Otako v Ochieng (Environment and Land Appeal 36 of 2021)
[2022] KEELC 2806 (KLR) (2 June 2022) (Judgment)

Neutral citation: [2022] KEELC 2806 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ENVIRONMENT AND LAND APPEAL 36 OF 2021

AY KOROSS, J

JUNE 2, 2022

(ORIGINALLY KISUMU ELC CASE NO. 24 OF 2019)

BETWEEN

CHARLES OJWANG OTAKO ..... APPELLANT

AND

GEOFFREY OWUOR OCHIENG ..... RESPONDENT

(Being an appeal from the judgment and decree of the Principal Magistrate Hon.J.O.Ong'ondo delivered on 4/07/2019 in Siaya PM ELC Case Number 91 of 2018)

JUDGMENT

Introduction

1. The root of this appeal can be traced to a plaint filed by the respondent where he contended that the plaintiff had trespassed on his parcel of land known as East Ugenya/jera/662 (suit property) in March 2015 by constructing on a portion of it. He prayed for the appellant to be evicted, permanent injunction, general damages and costs of the suit.

2. In a defence and counterclaim, the appellant denied the averments made in the claim and asserted that he had been in occupation of the suit property for a continuous and uninterrupted period of 48 years with the knowledge of the respondent. He averred that his right to the suit property was accrued from his father one Oyugi Otako (deceased). He prayed that the respondent's suit be dismissed and for him to be declared the rightful owner.

3. On hearing the parties, the court framed one issue for determination; who between the appellant and the respondent was the rightful owner of the suit property. The court found that the respondent had proved his case on a balance of probabilities and entered judgment as sought in the plaint and assessed general damages at Kshs. 50,000/=.

Appeal to this court

4. Aggrieved and dissatisfied with the entire judgment of the lower court, the appellant appealed to this court on several grounds which can be summarised as follows;

    a) The learned trial magistrate erred in fact and law by finding that the respondent had proved his case on a balance of probabilities.

    b) The learned trial magistrate erred in fact and law by failing to appreciate and evaluate the appellant's pleadings and evidence.

    c) The learned trial magistrate erred in fact and law by relying on documentary evidence which were never produced as exhibits contrary to the *Evidence Act*.

    d) The learned trial magistrate erred in fact and law by awarding the sum of Ksh 50,000.00/- as damages for trespass despite the respondent stating that he does not claim any damages for trespass.

5. The appellant prayed for the appeal to be allowed, judgment of the subordinate court be set aside, an order dismissing the respondent's suit in the lower court, costs of the suit in the subordinate court and of this appeal.

The appellant's submissions

6. The appellant's counsel M.A.Okumu & Co. Advocates filed written submissions dated 14/03/2022. He abandoned some grounds of appeal and consolidated others.

7. On the 1st ground, he contended that the trial court failed to recognise that he and his parents had been given permission to enter the suit property in 1967 by the 1st registered owner one Lang'o Oyugi [grandfather to the respondent] who was a brother to his father one Oyugi Otako and that Lang'o Oyugi and his successors in title held the suit property in customary trust for Oyugi Otako and his successors. On this, he relied on Section 28 of the *Land Registration Act* which provides that customary trusts are overriding rights over land, the authority of *Mwangi v Mwangi* [1986] KLR 328 which held that interests of plaintiffs arising from actual occupation without legal titles were equitable rights which were binding on the land and *Isack M'inanga Kiebia v Isaaya Theuri M'lintari & Another* [2018] eKLR where the court recognised equitable rights of those in possession of the land. Copies of these authorities were not availed to this court.

8. On the 2nd ground of appeal, the appellant contended that contrary to the provisions of Order 21 Rule 1 of the *Civil Procedure Rules,* the trial court failed to consider his counterclaim. Further, the trial court misrepresented the law, facts and evidence when it found that the appellant's rights had not crystallised because he entered the suit property in the 2015 despite evidence that he had been in occupation and possession of the suit property from 1967 and had only moved from his parents homestead which was within the suit property to his own homestead that was equally within the suit property. It was the appellant's submission that the respondent did not prove that the appellant had not resided on the suit property from 1967.

9. The 3rd ground was not addressed. On the 4th ground, the appellant asserted that the lower court erred in awarding the respondent general damages of Ksh 50,000/-.

The respondent's submissions

10. The respondent's counsel P.D.Onyango & Company Advocates filed written submissions dated 11/04/2022.

11. On the 1st and 2nd grounds, he asserted that his ownership to the suit property was never controverted and that customary trust was never pleaded or proved and that in any case the ancestral home of the parties was at a place called Kivirindo B and not the suit property. On adverse possession, he asserted that the appellant resided in his father's homestead which was within the suit property and that in 2015, he set out to construct his own house within the suit property. That the claim of adverse possession was instituted on his own behalf and not on behalf of his father's estate. Further, that the appellant took possession and occupation in his own capacity in 2015.He asserted that the respondent's occupation and possession was never peaceful.

