Oketch v Ochanda & 3 others (Environment and Land Appeal E002 of 2021) [2022] KEELC 14580 (KLR) (3 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14580 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ENVIRONMENT AND LAND APPEAL E002 OF 2021

AY KOROSS, J

NOVEMBER 3, 2022

BETWEEN

TOM ONYANGO OKETCH ..... APPELLANT

AND

HON.GIDEON OCHANDA ..... 1ST RESPONDENT

DISTRICT/COUNTY LAND REGISTRAR BONDO ..... 2ND RESPONDENT

DISTRICT/COUNTY LAND SURVEYOR BONDO ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

(Being an appeal from the judgment of the Hon. Principal Magistrate J.P. Nandi delivered on 2/12/2021 in Bondo PM ELC Case Number 59 of 2018)

JUDGMENT

Background of the appeal

1. The appellant filed a plaint dated 29/07/2015 against the respondents. It was his case that on 10/09/2009, the 1st respondent in collusion with the 2nd and 3rd respondents unlawfully excised a portion of the appellant's land parcel number Siaya/Usigu/517 ("suit property") which was allegedly 9 acres and amalgamated one part of the hived portion with the 1st respondent's parcel of land known as Siaya/Usigu/516 ("516") and the other by creating a new parcel of land known as Siaya/Usigu/3315 ("3315"). He averred that the registered owner of 3315 was non-existent.

2. He averred that in June 2011, the 1st respondent uprooted the live boundary that demarcated the suit property and 516 and fenced off a public access road that led to the suit property.

3. He averred that on diverse dates of 27/12/2013 and 15/11/2014, the 1st respondent trespassed on the suit property and cut off existing vegetation in order to create a car park.

4. The appellant sought *inter alia*, permanent injunction against the 1st respondent or any other person acting on his behalf from blocking or fencing off the public access road or from trespassing on the appellant's portion of the suit property and 3315; reinstatement of the existing public road; general damages for trespass against the 1st respondent; general damages against the 2nd , 3rd, and 4th respondents for not ascertaining the boundary of the suit property and/or issuing a mutation form in respect of the suit property and/or illegally excising the suit property; the 2nd respondent do reinstate the suit property in its original state by amalgamating 3315 to it.

5. The 1st respondent filed a defence dated 16/05/2016. He denied the averments made in the plaint and contended that 3315 was registered in the name of one Naftali Achieng and that he legally purchased 516 from Oluoch Nyunja. The 2nd, 3rd and 4th respondents filed a defence dated 15/10/2015 in which they merely denied the assertions made by the appellant.

6. After the parties had testified and closed their respective cases, the Trial Magistrate in his judgment framed 3 issues for determination;

   (i) whether the suit property was previously 9 acres

   (ii) whether the respondents conspired to increase the acreage of 516

   (iii) whether the 1st respondent blocked the access road to the suit property and, (iv) whether the 1st respondent had trespassed on the suit property.

7. On the 1st issue, the Trial Magistrate found in the negative after he reasoned that the appellant never ascertained the acreage of the suit property. On the 2nd issue the Trial Magistrate found the appellant had not proved his case and stated that he could not make adverse orders against Naftali Achieng who had never been made a party. On the 3rd issue, he found in the affirmative and ordered the access road that had been created by the 1st respondent be deemed as the new public access road and for the Registry Index Map (RIM) to be amended. On the 4th and last issue, he found that the appellant did not produce documents in support of his case but merely urged the court look at them and found the appellant did not prove his claim of trespass.

Appeal to this court

8. Being dissatisfied with the judgment of the Trial Magistrate, the appellant raised 5 grounds in his memorandum of appeal dated 23/12/2021. Having scrutinised the grounds together with the appellant's submissions, I have condensed them into the following 3 grounds;

   a) The Trial Magistrate erred in law and fact in finding that the appellant had not proved trespass against the 1st respondent,

   b) The Trial Magistrate erred in law and fact in failing to find that the suit property was initially 9 acres, and;

   c) The Trial Magistrate erred in law and fact in failing to consider that the act of the 1st respondent of blocking the public access road infringed on the appellant's right to own and enjoy property.

