REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC APPEAL NO. 3 OF 2018

CHARLES MBUGUA NJUGUNA.....APPELLANT

VERSUS

JULIUS NGARACHU KARANJA.....1ST RESPONDENT

KIAMBU COUNTY GOVERNMENT.....2ND RESPONDENT

***(*Being an appeal from the Judgement and Decree delivered *on the* 13th December, 2018,**

***by* Hon. C. A. OTIENO OMONDI (PM) in Chief Magistrate Court**

Civil Suit No 1281 of 1997*)*

JUDGEMENT

The Appellant **Charles Mbugua Njuguna,** was the Plaintiff in **Thika CMCC 1281 of 1997,** while the Respondents **Julius Ngarachu Karanja** and **Kiambu County Government** were the Defendants in the said suit. By a Further Amended Plaint dated **19th May 2016,** the Plaintiff (Appellant) **brought this suit against the Defendants(Respondents) and sought for orders that;-**

a. Plot No.447/29/GATURA is owned by CHARLES MBUGUA NJUGUNA the Plaintiff and the 1st Defendant his servants, agents, family or anybody else authorized by him be restrained/ stopped from constructing, working or doing any other act on plot No. 447/29/GATURA.

b. Muranga County Government be ordered to enforce the orders of this court.

c. The Plaintiff be awarded costs of this suit and any other costs plus interest that this Honorable Court may deem fit.

In his statement of claim, the Plaintiff (Appellant) averred that he is the registered proprietor of plot Number **447/29/**Gatura. That by an agreement dated 18th February 1983, Samuel Mwangi Muigai who was the original allotee by Muranga County Council, sold to him the said plot Number 447/29/Gatura. That on 10th September 1983, Samuel Mwangi Muigai, transferred the said property and it was registered in the Plaintiff's (Appellant's) name.

That on 22nd September 1997, the 1st Defendant(Respondent) entered onto the said plot without the Plaintiff's(Appellant's) authority. That the 2nd Defendant (Respondent) has unlawfully hived off a portion of plot Number 447/29 Gatura, and allocated it to the 1st Defendant (Respondent) as Plot No. 61 Gatura.

The suit was contested and the 1st Defendant filed a Defence dated 17th November 1997, and denied entering the suit premises. He averred that he only utilized his own Plot Number 61, which borders the Plaintiff's (Appellant's) plot. That the suit discloses no cause of action and should be struck out with costs.

After close of Pleadings, the matter proceeded by way of viva voce evidence wherein the Plaintiff (Appellant) testified for himself and closed his case and the Defendants(Respondents) called one witness.

PLAINTIFF'S (APPELLANT'S) CASE

PW1 Charles Mbugua Njuguna testified that Samuel Mwangi Muigai sold to him Plot Gatura No. 29. That he bought a map from Muranga County Council which showed the measurements of the plot. That he bought the land for Kshs 40,000/= and he used to pay Kshs.2000/= per year as rates. He produced sale agreement as exhibit 1,map as Exhibit 2, Receipt s/no 2617 for plot No. 30 as exhibit 3(A) receipt No 2616 for plot no 29 as Exhibit 3 (B). Further that there is no plot in between plot no. 29 and 30. It was his testimony that Julius Ngarachu bought a building on plot No. 29 in the year 1997, and he began digging on plot no 29 to which he complained to the local authorities and received a letter dated 18th August 1999, which he produced as Exhibit 4 . That Ngarachu continued to construct on the suit property despite being ordered to stop though the Plaintiff (Appellant) did not get a Court injunction. He produced photographs of the Construction as Exhibit 5a to 5 c.

That Ngarachu destroyed his building valued at Kshs. 5 million though the Plaintiff (Appellant) did not report the demolition as the value of the building is obvious. That the map shows where his plot starts and ends. Further that no surveyor showed him the demarcation. That as per Exhibit 2, Plot No. 29, borders a road on three sides and plot No. 30 on one side.

DEFENCE (RESPONDENT'S)CASE

DW1 Julius Ngarachu Karanja testified that he was allotted plot no.61 by the County Council of Muranga next to plot no. 29, that belongs to the Plantiff (Appellant) . That the Plaintiff (Appellant) built a structure that encroached on his building, but the Court ordered its demolition and he went on with his construction.

That when he was allocated plot no. 61, the surveyor from Thika showed him the beacons and he built on the plot allocated to him. That he began construction at the plot in the year 1997. He acknowledged that according to PEXH 2, the plots follow each other i.e. 29, 30 and 31 and 32. That the allotment letter, rates and receipts have not been produced but his allotment was for Plot 61 and not 29.

