



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL NO. 81 OF 2015

JOHN MAINA KAMWERE.....APPELLANT

-VERSUS-

NJOKI MWANGI.....RESPONDENT

JUDGMENT

The appellant filed a suit against the respondent and others who have not been joined in this appeal in the Chief Magistrate's Court at Milimani in CMCC No. 2642 of 2008 (hereinafter referred to as "the lower court") through a plaint dated 5th May, 2008 that was amended on 4th June, 2008. In the amended plaint, the appellant averred that he was at all material times the owner of Plot No. 105 Komarock Jua Kali Residential Cum Commercial Plots Phase I situated within Dandora Estate Nairobi (hereinafter referred to as "Plot No. 105").

The appellant averred that in April, 2008 the respondent entered Plot No. 105 and started making preparations to commence construction of a building thereon. The appellant averred that the respondent's entry on Plot No. 105 was illegal and was meant to deprive him of the said property. The appellant sought a permanent injunction to restrain the respondent from constructing on or interfering with Plot No. 105. The appellant also sought orders compelling the respondent to remove any materials she had placed on the suit property. There was also a claim for general damages.

The appellant's suit in the lower court was defended by the respondent. The respondent filed a statement of defence on 22nd May, 2012 in which she denied the appellant's claim in its entirety. The respondent averred that she was the owner of Plot No. 60 Komarock Jua Kali (hereinafter referred to as "Plot No. 60"). The respondent averred that the said plot that she had occupied since 2001 was not on the same location as Plot No. 105 owned by the plaintiff. The respondent averred that Plot No. 105 was not the same as Plot No. 60 that she had developed extensively. The respondent accused the appellant of trying to unjustly enrich himself out of her sweat. The respondent denied that she had trespassed on Plot No. 105 and termed the appellant's suit incompetent and an abuse of the court process. The appellant filed a reply to defence on 28th May, 2012 in which he admitted that Plot No. 105 and Plot No. 60 were not on the same location. The appellant contended however that the construction that was being carried out by the respondent was on Plot No. 105 and not on Plot No. 60 owned by the respondent. The appellant averred that the respondent was occupying Plot No. 105 and not Plot No. 60 and denied that he was out to unjustly enrich himself.

Together with the plaint, the appellant filed an application for a temporary injunction to restrain the respondent from continuing with construction on Plot No. 105. On 7th October, 2008, the lower court issued an order of injunction restraining the respondent from constructing on or interfering in any way whatsoever with Plot No. 105 pending the hearing and determination of the lower court suit.

At the trial, the appellant gave evidence and called three (3) witnesses. The respondent also gave evidence and called one (1) witness. The appellant told the court how he acquired Plot No. 105 from the City Council of Nairobi. He produced in evidence among others copies of, a letter of allotment dated 21st September, 2001; beacon certificate dated 7th March, 2008; a letter from the City Council of Nairobi dated 9th March, 2011 confirming that Plot No. 105 was developed with a single storey building while Plot No. 60 was not developed and, a report by West Survey Consult on the physical location of Plot No. 105 and Plot No. 60. The appellant told the court that the respondent had trespassed on Plot No. 105 and constructed a building thereon. He stated that the respondent continued with construction of the said building even after the court issued an order of interim injunction stopping the same. The respondent produced in evidence photographs which he took as the construction progressed on Plot No. 105. The appellant stated that the respondent refused to remove the structures she had put up on Plot No. 105 even after being asked to do so through an enforcement notice from the City Council of Nairobi.

The appellant's first witness was Richard Maina (PW2). PW2 was a surveyor with West Survey Consult that was engaged by the appellant to survey and point out the physical location of Plot No. 60 and Plot No. 105 at Komarock Bridge. He told the court that he obtained a plan from Dandora and went to the site after which he prepared a report. He stated that Plot No. 105 was under construction while Plot No. 60 was undeveloped. He stated that his terms of reference were to point out the location of Plot No. 105 and Plot No. 60 which he did using the said map.