9. The appellant sought the following reliefs; the appeal be allowed with costs; the lower court judgment be set aside and be substituted with judgment as sought in the plaint.

Parties written submissions

10. As directed by the court, the appellant's Counsel Mr.Sala disposed of the appeal by way of written submissions dated 18/07/2022.He framed 3 issues for determination;

    (i) whether the 1st to 3rd respondents infringed on the appellant's right to exclusive and peaceful enjoyment of his land

    (ii) whether there were any irregularities at the point of adjudication and,

    (iii) whether the respondents owed the appellant a legitimate expectation.

11. On the 1st issue, Counsel submitted that the 1st respondent trespassed on the suit property and 3315 by digging a water reservoir on them and blocking an access road. These actions were a violation of his rights under article 40 of the *Constitution* of Kenya. Counsel contended that the Trial Magistrate failed to find that his rights had been infringed upon. Counsel placed reliance on several authorities including *Wreck Motors Enterprises v the Commissioner of Lands and others* Nairobi Civil Appeal Number 71 of 1997 (unreported) and *Joseph N K Arap Ng'ok v Justice Moijo ole Keiuwa & others* Nairobi Civil Application number NAI 60 of 1997 (unreported).

12. On the 2nd issue, Counsel submitted that fraudulent actions were committed on the suit property by the 1st to 3rd respondents by hiving of portions of it. Counsel submitted that pursuant to the provisions of section 80 of the *Land Registration ACT*, the register ought to be rectified by restoring the suit property to its original size.

13. On the 3rd issue, Counsel submitted that the 2nd to 4th respondents owed the appellant legitimate expectation to ensure that upon adjudication, his entire parcel of land would be registered in his name. He placed reliance on the Supreme Court of Kenya decision of *Communications Commission of Kenya v Royal Media Services & 5 Others* where the court expressed itself thus;

    > "Legitimate expectation would arise when a body, by representation...has aroused an expectation that is within its power to fulfil"

14. The 1st respondent's Counsel Mr. Kouko filed his written submissions dated 25/07/2022.Counsel identified several issues for determination

    (i) whether the appellant was in breach of order 9 rule 9 of the *Civil Procedure Rules*

    (ii) whether the 1st respondent unlawfully trespassed on the suit property

    (iii) whether the court could make adverse orders over 3315

    (iv) whether the suit property was originally 9 acres and whether 516 and 3315 were originally part of it and had fraudulently been hived out of it and

    (v) whether the appellant had suffered loss and entitled to damages.

15. On the 1st issue, Counsel submitted that the appeal was improperly before this court because the appellant's Counsel had not sought leave to be placed on record post judgement and therefore, the appellant was in breach of order 9 rule 9 of the *Civil Procedure Rules*. Counsel relied on the case of *Monica Moraa v Kenindia Assurance Co.Ltd* [2010] eKLR.

16. On the 2nd issue Counsel contended that the appellant failed to discharge proof that the 1st respondent had encroached or trespassed on the suit property. He relied on the Court of Appeal decision of

Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau [2016] eKLR where the court stated thus;

> " In *Karugi & Another v Kabiya & 3 Others* [1987] KLR 347, this Court held that the burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof."

17. On the 3rd issue, Counsel submitted that the Trial Magistrate could not issue adverse orders against the registered owner of 3315 for two reasons; he was not made a party to the suit and allegedly according to the appellant, he was non-existent. To buttress his position Counsel relied on the case of *Joseph Karua Ngareh v Mary Gathoni Kihara & 2 others* [2018] eKLR which cited the Court of Appeal decision of *Pashito Holdings Limited & Another v Paul Ndungu & 2 OTHERS* [1197] eKLR where the Court stated: -

> " The learned Judge should have directed that the Commissioner was a proper party without whom the relief sought against the Commissioner could not be granted. The rule of "audi alteram partem", which literally means hear the other side, is a rule of natural justice".

18. On the 4th issue, Counsel submitted that the appellant did not prove fraud to the required standard. Counsel placed reliance on the case of *Benson Wandera Okuku v Israel Were Wakho* [2020] eKLR. On the last issue, Counsel contended that the appellant having not established trespass, was not entitled to damages.

