



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC APPEAL CASE NO. 6 OF 2020

SAMUEL OCHIENG OWITI alias SAMUEL OWITI.....APPELLANT

VERSUS

LUCY AKINYIRESPONDENT

(Being an appeal from the Judgment Hon. Thomas Obutu (SPM) delivered and dated 16th January 2020 in the original ELC No. 1 of 2017 at Homa-Bay)

RULING

1. The instant appeal was precipitated by the Judgment and subsequent decree of the trial court (Honourable Thomas Obutu, SPM) rendered on 16th January 2020 in Homa-Bay Chief Magistrate's Court land case number 1 of 2017. The court decided against the appellant, **Samuel Ochieng Owiti alias Samuel Owiti** and in favour of the respondent, **LUCY AKINYI** who was the plaintiff before the trial court. Thus, it aggrieved the appellant.
2. At the heart of the current dispute is land reference number Kanyada/Kanyango/Kalanya/4378 measuring approximately zero decimal zero seven hectares (0.07) in area. The same is contained in Registry map sheet number 1 located in Homa-Bay county.
3. The appellant who was the defendant before the trial court, is represented by the firm of G.S. Okoth and Company Advocates.
4. The respondent is represented by the firm of Rakewa Otieno and Company Advocates.
5. By a plaint dated 3rd June 2019 and duly filed in the trial court on even date, the respondent sued the appellant for the following remedies;-
 - a) An order of permanent injunction directed at the defendant and restraining the defendant, his agents, servants, employees or any of them whomsoever from trespassing upon, destroying euphorbia fence and replaced it with a barbed wire fence or in any other interfering with the plaintiff land parcel number Kanyada/Kanyango/Kalanya/4378.
 - b) An order of eviction of the defendant from the suit land Kanyada/Kanyango/Kalanya/4378 and demolition of the structure(s) erected and being therein.
 - c) Costs of this suit together with interest thereon.
 - d) Any other remedy this honourable court deem fit and just to grant in the circumstances.
6. Briefly, the respondent claimed that on or about February 2012, the appellant unlawfully entered or trespassed onto the suit land, destroyed a euphorbia fence which had been in existence since the year 1982 and replaced it with a barbed wire fence. That the appellant constructed a semi-permanent house on the suit land thus, rendered the filing of the suit unnecessary.
7. In his statement of defence dated 28th July 2015, the appellant denied the respondent's claim. He stated that there is a pending case namely Homa-Bay Chief Magistrate's court Civil case number 82 of 2014 over the same subject matter.
8. The appellant therefore, sought to have the entire suit struck out on the grounds as follows;-
 - a) The suit offends the mandatory provisions of Section 13 of the Environment and Land Court Act, 2011.

b) The court lacks jurisdiction to hear and determine the suit.

c) The suit is hopelessly misconceived.

9. Upon hearing the suit, the learned trial Magistrate concluded that the respondent had proved her claim against the appellant on a balance of probabilities. He then granted an order of permanent injunction, eviction and costs of the suit as sought in the plaint as well as KShs. 350,000/= being compensation for trespass in favour of the respondent.

10. Being dissatisfied with the Judgment of the trial court, the appellant initiated this appeal by way of a memorandum of appeal dated 23rd January 2020 and filed in court on 3rd February 2020 on grounds 1 to 6 set out on its face which include; that the appellant was not accorded a fair hearing and that general damages awarded to the respondent was not prayed for in the plaint. Wherefore, he prayed that this Honourable Court vary the order set aside the judgment of the court and reinstate the case for trial before different court.

11. On 13th July 2020, the appeal was admitted. Hearing of the same was by way of written submissions.

12. Accordingly, the appellant's counsel filed submissions dated 31st May 2021 On 23rd June 2021 where the grounds of appeal are discussed in favour of the appellant. Counsel submitted, inter alia, that the general damages awarded by the trial court were not sought in the plaint and that the trial was a mistrial.

13. To buttress the submissions, counsel relied on Section 3 of the Environment and Land Court Act, 2015 (2011), section 62 of the Evidence Act Chapter 80 of Kenya Laws of Kenya, Orders 17 Rule 1 (1) and 18 of the Civil Procedure Rules, 2010 as well as **Caltex Oil (Kenya) Ltd-vs-Rono Ltd (2016) eKLR and Fred Kiithusi Kula and Another -vs-Housing Finance Company Ltd (2021) eKLR**, among other authorities.

14. Learned counsel for the respondent filed submissions dated 16th June 2021 on 24th June 2021. Counsel submitted that the respondent opposes the appeal and noted that record of appeal is not complete as several pages are missing and urged this court to consider the original proceedings from the trial court. That the suit was properly determined by the trial court based on the evidence including the surveyor's report (PEXhibit 4) to which the appellant did not object and did cross examine the respondent on the same.

15. Counsel also submitted inter alia, that the trial court noted that the matter has been adjourned on several occasions hence, exercised its inherent discretion to close the defence and there was no plausible reasons to grant further adjournment of the suit. That the appellant did not appear in court for hearing of his case and did not apply to set aside the orders of the court in closing his case. That the court was right in denying the defence counsel an opportunity to derail the case and that the appellant even failed to file submissions.