The appellant's next witness was Jane Ndonga (PW3). PW3 was the acting Director of Housing Development Department at the City

Council of Nairobi. PW3 was shown the beacon certificate for Plot No. 105. She was also shown the beacon certificate dated 16th September, 2008 for Plot No. 60 and a survey map that were attached to the respondent's affidavit in support of her application dated 30th January, 2012 (see pages 87 and 88 of the record of appeal). PW3 told the court that in the survey map that was attached to the respondent's affidavit, Plot No. 105 and Plot No. 60 were swapped. PW3 confirmed that the plot that was developed was Plot No. 105 and that the survey map on the basis of which the respondent's beacon certificate for Plot No. 60 was issued did not originate from the City Council of Nairobi.

The last witness for the appellant was Mathew Mwangi (PW3)(sic). Mr. Mwangi was a former chairman of Komarock Bridge Jua Kali Traders Association whose members were allocated land by the City Council of Nairobi next to Komarock Bridge in the same area where Plot No. 105 and Plot No. 60 are situated. He told the court that the appellant was a member of his association and that he was allocated Plot 105. He told the court that Plot No. 60 was allocated to one, Joseph Kamau Murugi. He told the court that there was a court case in the High Court in which a list of members of the said association was given together with a survey map that was used to allocate land to them.

In her evidence, the respondent told the court that she was allocated Plot No. 60. She stated that she was shown the plot by a surveyor by the name Mr. Owaga who also issued her with a beacon certificate. She stated that she prepared a building plan that was approved by the City Council of Nairobi before she commenced construction of a building on the plot. She stated that she finished construction and let the building to tenants. She denied that she had trespassed on the plaintiff's plot. She produced as exhibits among others, copies of her letter of allotment, beacon certificate and building plans. She denied that she had been asked to demolish the building she had put up on Plot No. 60.

The respondent's witness was Joel Mwangi (DW2). DW2 told the court that he was involved in the allocation of plots in Komarock Bridge Jua Kali. He stated that the respondent was known to him and that she was allocated the plot where she had put up a building. He stated that the respondent was allocated Plot No. 60 and that Komarock Jua Kali is in Dandora Phase I.

After the evidence of DW2, the respondent's advocate made an application to be allowed to call additional witness to produce a map. The application was opposed by the appellant and the court made a ruling on 30th September, 2014 declining the request. The parties were thereafter directed to make closing submissions in writing. The appellant filed his submissions in the lower court on 8th December, 2014 while the respondent filed her submissions on 15th December, 2014.

The lower court framed the issues that were before it for determination as follows:

- (a) Whether the appellant was the owner of Plot No.105;
- (b) Whether the respondent had trespassed on the said plot and interfered with it by constructing a building thereon;
- (c) Whether the appellant was entitled to an order of injunction;
- (d) Whether the appellant was entitled to be declared as the owner of Plot No. 105; and
- (e) Whether a formal lease could be issued to the appellant.

In a judgment that was delivered on 27th January, 2015, the court dismissed the appellants claim and ordered each party to bear its own costs. Although the court did not make a specific finding on the issue of the ownership of Plot No.105, from its analysis of the parties' respective cases, the court found that there was no dispute over the ownership of the said plot. The court noted that the appellant owned Plot No. 105 while the respondent owned Plot No. 60. What the court found contentious was the physical location of Plot No. 105 and Plot No. 60. The determination of this question was important because the court's finding on the issue would in turn determine the issue as to whether or not the respondent had trespassed on Plot No. 105. In determining the issue, the court found that the beacon certificates that had been produced by the parties were crucial. The court noted that the appellant's beacon certificate that was issued on 7th March, 2008 with a serial number 2472 and the respondent's beacon certificate that was issued on 4th June, 2006 with a serial number 2233 showed that both Plot No. 105 and Plot No. 60 bordered Plot No. 102 to the East and Plot No. 130 to the West. The court also noted that whereas the beacons for Plot No. 105 were pointed out to the appellant by a surveyor by the name Wohoro Githinji, the beacons for Plot No. 60 were pointed out to the respondent by a different surveyor by the name, Francis Owaga. The court observed that it was necessary for the said surveyors to give evidence and explain how the two plots could be on the same location on the ground. The court noted that Wohoro Githinji who prepared the appellant's beacon certificate was a private surveyor while Francis Owaga was a surveyor working with the City Council of Nairobi. The court also noted that Mr. Owaga died before he could testify and that the survey map he used to prepare the beacon certificate for the respondent was contested. The lower court found that the appellant's beacon certificate for Plot No. 105 was prepared 2 years after the respondent's beacon certificate. The court observed that the Chief Surveyor for the City Council of Nairobi who signed both beacon certificates should have noted that the certificates related to the same parcel of land on the ground. The court also observed that only the officials of the City Council of Nairobi could resolve the riddle as to which of the two beacon certificates represented the true picture on the ground. With the City Council of Nairobi's failure to tender evidence in their defence, the court found itself poorer in material evidence that could assist in determining the location of the two parcels of land. In conclusion, the court held that the appellant who had the burden of proving his case on a balance of probabilities had failed to do so and dismissed the case.