12. On the 3rd ground, the respondent contended that the trial court called for copies of the "white cards" and "green cards" in order to establish ownership of the suit property.

13. On the 4th ground, the respondent contended that he had proved trespass against the appellant and he was entitled to damages. He placed reliance on the case of *Nakuru Industries Limited v S Mehta & sons* [2016] eKLR which stated that in tort, damages are awarded to compensate a plaintiff for loss as a result of wrongful action by a defendant. He also relied on Halsbury 4th Ed. Volume 45 at paragraph 26 which stipulated the parameters for assessing damages in trespass. Similar to the appellant, copies of the citations were never proffered.

The appellant's further submissions

14. In rebuttal, the appellant filed supplementary submissions dated 25/04/2022.He asserted that he could sue in his personal capacity as of right and that no notice had been issued for him to vacate the suit property. He contended that by dint of Section 7 and 17 of the *Limitation of Actions Act*, the respondent's suit was time barred.

Analysis and determination

15. As was stated in the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123 which was cited with approval in the case of Barnabas Biwott v Thomas Kipkorir Bundotich [2018] eKLR, this court is alive that its role as a first appellate is to re-evaluate, re-assess and re-analyze the record and then determine whether the conclusions reached by the learned trial magistrate stand or not and give reasons either way. The court should bear in mind that it did not have an opportunity of hearing the witnesses' testimony. See *Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2EA 212.

16. Before I proceed with my legal and jurisprudential framework on the four consolidated grounds of appeal, I have made certain observations on the submissions filed by the parties. The appellant has addressed grounds not contained in his memorandum of appeal and has gone further to adduce new evidence that were not before the trial court. Though the respondent pointed this out, and probably apprehensive that the appellant could steal a match, he similarly addressed the court on evidence that were not before trial. As a 1st appellate court, this court can only address its mind on the grounds set out in the memorandum of appeal, the pleadings and evidence before the trial court and the decision

being appealed from. In the case of *Kenya Hotels Limited v Oriental Commercial Bank* (2018) eKLR, the Court of Appeal stated thus;

> In Openda v. Ahn, (supra) this Court identified some of the principles ... grounds of appeal must arise from issues that were sufficiently pleaded, canvassed, raised or succinctly made issues at the trial; .... a new point which has not been pleaded or canvassed in the trial court should not be allowed to be taken on appeal, unless the evidence establishes beyond reasonable doubt that the facts before the trial court, if fully investigated, would support the point..."

I need not say more on this.

I. The learned trial magistrate erred in fact and law by finding that the respondent had proved his case on a balance of probabilities.

17. Within the provisions of Section 3 (1) of the *Trespass Act*, a trespasser is defined to mean any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier.

18. Trespass is a tortious action and a violation of the right to possession, and therefore the proper plaintiff in an action of trespass to land is the person who has title to it, or a person who is deemed to have been in possession at the time of the trespass. However, the owner has no right to sue in trespass if any other person was lawfully in possession of the land at the time of trespass See Halsbury's Laws of England, Volume 97 at p. 472-473, and the Court of Appeal decision of *Municipal Council of Eldoret v Titus Gatitu Njau* [2020] eKLR.

19. My understanding of this provision of law and Halsbury and is that a person who ingresses on private land with the permission of the owner and in lawful possession cannot be deemed to be a trespasser.

20. The trial court did not address its mind on whether or not the appellant was a trespasser. It merely stated that the respondent had proved his case on a balance of probabilities.

21. The respondent testified that he and the appellant entered the suit property in 2015. PW 2 and PW 3 corroborated this testimony. PW 3 went further and stated that the appellant trespassed twice; when Anselmus Ochieng Oyugi [father to the respondent] died which would imply in 2002 and in 2015. On cross examination, they were all unsure whether or not the appellant entered the suit property in 1967. The respondent testified that his father used to till the suit property until his death in 2002. PW 2 testified that Lang'o used to till the land prior to his death in 1980. While PW 3 testified that the respondent's mothers cultivated the suit property 2015. Their testimonies were contradictory and they were unsure who occupied the suit property when. It would appear that these persons whom they alleged cultivated the suit property never put up structures. The survey report that the respondent produced contradicted the respondent's testimony that the appellant merely trespassed by constructing a mud hut. The report demonstrated that there were several houses on the suit property with ongoing farming activity on approximately 1.048 hectares.

22. The appellant's testimony that his family entered the suit property in 1967 with Lang'o's consent was never controverted. It was his case that in 2015, he merely constructed his own homestead in the suit property after he vacated his parents homestead which was similarly within the suit property; this was not controverted. Though the respondent on appeal admitted this, he asserted that the appellant's rights to the suit property could only be derived from his father. Far from it, from the evidence that was adduced before the trial court, Otako's household which included the appellant were all granted permission by Lang'o in 1967.