After the *viva voce* evidence, the parties filed their written submissions and on **19th March 2018,** the trial Court entered Judgment in favour of the 1st Defendant (Respondent) plus costs and stated as follows;

> **"As regards issue No. 3 the Plaintiff's case was that plot No. 61 which was allocated to the 1st defendant was hived off his plot No. 29 while the 1st Defendant version is that he was allocated Plot No. 61 which is not related to Plot No. 29 but is next to it. As it is the Plaintiff who seeks that the Court enters Judgment in his favour, It was for him to prove beyond reasonable doubt that Plot No. 61 was hived off from plot No. 29 as alleged in his Amended Plaint . I note that apart from stating so in his evidence, the Plaintiff did not call any expert witness such as a surveyor who would have shed light on this matter. A surveyor would have demonstrated conclusively whether Plot No. 61 had encroached on Plot No. 29 . The map produced only showed the position Plot No. 29 and 30 which the Plaintiff stated he owned. In the absence of such evidence the court cannot enter Judgment for the Plaintiff as prayed in the Plaint. Consequently the suit is dismissed with costs to the 1st Defendant.**

The Appellant was aggrieved by the above determination of the Court in favor of the 1st Respondent herein and he has sought to challenge the said Judgment through the **Memorandum of Appeal** dated **27th March 2018, and sought for orders that;**

> **1. The Judgment of the Principal Magistrate of 19th March 2018, be set aside with costs.**
>
> **2.Judgment be entered for the Appellant as prayed in the Plaint in CMCC No. 1281 of 1997.**
>
> **3. Costs.**

The grounds upon which the Appellant sought for the Appeal to be allowed are;

> **a. That the Learned Magistrate erred in both law and fact by holding that the Appellant had not established his case on a balance of probabilities despite overwhelming evidence to the contrary.**
>
> **b. That the Learned Magistrate erred in fact by holding that a surveyor's evidence was necessary to establish that the Respondents had hived off portion of plot No. 29 Gatura yet there was oral and documentary evidence to prove the same.**
>
> **c. That the Learned Magistrate erred in misconstruing the test of balance of probabilities and in so doing reached a wrong conclusion.**

On 4th March 2020, the Court directed the Appeal to be canvassed by way of written submissions and the Appellant through the Law Firm of R. M. Mutiso & Co Advocates, filed his written submissions on 13th May 2020, and submitted that he did exactly as required by Section 107(1) of the Evidence Act as he proved his facts with documents adduced in court. That the authors of documents are required to verify the authenticity of documents but that the same can be done away if both parties have no issue with authenticity of documents.

It was further submitted that if the experts were called to testify, they would only have regurgitated what was already in the documents adduced. That the 1st Respondent did not produce any documents to substantiate his claim yet the court agreed with him that he was the proprietor of Plot No. 61 at Gatura Market. That the 1st Respondent did not adduce any evidence to show ownership as per Section 107 (1) of the Evidence Act. He relied on the case of *Douglas Kariuki…Vs…Francis Iregi Mwangi (2018) eKLR* and various provisions of the law and urged the Court to allow the Appeal.

The 1st Respondent filed his written submissions on 12th October 2020 through the Law Firm of Onesmus Githinji & Co Advocates and submitted that the Record of Appeal is incomplete as the Appellant had deliberately left out documents relied on by the 1st Respondent and attached the said documents to the submissions. It was submitted that the 1st Respondent demonstrated that he owned Plot No. 61 by attaching a letter of allocation by the County Council of Thika dated 18th December 1996 and that the same was not challenged. Further that the 1st Respondent relied on letters written by the Appellant to the County Council of Thika on the 21st July 1997, and 26th September 1997 where the Appellant admitted that Plot No. 61, was the plot next to his and not a portion of his plot. He relied on the case of *Rukanya Ali Mohammed …Vs… David Gikonyo Nambacha & Another Kisumu HCCA No. 9 of 2004.*

It was further submitted that the Appellant did provide Court with any evidence that indicated that the 1st Respondent encroached on his parcel of land as the map showed that plots 29 and 61 are distinct. That only an expert such as a Surveyor could prove the accuracy of a map or plan produced in Court. That the omission of a Surveyor's Report left the Court with no option but to make finding that there was no encroachment.

It was further submitted that the standard of proof was not merely a balance of probabilities, but that the Appellant ought to tip the scale to beyond reasonable doubt as the claim exposed the 1st Respondent to criminal culpability. The Court was urged to dismiss the Appeal.

The 2nd Respondent did not file any pleadings with regards to the Appellant's Appeal.