It is against this judgment that the appellant has preferred this appeal. The appellant has challenged the lower court's decision on the following grounds:

- 1. That the Learned Magistrate erred in law and in fact in including the issue of whether the appellant was the owner of Plot No. 105 among the issues for determination when this was not an issue in the pleadings and the evidence adduced in court.**
- 2. That the Learned Magistrate erred in law and in fact in failing to appreciate that the only issue for determination was whether the plot on which the respondent had constructed a building was Plot No. 105 belonging to the appellant or Plot No.**

60 which she owned.

3. That the Learned Magistrate erred in law and in fact in ignoring the evidence of PW2, Richard Maina, a private Surveyor who produced his report and testified that he had visited the site after obtaining a map of the area from the Housing Development Department at Dandora and noted that the construction was on Plot No. 105 and that Plot No. 60 was undeveloped.

4. That the Learned Magistrate erred in law and in fact in ignoring the evidence of PW3, Jane Ndonga, a Director at the City Council, who testified that the building was on Plot No. 105 and that the Plot No. 60 was undeveloped and produced a letter dated 9th March, 2011 that she had written to the D.C.I.O Buruburu confirming this fact among others.

5. That the Learned Magistrate erred in not appreciating the relevance of the map of the area prepared by the Housing Development Department which was produced by both PW2 and PW4 and the evidence by PW2 and PW3 that Plot No. 105 and Plot No. 60 had been swapped in the map produced by the respondent as well as PW3's evidence that the latter map did not originate from the City Council.

6. That the Learned Magistrate erred in law and in fact in holding that what was important were the beacon certificates and going to great length to analyse the same when ownership of the two plots was not in issue and in stating that the evidence of those named in the said beacon certificates, would have been invaluable in resolving the riddle as to which of the two beacons certificates represented the true picture on the ground.

7. That the Learned Magistrate erred in law in giving undue consideration to Mr. Owaga's statement when he never testified during the hearing.

8. That the Learned Magistrate erred in questioning the stand taken by counsel for the appellant in objecting to the production of the map by the respondent in evidence when the same was the subject of a ruling by him in which he agreed with the said counsel and declined the request saying that it was not appropriate and would prejudice the appellant.

9. That the Learned Magistrate erred in law and in fact in his appraisal and assessment of the evidence on record thus arriving at an erroneous conclusion that the appellant had failed to prove his case on a balance of probability.

The appeal was argued by way of written submissions. The appellant filed his submissions on 30th August, 2017 while the respondent filed her submissions on 13th November, 2017. I have perused the lower court record and the judgment appealed from. I have considered the grounds of appeal and the submissions of counsel. This being a first appeal, the court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions although it has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified in the lower court. See, the case of Verani t/a Kisumu Beach Resortv. Phoenix of East Africa Assurance Co. Ltd [2004] 2 KLR 269 on the duty of the first appellate court.

It is also settled, that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they were not based on evidence at all, or on misapprehension of the evidence or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, Peter v. Sunday Post Ltd. [1958] E.A 424 and Makubev. Nyamuro [1983] KLR 403.

