



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KISII

ELC CIVIL APPEAL NO. 14 OF 2019

JOHN NYAKONDO.....1ST APPELLANT

JAMES NYAKONDO.....2ND APPELLANT

VERSUS

JAMES OROGO.....RESPONDENT

(Being an appeal from the judgment of Hon. J.M. Njoroge delivered on 19th January, 2016 in Kisii CMCC No. 676 of 1999)

JUDGMENT

INTRODUCTION AND BACKGROUND

1. By a Memorandum of Appeal filed on the 12th June 2017, the Appellants appeal against the judgment delivered by *Hon. J. M. Njoroge* (CM) in Kisii CMCC No. 696 of 1999.
2. A brief background of the case in the subordinate court is necessary in order to put the matter into perspective. The Respondent filed a Plaint dated 29th February, 1996 before the trial court seeking an order of rectification of the land register in relation to land parcel No. NORTH MUGIRANGO/BOISANGA/40 (hereinafter referred to as the suit property) registered in the name of the Appellants' deceased father and an order of eviction against the Appellants.
3. In support of his suit the Respondent averred that the Appellants' late father had bought only 2 acres and not 3 acres as was indicated in the register. He further averred that he was in actual occupation of the one acre that was erroneously included in the suit property since 1973. He contended that he was in occupation of the said portion of the suit property up to the time when the Appellants forcefully entered thereon claiming the same to be their land. He stated that when he checked with the land register he found out that the said portion had been erroneously included in the suit property. He stated that he was therefore forced to file the suit seeking the rectification of the register by having the said portion from the suit property and registering the same in his name together with an order of eviction against the Appellant.
4. The Appellants filed a Defence and Counterclaim denying the averments by the Respondent. In their Counterclaim they sought an order of eviction against the Respondent from the one acre of the suit property that he occupied and prayed that the same be delivered to the heirs of the deceased registered proprietor. They also prayed for damages for trespass and *mesne* profits.
5. After hearing the parties, the court rendered its judgment. In the said Judgement dated 19th January, 2015 the trial magistrate allowed the Respondents suit and dismissed the Appellants Counterclaim on grounds that the court was referred to previous court proceedings over the same property that showed that the one acre had erroneously been included in the suit property which evidence was unconverted by the Defense. The court observed that the Respondents had been in occupation of the one acre for a period of 20 years. The court also held that the Appellants had not demonstrated agility in seeking a legal solution to the disputed portion and as such the court was of the view that the conduct of the Appellant could not lead the court to infer ownership of the said portion in favor of the Appellants since their indolence supported the Respondent's case.
6. The Appellants being dissatisfied with the decision of the subordinate court filed a Memorandum of Appeal raising the following grounds:
 - a) The learned trial Magistrate misapprehended the entire evidence to the extent that his conclusion was erroneous.
 - b) The learned trial Magistrate erred in law and misdirected himself fundamentally in not holding that the respondent had without color of right and without the consent or permission or approval of the Appellants entered into and/or trespassed into a portion of the suit property.

c) The learned Magistrate erred in fact and in law and misdirected himself when he failed to hold that the Respondent's entry into the suit property upon the suit property was unlawful and ineffectual.

7. The appeal was disposed of by way of written submissions and both parties complied by filing their respective submissions.

APPELLANT'S SUBMISSIONS.

8. Learned counsel for the Appellant submitted that the trial Magistrate had the privilege of getting expert evidence and testimonies of all witnesses, which evidence he was supposed to weigh on balance of Probabilities. Counsel contended that the Learned Trial Magistrate ignored the evidence of the District Land Registrar and Surveyor whose report showed that the Respondent had encroached into the suit property.

9. It was counsel's contention that the court only relied on an alleged agreement mentioned but not produced in court as evidence that tended to show that the suit property was less by one acre. He submitted that the Surveyor's report that was disregarded by the court vindicated the Appellants, when it clearly stated the boundaries dividing the suit property and the Respondent's property were well defined and that the Respondent was the one who had entered therein and planted maize on a portion measuring 1.2.

10. In conclusion counsel urged the court to set aside the Judgment of the lower court, substitute it with a judgment dismissing the Respondents case with costs and proceed to allow the Appellants' Counterclaim.

RESPONDENT'S SUBMISSIONS

11. Learned counsel for the Respondent submitted in support of the Judgment of the lower court. He argued that the one acre that is in controversy only belonged to the Appellants on paper but it was the Respondent who had been using it.