Analysis and determination

19. As rightfully submitted by appellant's Counsel, the role of a first appellate is to re-evaluate, re-assess and re-analyze the record and then determine whether the conclusions reached by the Trial Magistrate stood or not and give reasons either way. See 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.

20. Having considered the lower court record and rival submissions, I will render my determination on the 3 condensed grounds of appeal. But before I do that, I have to address one issue that the 1st respondent had raised; whether the appellant was properly represented.

21. It is my considered view and as has been held in various court decisions and rightly posited by the 1st respondent's Counsel, the intent of Order 9 Rule 9 and 10 of the Civil Procedure Rules was to cure the mischief of litigants sacking their advocates at the execution stage or at the point of filing their bill of costs thus denying their advocates their hard-earned fees. However, this court did not hear and determine the suit.

22. However, the scenario is different in the instant case, this court is sitting as an appellate court. Does one need to seek leave in such circumstances? Bearing in mind the provisions of Section 1A of the Civil Procedure Act and Section 3 of the Environment and Land Court Act that courts have to ensure that cases are conducted in a manner that are just and expeditious, it is my view that Order 9 Rule 9 and 10 of the Civil Procedure Rules do not apply in instances of an appeal because the advocate's instructions in a lower court were exhausted at the conclusion of a case and requiring such leave would be tantamount to denying such an appellant a right to representation of his choice at an appellate stage thus negating the intent of just and expeditious disposal of a dispute. See the Court of Appeal decision of Tobias M. Wafubwa v Ben Butali [2017] eKLR where the court held;

... Parties should therefore have the right to choose whether to remain with the same counselor to engage other counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate".

It is my finding that the firm of Sala & Mudany Advocates are properly on record for the appellant.I will now proceed to address the 3 grounds of appeal in a sequential manner.

a) The Trial Magistrate erred in law and fact in finding that the appellant had not proved trespass against the 1st respondent

23. It is trite that he who alleges must prove. Section 107 of the Evidence ACT states as follows:

> "(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person".

24. From the plaint, the appellant contended that the 1st respondent trespassed on the suit property in several instances; in mid-June 2011, he uprooted a fence and, sometimes in December 2013 and 15/11/2014, he cleared vegetation and put up a car park on it. This was denied by the 1st respondent.

25. From the record, the Trial Magistrate rightly reasoned that the spillage of water from the water reservoir that was on 3315 was never pleaded and that the appellant did not produce any documents in support of his case.

26. In my considered view, the Trial Magistrate rightfully stated that the duty to tender evidence showing that trespass allegedly took place lay with the appellant; which he did not. I am not satisfied that the appellant proved his case on this ground and I place reliance on the case of CMC Aviation Ltd v. Crusair Ltd (No1) [1987] KLR 103 which was cited by the Court of Appeal decision of Dellian Langata Limited v Symon Thuo Muhia,Mary Njoki Thuo, Agricultural Finance Corporation, Nairobi City Council & Council of Legal Education [2018] eKLR where the court expressed itself thus;

> " The pleadings contain the averments of the three parties concerned. Until they are proved or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded on them. Proof is the foundation of evidence".
>
> It is my finding that that the Trial Magistrate did not err and this ground fails.

b) The Trial Magistrate erred in law and fact in failing to find that the suit property was initially 9 acres.

27. Within the provisions of Order 2 Rule 10(1) of the Civil Procedure Rules and settled law, fraud must be pleaded, particularized and proved to a standard higher than on a balance of probabilities. See Vijay Morjaria v Nansingh Madhusingh Darbar& another [2000] eKLR (Civil Appeal No. 106 of 2000). The appellant never particularized fraud in his pleadings.

28. Though the appellant testified that the land adjudication and settlement officer erred in creating 3315 out of the suit property and further hiving off a portion of it and amalgamating it with 516. He never joined the adjudication officer in the proceedings. In cross examination he testified that he did not have documents to prove that the suit property was originally 9 acres. The person who allegedly sold it to the appellant testified that at adjudication, the suit property was 9 acres. During cross examination, he

testified that he never raised an objection during adjudication and further, he did not have a map to verify his assertions that the suit property was originally 9 acres.