It is on the foregoing principles that this appeal falls for consideration. I will consider the grounds of appeal put forward by the appellant in the same manner in which the parties argued the same in their submissions. I will consider ground 1 alone, grounds 2, 3, 4, 5 and 6 together and grounds 7, 8 and 9 separately.

Ground 1 of appeal:

I am in agreement with the respondent's submission that the ownership of Plot No. 105 was not an issue for determination by the lower court. There was consensus that Plot No. 105 was owned by the appellant while Plot No. 60 was owned by the respondent. The court did not make any finding to the contrary. In the circumstances, I find no merit on this ground of appeal.

Grounds 2, 3, 4, 5 and 6 of appeal:

In my view, the main issue that the lower court was called upon to determine was whether the respondent was constructing or had constructed a house on her Plot No. 60 or on the appellant's Plot No. 105. I am in agreement with the lower court that the onus was upon the appellant to prove that the respondent was occupying Plot No. 105 instead of Plot No. 60. The lower court found that there was no sufficient evidence adduced by the appellant showing that the respondent was on Plot No. 60. In my own assessment of the evidence that was before the lower court, it is my finding that the appellant placed before the court sufficient evidence in proof of the fact that the respondent was in occupation of Plot No. 105. The starting point is the beacon certificates. Whereas the appellant produced before the court only one beacon certificate (See page 321 of the record of appeal) showing the location of Plot No. 105, the respondent had two (2) beacon certificates issued by two (2) different surveyors (see pages 87 and 150 of the record of appeal). The beacon certificate that the respondent produced in court first was issued by one, Samuel Omondi and the same is dated 16th September, 2008. This beacon certificate shows that the plot that was allocated to the respondent was Plot No. 60, Komarock Bridge Jua Kali cum Commercial Plot, **Dandora Phase 1**. The beacon certificate that the respondent produced during the trial was dated 14th June, 2006 and the same was issued by Francis Owaga. According to this beacon certificate, the respondent was allocated Plot No. 60, Komarock Bridge, **Kariobangi South Estate**. There was no explanation given as to why the respondent had two (2) beacon certificates issued for the same property at different times. I have carefully analysed the original copy of the beacon certificate dated 14th June, 2006 that was produced by the respondent in evidence at the trial. It is obvious to the naked eye that the Plot number that was between Plot No. 130 and Plot No. 102 was erased and Plot No. 60 inserted in place thereof.

The beacon certificates that were produced by the appellant and the respondent in the lower court were backed by survey maps. The appellant produced a survey map that was attached to a survey report (P.Exh. 13) (See page 340 of the record of appeal). The appellant's survey map shows the location of Plot No. 105 and Plot No. 60. The two plots are shown to be some distance from each other. Plot No. 105 is shown to be between Plot No. 102 and Plot No. 130 in accordance with the beacon certificate that was issued to the appellant while Plot No. 60 is shown to be between Plot No. 69 and Plot No. 189 contrary to the beacon certificate that was issued to the respondent which puts Plot No. 60 in the same position as Plot No. 105. This survey map is dated and signed. The survey map that was placed before the court by the respondent is at page 88 of the record of appeal. In this survey map, the location of Plot No. 105 and Plot No. 60 are swapped. It is on the basis of this survey map that the respondent is said to have been issued with a beacon certificate. The survey map is neither dated nor signed. There is no indication as to who prepared it. The map was disowned by PW3 who was the acting director of Housing Development Department at the City Council of Nairobi.

In addition to the discrepancies on the survey map that was produced by the respondent, the appellant led evidence showing that the plot on which the respondent had constructed a house was Plot No. 105 and not Plot No. 60. Apart from his testimony, PW2 who was a surveyor testified how he went to the site of Plot No. 105 and Plot No. 60 and identified the same on the ground. The survey map that he used to locate the two parcels of land was obtained by him from the City Council of Nairobi's office at Dandora. This witness gave a detailed report on the location of Plot No. 105 and Plot No. 60. He concluded that the plot that was developed by the respondent was Plot No. 105 belonging to the appellant and not Plot No. 60. The report by PW2 was not challenged in any material respect. PW3 also confirmed that the plot on which the respondent had put up a building was Plot No. 105 and not Plot No. 60. She stated that in the survey map which the respondent had relied on as a basis for her beacon certificate, Plot No. 105 and Plot No. 60 had been swapped. The evidence of PW3 was not shaken in cross-examination. I am in agreement with the appellant's contention that the lower court ignored the evidence of PW2 and PW3.

