



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 85 OF 2019

GEORGE LINTARI..... APPELLANT

VERSUS

ROSE KIRITO MUTUMA..... RESPONDENT

(Being an appeal from the Ruling and Order of Hon Sogomo G. Principal Magistrate in TIGANIA PM ELC NO. 163 of 2018 dated 13.6.2019)

JUDGMENT

1. The appellant was the plaintiff in the lower court where he instituted the suit vide a plaint dated 28/08/2018 seeking an order of injunction restraining the defendant, his servants, agents and employees from trespassing into the plaintiffs plot No.145'A' KIANJAI MARKET, general damages for the trespass, and costs of the suit.

2. The plaintiff pleaded that he was the registered owner of plot No.145'A' KIANJAI MARKET and the defendant had unlawfully and wrongfully trespassed into the said plot and started constructing a commercial building without his consent. Despite repeated demands and notices of intimation to sue in default, the defendant continued with the trespass.

3. The Defendant in her statement of defence dated 4/09/2018, denied the plaintiffs claim, averring that she was the registered owner of plot No. 40 KIANJAI MARKET, on which she was constructing a commercial building and that she has never undertaken any construction on the plaintiff's plot No.145'A' KIANJAI MARKET.

4. Vide a ruling dated 17/01/2019, the trial court ordered the District Surveyor, under Section 22 and 23 of the Survey Act to visit the disputed boundary with a view of conducting a survey, ascertainment and affixing or entering the boundary as the case maybe and a report in this regard to be presented before court. The court then directed that the parties could file a summary application on the basis of the survey report.

5. The defendant filed an application dated 30.5.2019 for dismissal of the suit and costs to the defendant, on the ground that the report prepared by Meru County Physical Planning Officer indicated that the defendant was building a commercial building on her own plot and not on plaintiff's and that defendant had obtained the relevant approvals from the County Government of Meru. Thus it would be a waste of precious judicial time to conduct a trial in a matter where the expert report had exonerated the defendant.

6. The trial Court allowed the said application on 13/06/2019 dismissing the suit with costs to the defendant. Aggrieved by the decision thereof, the appellant filed his memorandum of appeal dated 24/06/2019 based on Four (4) grounds which are:-

i. That the learned Principal magistrate erred in law and fact in deciding the case without hearing the parties.

ii. That the learned Principal magistrate erred in law and fact in basing his ruling on an alleged expert opinion which had not been subjected to cross examination.

iii. That the learned Principal magistrate erred in law and fact in interpreting the contents of the so called expert's report which actually supported the appellant's case.

iv. That the judgment of the learned Principal magistrate is against the weight of the evidence and law.

7. The appeal was canvassed by way of written submissions. The Appellant submitted that he was never given an opportunity to argue his case and the dismissal of his suit on an opinion that was not challenged in any form or shape is against the spirit of Article 25 (c) and 50 (1) of the Constitution of Kenya. That the expert evidence is not compelling on its own and should not be considered in a vacuum but the same should be considered in context of other evidence.

8. It was further submitted that the court order dated 28/01/2019 directed the district surveyor to visit the scene, fix boundaries and present the report in court but nowhere in the report is the issue of fixing boundaries mentioned. All these issues would have been raised had the lower court allowed the appellant's advocate to undertake cross examination on the expert report.

9. He also submitted that the court took no concrete steps to resolve the dispute but instead heightened it, taking no initiative to ensure that the recommendations highlighted in the expert report were implemented. The appellant was an aggrieved party who approached the court having no other avenue to seek justice and he was chased away when the court opted to be biased and dismissed the case. He urges the court to allow the appeal to remedy the gross injustice occasioned upon the appellant.

10. The appellant has relied on the following cases; **Abdinoor Shurie vs. Halima Bundid (2020) eKLR**, **Stephen Kanini Wangondu vs. The Ark Limited (2016)eKLR** and **Elizabeth Kamene Ndolo V George Matata Ndolo (1996) eKLR**.

11. The respondent submitted that the appellant had been given opportunities by the court to present its case by filing his replying affidavit opposing the application seeking dismissal of the suit, which response the court took into consideration in the ruling. Further the appellant never applied to the court to be heard in any other way, nor did he oppose or raise any issue.