29. The surveyor who testified after a site visit, testified that the registered boundaries of the suit property, 516 and 3315 were respectively 0.95, 1.72 and 0.88 hectares respectively. His report was produced in court and adopted by the appellant. The land registrar during cross examination testified that the suit property was never subdivided.

30. I agree with the findings of the Trial Magistrate and the 1st respondent's submissions, that the appellant did not prove his case on this ground. The greencards of the suit property, 516 and 3315 that were produced by the land registrar were taken by the Trial Magistrate as prima facie evidence as to ownership and acreage of the properties as per Section 26 of the Land Registration ACT. In the absence of contrary documents from the office of the land adjudication and settlement officer, the Trial Magistrate had no basis to arrive at a contrary finding. The appellant fails on this ground. I find the Trial Magistrate did not err.

c) The Trial Magistrate erred in law and fact in finding that the appellant had not proved trespass against the 1st respondent

31. The Public Roads and Roads of Access ACT defines a public road as follows;.

> " 2.....
>
> "public road" means—
>
> (a)any road which the public had a right to use immediately before the commencement of this Act;
>
> (b)all proclaimed or reserved roads and thoroughfares being or existing on any land sold or leased or otherwise held under the East Africa Land Regulations, 1897, the Crown Lands Act, 1902, or the Government Lands Act (Cap. 280), at any time before the commencement of this Act;
>
> (c)all roads and thoroughfares hereafter reserved for public use;"

32. A public road is set apart and designated as such and can be utilized by the public without restriction unless such is imposed legally by a relevant government authority. The Court of Appeal when rendering its judgment in Dellian Langata Limited v Symon Thuo Muhia (Supra) found as follows;

> " We therefore find no fault with the trial court's finding that the closure of LR 3591/3/R and/or LR 3591/39 was unlawful and that the appellant has no claim on the said property as it is a public road of access"

33. It was indisputable that the 1st respondent had blocked the public access road and created a private access road in 516. Despite the Trial Magistrate finding that the 1st respondent had blocked the public access road, he went ahead and ordered for an amendment of the RIM so as to deem the newly created road a legally recognised access road. This was erroneous.

34. I agree with the appellant's submissions that contrary to the provisions of article 40 (2)(b) of the *Constitution* of Kenya, the 1st respondent impeded the appellant's right to enjoy the suit property. Further, even if the 1st respondent wanted to create an access road on 516, he had to register it as an access road in accordance with the procedure set out in section 9 of the Public Roads and Roads of Access ACT. It is my finding that the Trial Magistrate erred in ordering for an amendment of the RIM.

I also find he erred in not finding the 1st respondent's acts were unlawful. The appellant succeeds on this ground.

35. Based on the reasons given, the upshot is I hereby affirm and uphold the judgment of the Trial Magistrate. However, I hereby vary the said judgment and set aside its order that the RIM of the suit property and that of 516 be amended and for the new access road that was in 516 be deemed legal and, in its place, I substitute it with a finding that the 1st respondent's actions of blocking the public access road was unlawful. The appeal partially succeeds and because it is trite law that costs follow the event (See Section 27 of the Civil Procedure ACT), I award one half of the costs of this appeal to the appellant. I will not disturb the award of costs by the Trial Magistrate. I allow the appeal on the following disposal terms;

    a) That an order of permanent injunction shall issue, restraining the 1st respondent, his agents, servants or any person acting on his behalf from blocking or ever blocking and/or fencing off the existing public access road that grants access to Land Parcels Numbers Siaya/Usigu/517 and Siaya/Usigu/516.

    b) That upon service of these orders, the 1st respondent shall within 60 days remove all impediments including fences and shall therefore reopen the said road and keep it open.

    c) The appellant shall have one half of the costs of this appeal.

It is so ordered

DELIVERED AND DATED AT SIAYA THIS 3RD DAY OF NOVEMBER 2022.

HON. A. Y. KOROSS

JUDGE

3/11/2022

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform:

In the Presence of:

Mr. Sala for the appellant

Mr. Kouko for the 1st respondent

N/A for the 2nd, 3rd & 4th respondent

Court assistant: Ishmael Orwa