The other material evidence which in my view was also ignored by the lower court was the evidence of the appellant's last witness, Mathew Mwangi. This witness introduced in evidence some documents that had been filed in an earlier case in the High Court in Nairobi HCCC No. 1457 of 1995 which touched on the allocation of land at Komarock Bridge. The documents were attached to the further affidavit of George Muthuo Mwangi (See page 213 of the record of appeal). George Muthuo Mwangi was the Chairman of Komarock Bridge Jua Kali Traders Association whose members were allocated land at Komarock Bridge. In that affidavit, he had annexed a survey map on the basis of which land in the area was allocated to the members of his association. This survey map is the same map that was produced by the appellant in evidence through PW2. According to the survey map that was produced in the High Court before the lower court case was filed, the location of Plot No. 105 and Plot No. 60 are shown to be in accordance with the beacon certificate that was issued to the appellant. Arising from the foregoing, I am of the view that the appellant had placed overwhelming evidence before the lower court showing that the parcel of land that was occupied by the respondent was Plot No. 105. The finding by the lower court that the respondent had occupied the plot on which she had constructed the house from 1996 was not supported by evidence. The photographs that were produced by the appellant in evidence (see pages 65 to page 70 of the record of appeal) show that the appellant came to court when the respondent started construction on his land in 2008. The photographs that were produced in evidence as P. Exh. 9 were not challenged by the respondent. In any event, even if the respondent had occupied the parcel of land on which she constructed the house in question since 1996 that was not a proof that the said parcel of land was Plot No. 60. I am in agreement with the appellant that the lower court ignored crucial evidence that was placed before it by the appellant as a result of which it arrived at wrong decision.

Ground 7 of appeal:

I am in agreement with the appellant that the lower court gave undue consideration to what Francis Owaga was said to have done in relation to Plot No. 60. This in my view was wrong because Francis Owaga did not give evidence and as such whatever he was said to have done was hearsay on which the court could not base its decision.

Ground 8 of appeal:

In the directions which the lower court gave on 30th October, 2014, the court rejected the application by the respondent to call additional witness to produce the map which was the basis of the respondent's beacon certificate. The court gave reasons for that decision. In the judgment, the court blamed the appellant for the respondent's failure to produce the said map and suggested that the appellant may have had some bad motive for objecting to the production of the map. I am in agreement with the appellant that this negative inference had no basis since the appellant was not to blame for the respondent's failure to have the said survey map that was already before the court produced in evidence.

Ground 9 of appeal:

In view of my findings above, I am in agreement with the appellant that the lower court failed to analyse and assess properly the evidence that was placed before it and as a result arrived at a wrong decision. Its decision in my view was against the weight of evidence that was placed before it by the appellant.

Conclusion:

In conclusion, I find merit in the appeal before me. The appeal is allowed on the following terms:

1. The judgment and decree of the lower court made on 27th January, 2015 is set aside and in place thereof judgment is entered for the appellant against the respondent for:
 - (i) A permanent injunction restraining the respondent by herself, her servants or employees from constructing on or interfering with the parcel of land known as Plot No. 105 Dandora Phase I which she wrongfully claims to be Plot No. 60.
 - (ii) A mandatory injunction is granted compelling the respondent to remove all the structures she has put up on Plot No. 105

Dandora Phase I within a period of 120 days from the date hereof in default of which the appellant shall be at liberty to remove the same at her cost.

(iii) An award of Kshs.50,000/= for general damages for trespass together with interest from the date hereof until payment in full.

2. The appellant shall have the costs of the appeal and the lower court suit.

Delivered and Dated at Nairobi this 5th Day of July 2018

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

N/A for the Appellant

Mr. Wanjohi for the Respondent

Catherine Court Assistant