16. In the foregone, the grounds of appeal are compressed thus;(a) grounds 1,2 and 6; (b) grounds 3 and (c) grounds 4 and 5. Their discussion in 3-sets to proceed hereinafter accordingly.

17. As regards the first set of grounds-1,2 and 6, on 17th November 2019, counsel for the appellant sought time to obtain the surveyor's report. Further, counsel informed the court that the appellant was out of reach.

18. The respondent who was then appearing in person, did lament that she travelling from Kisumu. That the appellant had all the time to get an independent surveyor.

19. The learned trial Magistrate's marked the appellant's case closed. He remarked;

“ I see no reason as to why this matter should be adjourned for any longer. The defendant had all the time since 2017 when this matter was filed to get an independent report. The application of adjournment is refused. Matter to proceed for defence hearing.”

20. Notably, on 6th August 2018, the respondent's counsel prompted the trial court to order for surveyor's report in respect of the suit land and the other parcel of land, Kanyada/Kanyango/Kalanya/5866. The appellant and the respondent were to be present during the surveyor's visit to the two parcels of land before the generation of the report.

21. The surveyor's report is dated 30th January 2019 (PEXhibit 4) and the respondent (PW1) produced it during hearing of the respondent's case on 1st August 2019. PW2, too referred to the surveyors' visit and the report as per his evidence captured in the trial court proceedings of 3rd October 2019.

22. On 13th September 2019, Ms. Nyarige learned counsel for the appellant informed the trial court that she had just been instructed and sought an adjournment which was granted accordingly. On 3rd October 2019, PW2, Joshua Chuanya Ochogo, the Senior Chief of Homa-Bay Town location gave testimony was cross-examined by the said learned counsel. The respondent's case was closed on that day.

23. PEXhibit 4 reveals that the suit land belongs to the respondent. Plainly, the learned trial magistrate proceeded to hear the suit after the generation of PEXhibit 4 in compliance with the trial court's order of 6th August 2018 and bearing in mind **section 18 (1) of the Land Registration Act, 2016 (2012)**

24. Learned counsel for the respondents submitted that the trial court disallowed an adjournment sought by the appellant's counsel as the

matter had been pending before the court for a long time and that the appellant had contributed to its delay. **Article 159 (2) (b) of the Constitution of Kenya, 2010** provides; -

“ Justice shall not be delayed”

25. Moreover, **“audi alteram partem” rule (right to be heard rule)** is a fundamental principle of justice as enshrined in **Article 50 (1) of the said Constitution**; see also the case of **Re Hebtullah Properties Ltd (1976-80) 1 KLR 1195 at 1209 and James Kanyita Nderitu and another vs= Marios Philotas Ghikas and another (2016) eKLR**, among other authoritative pronouncements. The appellant was accorded an opportunity to be heard as disclosed in the trial court’s proceedings of 1st August 2019, 13th September 2019 and 7th November 2019. Therefore, there was no violation of the right to be heard at the trial court. To that extent, grounds 1, 2 and 6 fail.

26. On ground number 3, it is true from the plaint that the respondent did not pray for general damages. Parties are indeed, bound by their pleadings as noted in **IEBC and another vs Stephen Mutinda Mule and 3 others (2014) eKLR**.

27. Besides, in prayer (d) at the foot of the plaint, the respondent sought any other relief. On that score, it was an issue left to the court for decision; see **Odd Jobs v Mubia (1970)EA 476** and **Vyas Industries Ltd v Diocese of Meru (1982)KLR 114**.

28. The respondent further cited **Park Towers case (supra) to the effect** that proof of specific damage or loss was not necessary as the court is under a duty to assess the damages awardable depending on unique circumstances of each case. **The Halsbury’s Laws of England 4th Edition Volume 45 paragraph 261503** stipulates that computation of damage action for trespass including recovery of nominal damages can be done even if there is no actual loss. The learned trial magistrate acted within this scenario hence, ground 3 also fails.

29. Concerning grounds 4 and 5, reference is made to paragraph 24 hereinabove. This court is also conscious of merit determination of cases as held in the case of **Philip Chemwolo and another v Augustine Kubende (1982-88) KAR 103**.

30. I further approve the dictum in **Mwangi and another v Mwangi (1986) KLR 328** that land is an extremely important aspect of the lives of ordinary people. That land cases must be heard as quickly as possible by any forum provided by law or as agreed by parties. That such cases must get a better priority than even accident injury cases.

31. In the instant matter, the appellant filed his statement of defence which was considered in the judgment of the learned trial magistrate who gave the appellant latitude to present his case as shown in the court proceedings. However, the appellant neglected to utilise his right or at all. He cannot eat his cake and have it all at the same time. I find that the learned trial magistrate did not errand or misdirect himself on matters of law and fact. So, grounds 4 and 5 also fail.

32. Accordingly, this appeal commenced by way of a memorandum of appeal dated 23rd January 2020 and filed in court on 3rd February 2020 is hereby dismissed with costs to the respondent in this appeal and in the trial court.

It is so ordered.

DELIVERED, DATED and SIGNED at MIGORI this 28th day of JULY 2021

G.M.A. ONGONDO

JUDGE

In presence of :-

Ms. Opar learned counsel for the appellant

Mr. Rakewa learned counsel for respondent

Tom Maurice – Court Assistant