12. He submitted that the Respondent and the Appellants were all aware that the one acre was erroneously included in the suit property during the adjudication process in 1973 and that it was the Respondent who had been using it. He contended that the Respondent appeared in court seeking a rectification of the Register to have the one acre which he had been using with the knowledge of the Appellant's hived off from the suit property.

13. He argued that at page 51 of the Record of Appeal, the 2nd Appellant clearly acknowledged during cross-examination that Respondent was the one using the one acre and had used the same for a period of 20 years and that the matter had been determined by another forum which found that the one acre had erroneously been allocated to his father and he was well aware that he was supposed to surrender the one acre.

14. Counsel argued that the Court in its finding relied on the Appellants' admission that they were well aware that their father was erroneously allocated an extra acre of land. It was also his argument the trial Magistrate did not disregard the expert evidence as alleged by the Appellants since at page 55 of the Record of Appeal, the trial Magistrate noted that the Registrar's report only confirmed that the Plaintiff was cultivating 1.2 of the suit property and cemented the Respondent's claim for the rectification of the register to have the same transferred to him.

15. Counsel submitted that it was not in dispute the Respondent occupied one acre belonging to the Appellants and had been staying thereon since 1973 with the full knowledge of the Appellants and that is why in the entire period they had never disturbed the Respondent's occupation of the one acre.

ISSUES FOR DETERMINATION

16. Having considered the history of this case, the judgment of the trial court as well as the submissions of counsel for the Appellant, the only issue that arises for determination is whether the trial Magistrate erred in law and in fact and misdirected himself fundamentally in not holding that the Respondent had trespassed into a portion of the suit property measuring 1.2 acres.

ANALYSIS AND DETERMINATION

17. It is common ground that the suit property is registered in the name of the Appellants' late father. It is also common ground that the Respondent occupies approximately one acre of the suit property and has been in occupation of the said portion since 1973.

18. What is in dispute is whether the trial Magistrate failed to consider that the entry of the Respondent into the suit property was unlawful despite the Registrar's report indicating that the boundaries of the suit property were intact and the Respondent was indeed in the Appellants' property. In their Defence, the Appellants aver that the alleged illegal entry/trespass happened around 1995 and 1996. However, during the hearing of the suit, the 2nd Appellant who was the sole Defense witness departed from the Defence. From the Record of Appeal at page 51, the 2nd Appellant had this say with regard to portion of the suit property that is in controversy;

“..... He has used the one acre for over 20 years. I had reported the trespass to Ekereny Police Post. The matter went to court and the findings were that my father was erroneously allocated one acre which belonged to the Plaintiff. The one acre has tea bushes, maize plants belonging to the Plaintiff. He has worked on the land for 20 years. There was a Surveyors' report filed in court. I don't know if it concludes that I should surrender the one acre.”

19. In view of the 2nd Appellant's evidence, I do not see how the learned trial magistrate could have determined the case differently. Which

other evidence could he have considered when the sole witness for the Defence gave evidence that vindicated the Plaintiff case. From the 2nd Appellant's own testimony there had been a decision that had been made by a court that had decreed that one acre had erroneously been allocated to his father and the same belonged to the Plaintiff and had been occupied by the Plaintiff for a period of 20 years. It would have been great injustice to the Plaintiff if the court disregarded the testimony of the 2nd Appellant that was plain and clear to make a determination that the Respondent's entry was illegal.

20. As correctly held by the trial court, the Appellants had all the time to challenge the Respondent's entry into the suit property that from their own testimony had lasted for more than 20 years. The lack of agility in resolving the same only cemented the Respondents claim. On this, I am guided by the case of **Aula Ali Aula and 2 others vs Katana Shingu and 2 others [2018] eKLR** where the court held that:

“Therefore, the registered owners cannot use the indefeasibility of their title as a ground to evict the Defendants who have been on the land for over twenty years because by their omission/commission, they created a constructive trust in favor of the Defendants. Their right to claim back the portions occupied by the Defendants goes against the provisions of section 7 of Cap 22 which provides thus;

“An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims, to that person.”

In conclusion, I am not satisfied that the Plaintiffs have proved a case against all the Defendants. Consequently, their suit is dismissed with costs to the defendants.”

21. From the foregoing therefore, I find that the appeal has no merit and it is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 22ND DAY OF SEPTEMBER, 2021.

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J.M ONYANGO

JUDGE