The court has considered the evidence adduced in court as well as the submissions thereafter by parties and the authorities herein submitted. This Court recognizes that it neither saw nor heard the witnesses and must therefore give allowance to that. The Court has also carefully considered the findings of the trial court, the submissions by the Counsels and finds as follows;-

As this is a first appeal, it is the Court's duty to analyze and re-assess the evidence on record and reach its own independent decision in the matter as provided by **Section 78** of the **Civil Procedure Act**. See the case of ***Selle v Associated Motor Boat Co. [1968] EA 123*** where the Court held that;

> **"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that 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 or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270).**

Further as the Court determines this Appeal, it takes into account that it will only interfere with the discretion of the trial Court where it is shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. See the case of ***Ocean Freight Shipping Co. Ltd….Vs.. Oakdale Commodities Ltd(1997)eKLR, Civil App.No.198 of 1995,*** where the Court held that:-

> **"This is of course not an appeal to us from the decision of the single Judge. The discretion given by Rule 4 is exercised on behalf of the court by a single Judge and for a full bench to interfere with the exercise of the discretion, it must be shown that the discretion was exercised contrary to law, i.e. that the single Judge misapprehended the applicable law, or that he failed to take into account a relevant factor, or took into account an irrelevant one or that on the facts and the law as they are known, the decision is plainly wrong."**

The Court finds the issues for determination are:-

I. Whether Plot No.61 was hived off from plot No.29

II. Whether the Appeal is merited

1. Whether Plot No. 61 was hived off from Plot No. 29

It is not in doubt that there exists Plot No. 29 and Plot No. 61. Further it is not in doubt that the Appellant is the owner of Plot 29 and the 1st Respondent is the owner of Plot 61. What is in contention is whether the said Plot 61 was hived off Plot 29. In his evidence the appellant testified that Plot 61 was part of his plot and that the same had been hived off by the Muranga County Council from Plot 29. He further testified that no Surveyor showed him the demarcation of his plot. What the Appellant produced in evidence is a map that showed where his plot starts and ends and this has been confirmed in his evidence.

Further the Appellant relied on various letters including letters dated 18th August 1999, and 17th November 2000, and it is not in doubt that all these letters only confirmed that Plot 29 belonged to the Appellant but not that Plot 61 was hived off Plot 29. The Appellant has not disputed the existence of Plot 61, which he has acknowledged existed and his contention is that Plot 61 was hived off Plot 29.

The Appellant is not a Surveyor and therefore not an expert. He has not produced in evidence any documentation that would make the Court understand why he has claimed that Plot 61 was hived off Plot 29. While the Court agrees that there might not have been the need to call an Expert witness if the documentations were not challenged, the Court also notes that the Appellant should have produced documents that show that Plot 61 was hived off Plot 29. Of Course calling an expert to further expound on this would have been beneficial to the Court,

but the Court would still have been required to independently examine the documents produced in Court to arrive at a just decision as the opinion of an Expert is not final as it is weighed against the evidence produced .Section 107 of evidence Act succinctly states:

> **"Whosever 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."**

Further **Section 108 of Evidence Act**, states thus:

> **"The burden of proof in a suit or proceeding lies on that person who would fail *if no evidence at all were given on either side."***

Therefore, it follows that the onus was on the Appellant to prove that Plot 61 was hived off Plot 29, which the Court finds and holds that he failed to do. The Appellant did not provide any evidence of how Plot 61 was hived off Plot 29.

The Court therefore finds and holds that there being no evidence produced to support the Appellant's claim, the trial Court correctly held that the Appellant did not prove that Plot 61 was not hived off Plot 29.

The Court in the case of *Sanganyi Tea Factory v James Ayiera Magari [2016] eKLR* cited the case of ***Susan Mumbi …Vs… Kefala Grebedhin (Nairobi HCCC No.332 of 1993) where Justice Juma*** stated:

> **"The question of the court presuming adverse evidence does not rise in civil cases. The position in civil cases is that whoever alleges has to prove. It is the plaintiff to prove her case on a balance of probability and the fact that the Defendant does not adduce any evidence is immaterial."**

2. Whether the Appeal is merited

The Appellant had sought for the setting aside of the trial Court's Judgment and that Judgment be entered in his favour as sought for in the Plaint. The trial Court held that the Appellant did not prove and or demonstrate that **Plot 61** was hived off from **Plot 29.** This Court has also come to the same conclusion. Therefore, it follows that the trial Court did not misapprehend neither the Law nor facts and therefore the Appeal herein is **not merited.**

Having now carefully re-evaluated and re-assessed the available evidence before the trial court and the **Memorandum of Appeal** together with the **written submissions,** the Court finds that the trial Magistrate arrived at a proper determination and this Court finds no reason to upset the said determination.

The upshot of the foregoing is that the Appellant's Appeal is found **not merited** and consequently the said Appeal is dismissed entirely and the Judgment and Decree of the trial court is upheld with costs to the 1st Respondent herein.

It is so ordered.

DATED, SIGNED AND *DELIVERED* AT THIKA THIS *8TH* DAY OF APRIL 2021.

L. GACHERU

JUDGE

8/4/2021

Court Assistant -Phyllis

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They 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.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Wachira for the Appellant

No appearance for the 1st Respondent

No appearance for the 2nd Respondent

L. GACHERU

JUDGE

8/4/2021