12. In regards to the expert report, the same was ordered by the court in the presence of both parties' advocates and when it was filed, the appellants advocate did not challenge, deny or seek to file another report to controvert the said report. The said report indicated that the respondent had developed her plot No. 40 and the trial court did not error at all in interpreting the said expert report and dismissing the suit as the report did not support the appellants case as alleged or at all. She urges this court to find and hold that this appeal lacks merit and dismiss it in its entirety, relying on the cited cases of; **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros V Augustine Munyao Kioko [2006]eKLR** and **Farah Awad Gullet V CMC Motors Group Limited [2018] eKLR**.

Analysis and determination

13. As the first appellate court, this court has a duty to evaluate, assess and analyze the extracts on record and make its own determination. See: **Selle & Another vs. Associated Motor Board Company Ltd [1968] EA 123, Kenya Ports Authority vs. Modern Holdings (E.A.) Limited (2017) eKLR**.

14. The trial court in its ruling of 13.6.2019 stated as follows;

“This Court has had regard to the subject application and the respondents replying affidavit. This Court abides by the expert report annexed to the applicants replying affidavit whose contents have not been controverted by any other expert report to the contrary..... the plaintiffs suit is dismissed with costs to the defendant.”

15. Having gone through the lower court proceedings, I do find that at no time did the appellant and/or his advocate ever oppose the expert report or make a request to be allowed to file their own expert report, nor did he make an application before the court to have the maker of the report come before court for purposes of being cross examined.

16. The court can only grant prayers before it and as such I do opine that the learned magistrate did indeed give the parties an opportunity to be heard. To this end, the court had directed that parties may file a summary application based on the expert report and the respondent herein filed her application and the appellant opposed it vide a replying affidavit which were both considered by the lower court when giving its ruling.

17. The report in question dated 20/05/2019 concluded that the two plots border each other with no fixed boundary, that the department of physical planning and urban development had earlier received a complaint from the conflicting parties herein and had scheduled a meeting with the respective market committee for redress/solution. Further that the respondent had built a permanent building on plot no.40 which had been approved by the County Government.

18. An interchange in position occurred on the ground during boundary identification and the issue of plot re-organization occurred as a result of re-planning to pave way for the access. Nowhere in the report does it say that the building in Plot No. 40 had extended into Plot No. 145”A”.

19. The report of the county physical planning officer does state that there are no leases on the suit parcels, thus the issue of fixed boundaries does not apply in that area. That proof of ownership in Kianjai market is through letters of allotment or copies of full council minutes where general survey as opposed to fixed boundaries applies. The appellant did not point out any evidence to the contrary. What emerges is that the appellant ought to pursue his claim with the relevant entities (read the County Government) to ensure that his plot is defined and delineated on the ground and on paper, as the aforementioned entity (particularly the department of planning as well as market committee) is the one in charge of plot reorganization and re-planning.

20. At this juncture, I must express my dismay in the manner the record of appeal has been filed. The appellant has failed to avail the full text of his replying affidavit to the application of 30.5.2019 which is supposedly factored on page 68-69 of the record of Appeal. Page 68 of the said record of appeal contains the supporting affidavit of the respondent, while page 69 there of contains an incomplete document of the appellant. Thus the court is not in a position to fully appreciate what the appellant's case was in so far as the application of 30.5.2019 is concerned.

21. Nevertheless, I hold the view that in these kind of disputes, where the plots have no titles, the input of the physical planner plays a central role in determining the general plan of the area. I find that the report of 20.5.2019 had erased any notion of trespass by the defendant upon plaintiff's plot.

22. Taking cue from the holding of Judge Mativo in **Stephen Kanini Wangondu vs. The Ark Limited (2016)eKLR** (a case cited by the appellant); ***“there is nothing to demonstrate that the expert’s opinion is based on illogical or even irrational reasoning and I have no basis to reject it”***. Thus the trial court was right in adopting the said report. I do opine that the appeal lacks merits and the same is hereby dismissed. Each party to bear their own costs of this appeal.

DATED, SIGNED AND DELIVERED AT MERU THIS 14TH DAY OF APRIL, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the advocates for the parties through a virtual session via Microsoft teams on 1.2.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE