REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC APPEAL NO. 93 OF 2016

THOMAS OGUTTA ONGORI ....APPELLANT

VERSUS

MUHIDINI HILOWE WAHILIYE..1ST RESPONDENT

NAIROBI CITY COUNTY ....2ND RESPONDENT

(Being an appeal from the judgement of C. Obulutsa(Mr) Ag Chief Magistrate delivered on 14/4/2014 in the Chief Magistrate Court at Milimani Commercial Court Civil Suit No.2774 of 2008).

JUDGEMENT

1. The appellant is the allottee of plot No.234 Kimathi Estate Riverbank in Nairobi. The 1st Respondent is owner of plot No.233 Kimathi Estate Riverbank in Nairobi. The appellant was the original allottee whereas the 1st respondent purchased his plot from a previous allottee. Both plots were allotted by Nairobi City Council which is the predecessor of the 2nd Respondent.

2. Sometime in 2008, the appellant claimed that the 1st respondent had trespassed on to his plot No.234 and started constructing permanent structures on it claiming that it was plot No.233. The appellant asked the 1st respondent to cease the trespass but the 1st respondent could not heed the request. This is what forced the appellant to file a suit in the lower court where he sought for a permanent injunction and general damages for trespass. The suit was fully heard and the same was dismissed vide a judgement delivered on 14/4/2004.

3. The appellant preferred an appeal to this court in which he raised the following grounds of appeal.

> ***1) The Honourable Magistrate erred in fact and in law in holding that, the plaintiff had not proved his case disregarding the evidence adduced by both the plaintiff and some of the defendant's witnesses to the contrary.***
>
> ***2) The Honourable magistrate erred in fact and law in holding that the defendant was the rightful owner of the suit property when it was apparent from the records the Respondent produced that the same were forgeries.***
>
> ***3) The Honourable Magistrate erred in fact and law in holding that, when all evidence showed that, the 1st respondent's plot was at a different place other than where he had encroached.***
>
> ***4) The trial magistrate erred in law and fact by failing to find that the 1st defendant had not proved his case and dismiss the same with costs.***
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> ***5) The trial magistrate erred in law and fact by failing to make a finding despite overwhelming evidence that the plaintiff's case on a balance of probability must succeed.***
>
> ***6) The trial magistrate erred in law and fact by relying on extraneous matters in arriving at his judgement.***
>
> ***7) The trial magistrate erred in law and fact by introducing extraneous and unpleaded matters in his judgement.***
>
> ***8) The trial magistrate erred in law and fact by failing to analyse the law and fact misdirecting himself on the facts and the law and arriving at an erroneous judgement.***

9) The trial magistrate erred in law by failing to analyse the authorities submitted by the appellant and misdirected himself on the law relating to ownership of property.

10) The trial magistrate erred in law and fact by disregarding the evidence of 2nd defendant's surveyor one WILSON MWANGI who answered the question that had been posed by the 1st defendant and which question was poised to solve the question at hand.

11) The trial magistrate erred in law and fact by allowing and relying on documents that were introduced later in the matter and that, which had been objected to by the appellant.

12) The trial magistrate erred in law and fact by not appreciating the fact that evidence was manufactured in the cause of trial in favour of the 1st respondent.

13) The trial magistrate erred in law and fact by failing to consider the ably prepared submissions by the appellant which even elisted a reply by the respondents.

4. The Court directed parties to file written submissions. The appellant filed his submissions on 13/5/2019. The 1st respondent filed his submissions on 26/6/2019. I have gone through the submissions as well as the record of appeal. The contention before the lower court was whether on the ground, plot No.234 was in the position of plot No.233. There was no dispute as to who owned plot 233 or plot 234.

5. The task of the first appellate court was clearly summarised by the Court of Appeal in the case of **Susan Munyi Versus Keshar Shiani (2013)eKLR as follows:-**

"As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.

In undertaking this task, however, we always bear in mind that unlike the trial court which had the advantage of hearing and observing the witnesses, we make our conclusions from the evidence as captured in the cold letter of the record. We therefore operate under a decided handicap as there is much to be gleaned from the demeanor and nuanced communication of a live witness that is inevitably unavailable, indeed lost, on the record. For precisely this common sense reason, an appeal court must accord due respect to the factual findings of the trial court and will be circumspect and slow to disturb them".

The general rule is that an appellate court will not interfere with a finding of fact made by a trial court unless the court is satisfied that the finding of the trial court is plainly wrong and this has been enunciated in a long line of authorities. In **MAKUBE Vs. NYAMIRO [1983] KLR 403**, the court stated that;

" … a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."

In **KIRUGA Vs. KIRUGA & ANOTHER [1988] eKLR** the court reiterated the principles above. Apaloo JA outlined the following (page 22);

"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. In the oft-cited case of Peters vs. Sunday Post [1958] EA 424, this Court accepted the principle laid down by the House of Lords in Watt vs. Thomas [1947] 1 All ER 582".

The principle referred to was the one expressed by Sir O'Connor in the **Sunday Post** case thus;

"An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon the evidence should stand but this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion."

In **OGOT Vs. MURITHI [1985] KLR 359**, Nyarangi JA also cautioned that in discharging its duties on appeal, an appellate court ought to be mindful that the trial court enjoyed an advantage; it saw the witnesses and was in a better position to assess the significance of the evidence. In that case, it was held that;

"The Court of Appeal in considering evidence should be mindful of the advantage enjoyed by the trial judge who saw and heard the witnesses and that the judge was in a better position to assess the significance of what was said and equally important what was not said."

6. The trial Court wrote a three page judgement but the appellant raised 13 grounds of appeal which can conveniently be reduced to one ground namely; whether the trial magistrate correctly analysed the evidence before reaching the conclusion which he arrived at. I have gone through the record and the judgement of the trial Magistrate. Besides hearing the witness, the trial Magistrate visited the site.

7. The trial Magistrate had the approved Part Development Plan (PDP) of the area which PDP was obtained from the 2nd respondent after

notice to produce had been served upon the 2nd respondent. The trial magistrate compared this PDP with what the appellant had produced. The appellant had produced a photocopy of a document which was neither signed nor authenticated. This document did not tally with the beacon certificate which the appellant produced.

8. When the trial magistrate visited the ground, he observed that plot 233 was the one next to open storm water drainage. This tallied with what was on the approved PDP . Even if there may have been amendments to the PDP of 1999, there was no evidence produced by the appellant to show that this was the case.

9. The beacon certificate produced by the appellant showed that plot 233 is to the left of plot 234 and is next to plot 236 which is to the right side. This is not disputed by the survey map which the appellant produced which shows that plot 234 is in between plot 38 to the left and plot 236 to the right. The approved DPD of 1999 shows that plot 234 is next to plot 233 to the left side. Plot 233 is the one next to the open storm water drainage. This is what the trial magistrate found when he went to the ground. There was no evidence of forgery of documents as alleged by the appellant. The trial magistrate considered the appellants submissions and distinguished the authorities which were relied on by the appellant. The trial magistrate did not rely on any extraneous materials or un-pleaded facts as alleged.

10. There is no basis upon which the court can interfere with the findings of fact by the trial Magistrate. I therefore find no merit in this appeal which is dismissed in its entirety with costs to the respondents.

Dated, Signed and ***delivered*** at ***Nairobi*** on this ***3rd*** day of ***October, 2019.***

E.O.OBAGA

JUDGE

In the presence of :-

M/s Mengesa for M/s Makori for appellant.

Mr Abdi Aziz for Mr. Kinyanjui for respondent.