contrary, the Respondents defense was that the Appellant had blocked an access road serving the community.
28. The bone of contention therefore is whether an access road was illegally opened on the Appellants land. To answer this question, I refer to the evidence of two expert witnesses, PW7 the District land surveyor and PW8, the Land Registrar. PW7 testified that according to the map dated 34th edition of 16/4/2003 produced as P-Exhibit 7; there is a common boundary between land parcel no. East Bukusu/West Sangalo/1683(the Appellants land) and 1682 but there is no access road in between. On cross-examination, he testified that there are instances where the map does not tally with the situation on the ground.
29. The land registrar on his part produced a report as P-Exhibit 4 and testified that there was an existing road on the ground which is not on the map between land parcel no. East Bukusu/West Sangalo/1683 and 1682 and which has been in use for a long period of time connecting the community to town and Nzoia Sugar Company. He further gave a recommendation that the map ought to be amended to reflect the same.
30. In my appreciation of the evidence as summarized above, I make reference to Section 18(2) of the *Land Registration Act* which confers the mandate for determination of access roads where they border registered land on the Land Registrar. Further, it is trite that the acreage depicted on the title should be



reflected on the ground. It is noteworthy that the Appellant did not lead any evidence by way of a survey report to show that the approximate area of his parcel of land as per his title had been interfered with and to what extent. This piece of evidence in my humble view was crucial in supporting the Appellants case.

31. I say so because the Appellant seems to base his case on the evidence of the surveyor who testified that according to the map there was no existing road between land parcel East Bukusu/West Sangalo/1683 & 1682. However, it is noteworthy that this court has not been told whether the boundaries of land parcel East Bukusu/West Sangalo/1683 & 1682 are fixed or general, it can therefore be safely assumed that the boundaries are general boundaries. In his paper, *“The Role of the Registry Index Map (RIM) in Land Management in Kenya”*, Peter K. Wanyoike has stated that the Registered Index Map is a very useful document in registration and management of land in Kenya within the context of “General Boundaries” or “approximate boundaries.”
32. In the case of *Ali Mohamed Salim vs Faisal Hassan Ali* (2014) eKLR, the court held as follows:

“The type of survey that generated the Registry Index Map is what was known as “general boundaries” which has been defined in Section 18(1) of the *Land Registration Act, 2012* to mean “the approximate boundaries and the approximate situation only of the parcel.” Indeed, most of the titles under the repealed *Registered Land Act* were issued on the basis of the general boundaries, meaning that such parcel of land had no fixed beacons. On the other hand, land registered under the *Registration of Titles Act* required a cadastral survey to be prepared, which is based on a fixed boundary principle. Such a survey has an accurate linear and angular measurements to aid the registration of a title of a plot. The boundaries of land registered under the Registration of Titles Act can easily be identified by any surveyor because of the fixed nature of its beacons.”
33. Further, in the case of *Samuel Wangau vs. AG & 2 others* (2009) eKLR, it was held as follows:

“However, it is common ground that such maps (Registry Index Map) are not authorities on boundaries. Both the District Land Registrar and the District Land Surveyor said as much...It means therefore that when and where there is a dispute as to the position and location of a boundary as in this case, unless the same is a fixed boundary, one has to go beyond the Registry Index Map in solving the dispute.”
34. In essence therefore, there was no evidence tendered by the witnesses including the experts that the Respondents had trespassed onto the Appellant’s parcel of land and/or that the matter herein concerned trespass at all.
35. Further to the foregoing, it should be noted that the Appellant had a duty to plead and prove who, how and the particulars of the Respondent’s acts of trespass and destruction. The Appellant blamed the 1st Respondent as the registered owner of the tractor that opened the road. As for the other Respondents, no evidence was tendered on the manner they trespassed into and committed acts of destruction on the Appellant’s parcel of land. It is therefore my finding that the Appellant did not prove encroachment and destruction of his land and property by the Respondents
36. From the foregoing therefore, the Appellant did not discharge his burden of proof as stipulated in section 107(1) of the *Evidence Act* which provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



Whether the Appellant is Entitled to the Reliefs Sought

37. Having arrived at the findings in the preceding paragraphs, I find that the Appellant is not entitled to damages claimed since the same have not been proved to the required standard.

Whether the Trial Court erred in Allowing the Evidence of the Respondent’s Witnesses.

38. In my considered view, the burden of proof was upon the Appellant and even if the Respondent would not have defended the claim, it was still incumbent upon the Appellant to prove his case. Since the Appellant failed to prove his case on a balance of probabilities, it is irrelevant whether the evidence by DW1-DW5 should have been taken into account.

39. The upshot of my finding is that this appeal lacks merits and the same is hereby dismissed with costs.

40. Orders accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 11TH DAY OF OCTOBER, 2024.

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HON.E.C CHERONO
ELC JUDGE

In the presence of;
John Silikhani Mukhwana-Appellant-present
M/S Masengeli for the Respondents.
Bett C/A