23. Persuaded by the decision of Mutungi J in the case of *Ochako Obinchu v Zachary Oyoti Nyamongo* [2018] eKLR where he stated that want of permission deemed one a trespasser, I am satisfied that the appellant and his family entered the suit property in 1967 with the permission of Lan'go and hence were not trespassers. It is my finding that the trial court erred in finding that the respondent had proved his case on a balance of probabilities.

II. The learned trial magistrate erred in fact and law by failing to appreciate and evaluate the appellant's pleadings and evidence.

24. Though the Trial Magistrate never expressly mentioned the word counterclaim in his decision, he applied his mind to the averments in the appellant's counterclaim and evidence when he stated thus;

> " The defendant claims that he has been staying in the parcel since he was about 4 (sic) years old having been shown land by his father. He again says that he started occupying the land in 2015, ...there are no proprietary rights which have crystalized..." Emphasis added.

25. Did he misconstrue the evidence in arriving at his decision? My answer is in the affirmative. It was the appellant's testimony that he had always resided at his parent's homestead which was within the suit property from 1967 and it was only in 2015 that he set out from the family homestead to establish his homestead which was within the suit property. I need not say more. I now turn to whether appellant proved his case. Was he an adverse possessor?

26. The critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to land by adverse possession to prove not only the period but also that his possession was without the true owner's permission and further, that the owner was dispossessed or discontinued his possession of the land. See the Court of Appeal decision of *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR that quoted with approval the case of Littledale v Liverpool College (1900)1 Ch.19, 21.

27. Section 28 (h) of the *Land Registration Act* recognises adverse possession as an overriding interest over land. The case of *Daniel Kimani Ruchine & Others v Swift, Rutherford Co Ltd & another* [1977] eKLR stated that a party must prove that he had used the land which they claim as of right: Nec vi, nec clam, nec precario which means no force, no secrecy or evasion.

28. Though the appellant proved that he had resided on the suit property with permission for a period of 48 years prior to the suit being filed in 2015, he never adduced evidence that the permission was withdrawn. I find that the appellant did not prove his counterclaim on a balance of probabilities and I will not disturb the reasoning of the trial court that the appellant's rights to the suit property had not crystalized.

III. The learned Trial Magistrate erred in fact and law by relying on documentary evidence which were never produced as exhibits contrary to the *Evidence Act*.

29. In its directions dated 30/5/2019, the trial court ordered the Land Registrar to tender the "green cards" and "white cards" of the suit property. Though these documents are in the court record, they were never produced by any party in the proceedings. Equally, the land registrar was neither summoned to produce them nor were the parties given an opportunity to interrogate them. If the Trial Magistrate saw the need to call for additional evidence, nothing could have been easier than for him to exercise his discretion within the provisions of Section 146 (4) of the *Evidence Act* and Order 18 Rule 10 of the *Civil Procedure Rule*s to recall a witness and I rely on this court's decision in *Mary Apondi Yinda &*

another v Joice Achieng Okumu & 3 others [2022] eKLR. It is my finding that the trial court erred in relying on documents that were never produced.

IV. The learned trial magistrate erred in fact and law by awarding the sum of Ksh 50,000.00/- as damages for trespass despite the respondent stating that he does not claim any damages for trespass.

30. Though my findings on the 1st ground of appeal has more or less determined this ground, I do find the need to address it. It is settled law that trespass is an actionable tort for which damages are payable. Though the trial court erroneously found that the appellant was a trespasser, it granted the respondent general damages.

31. It is trite law that courts are bound by the pleadings of the parties and in my considered view, the trial court was bound to analyze the pleadings of the parties in arriving at its decision. The case of *Nakuru Industries Limited v S S Mehta & Sons* [2016] eKLR, cited with approval *Halsbury's 4th ed, Vol 45,* at para 26, 1503 which stated that where the defendant had made use of the plaintiff's land, the plaintiff was entitled to receive by way of damages such a sum as would reasonably be paid for that use. If the specific figure could not be ascertained, it was at the court's discretion to award general damages for trespass. Had I not disturbed the decision of the trial court by my finding that the appellant was not a trespasser, I would have not hesitated but upheld the assessment of the trial court on the quantum of general damages.

32. The upshot is that neither the appellant nor respondent proved their respective claims before the trial court on a balance of probabilities and were not entitled to the orders sought. The appeal partially succeeds. It is trite law that costs follow the event and because the appellant and respondent are close family relations, each party shall bear their respective costs of the appeal and of the trial court. The upshot is that I hereby set aside the entire judgment and decree of the trial court and in its place, I substitute it with orders in the following terms;

    I. The respondent's suit is hereby dismissed.

    II. The appellant's counterclaim is hereby dismissed.

    III. Each party to bear their own costs of this appeal and that of the trial court.

    It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 2ND DAY OF JUNE 2022.

HON. A. Y. KOROSS

JUDGE

2/6/2022

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Ms. Aron for the appellant

Mr. Bagada for the respondent

Court assistant: Ishmael Orwa