



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 103 OF 2019

M'MUNORU M'KIUNGA.....APPELLANT

VERSUS

GRACE KARIMI NTONJARESPONDENT

(Being an appeal from the judgment of HON. OSCAR WANYAGA- SRM-in MAUA CM ELC NO. 19 OF 2018 delivered 9/08/2019)

JUDGMENT

1. The suit was originally filed in the ELC Meru as no. 31 of 2017 but was transferred to Maua court for determination on 13.12.2017. The appellant being the plaintiff in the trial court sued the respondent vide a plaint dated 2/02/2017 seeking; *an order of eviction, a permanent injunction against the defendant and costs of this suit with interest thereon.*

2. It was the plaintiff's case that he is the registered owner of parcel L.R NO. AMWATHI/MAUA/5969 measuring 0.3296 Ha. He also had another parcel no. AMWATHI/MAUA/8204 which borders the other parcel and which he gifted to the defendant who is his niece and her late husband. That despite his kindness, the defendant has trespassed on to his land AMWATHI/MAUA/5969. Despite several warnings, she is now in the process of putting up semi-permanent structures and planting trees and seasonal crops, and if the court does not restrain her, the appellant would suffer irreparable loss and damage.

3. The respondent/defendant filed her statement of defence dated 14/03/2017, denying all allegations and averring that she is the registered owner of land parcel AMWATHI/MAUA/8204 measuring approximately 0.45 acres. That prior to the year 1998, her deceased husband and the plaintiff had a dispute over 0.15 acres of land that was occupied by her husband on the land bordering the plaintiffs land parcel no.528 and upon his death they entered into a consent with the plaintiff to the effect that the 0.15 acres be taken by the defendant while the plaintiff takes the defendant's land parcel no. 9717 measuring 0.15 acres. That the defendant consolidated the 0.15 acres with her parcel no. 8204 and it is therefore misleading for the plaintiff to claim that he gifted her any land. Since 1998 the plaintiff has never challenged the settlement thus the suit herein is frivolous, scandalous, vexatious and an abuse of the court process.

4. The suit proceeded for hearing on 20/05/2019 and the trial court rendered its judgment on 09/08/2019 dismissing the plaintiff's suit. Being aggrieved by the decision thereof, the appellant filed his memorandum of appeal dated 20/08/2019 basing his appeal on six (6) grounds as follows:-

i. That the learned trial magistrate erred in law and fact in that he relied on evidence of a sub-county surveyor which had been gathered illegally against the court order and in absence of the appellant.

ii. The judgment/decision of the learned trial magistrate is against the weight of evidence placed before him.

iii. That the learned trial magistrate erred in law and fact in finding that the plaintiff had not proved his case to the required standard.

iv. That the learned trial magistrate erred in law and fact in accepting contradicting evidence from the defendant and the sub-county surveyor.

v. That the learned trial magistrate erred in law in ordering costs to be paid by the appellant/plaintiff.

vi. The judgment of the learned magistrate is bad in law and fact.

5. The appeal was canvassed by way of written submissions. The appellant filed submissions dated 22/12/2020 averring that the surveyor decided to visit the suit land alone contrary to the court order thus his report became a nullity. Further, the surveyor admitted that without the land registrar, he could not deal or explain the acreage of the title deeds. The scene visit report was therefore not proper, was illegal and

should be set aside. The surveyor gathered the said evidence in absence of the appellant which is unacceptable and prejudicial to him.

6. Further, the decision of the trial magistrate was against the weight of the evidence as he produced documents showing the size of his land, being the title deed, map and register but what was on the ground was less than what was on those official records while the defendant was unable to show how big her land was according to the official records and she could not justify why her land was bigger on the ground.

7. The trial magistrate went against the provisions of Order 21 rule 4 of the Civil Procedure Rules and failed to determine the issues raised by the appellant, hence the judgment was bad in law.

8. In support of his case, the appellant relied on the following cases; **Al-malik Brothers Ltd V Jackline Kemunto Ondari & Anther Kisii HCCA No. 120 of 2006(unreported), James Ndirangu Ng'ang'a V Kahubha Merubha Vangela [2015]eKLR, Nakuru Industries Ltd V S. Mehta Tsos [2016]eKLR.**

9. The Respondent vide submissions dated 03/06/2021, submitted that the court directed the sub county surveyor to visit the suit land and prepare a report, in another order the land registrar was to accompany the surveyor, thus these are two distinct orders that were to be executed separately. That this court is being asked to punish the surveyor who carried out his duty faithfully and even testified on behalf of plaintiff's case.

10. The appellant has not shown how the surveyors evidence amounted to an illegally, how the said evidence violated the statutes or how the appellant's constitutional rights were violated. It is not true that the appellant was not present during the site visit as he was present but disagreed with the shown boundaries. Also, the surveyor was the appellants witness and if the appellant found the surveyor's evidence prejudicial and unfavorable, all he had to do was request to declare the surveyor as a hostile witness.

11. The respondent relied on the following cases; **John Muriithi & Others V Registered Trustees of Sisters of Mery (Kenya) T/A The matter Misericordiae Hospital & Another [2018]eKLR, Miller V Minister of pensions (1947) 2ALL ER 372.**

Analysis and determination

12. As the first appellate court, this court has a duty to evaluate, assess and analyze the extracts on record and make its own determination having in mind that it did not have the advantage of hearing witnesses. See: **Selle & Another vs. Associated Motor Board Company Ltd [1968] EA 123.**

13. **Pw1 M'Munoru M'Kiunga** the plaintiff testified and adopted his statement dated 24/01/2016 as his evidence in which he averred that he is the registered owner of parcel no. AMWATHI/MAUA/5269. That defendant is his niece and his neighbor by virtue of gifting her late husband land parcel no. AMWATHI/MAUA/8204. The defendant has now trespassed onto his land, putting up structures, planting trees and seasonal crops. He has suffered economic loss and mental anguish and unless the court restrains the defendant he would suffer irreparable loss. He produced copy of search and title for parcel 5969 as well as a sketch map as his exhibits.

14. In cross examination he stated that he got his parcel from his father measuring about 0.96. Defendant's husband, Ntoja was demanding 1 acre from him. He admitted that there was an exchange of land in which plaintiff gave defendant 0.15 points, while the latter gave him parcel 9717 which he still utilizes. The exchange was done at the land committee and defendant's son, one Andrew was present. The plaintiff stated that he had no problem if defendant's parcel was 0.30 acres plus the 0.15 which he added her to give a tally of 0.45 acres.

15. **PW2 Raphael Muthomi Riungu** averred that he works at District Surveyors Office and he had a report dated 10/12/2018 which he had prepared and signed. There in, he avers that there exists a well-defined fence between parcel 5969 and 8204 and he used the official map and sketch map. The proprietors showed him the boundaries, but the plaintiff opposed stating those were not the proper boundaries. That parcel 5969 has a title deed which indicates that it measures 0.3296 Hectares which translates to 0.81 acres thus the title contradicts what is on the ground as on the ground it is equivalent to 0.1699 Ha. The title gives an approximate area and the map is never an authority on boundaries. The suit land 5969 is on the ground almost half of what the title says but there is no unsurveyed area between 5969 and 8204. He also stated that there is no boundary between parcel 528 and 8204 as the two belong to one person.

16. In cross examination, pw1 stated that he surveyed parcels 5969, 528 and 8204, that the combined measurements for parcels 528 and 8204 is 0.44 acres. He used the existing boundaries from neighbouring parcels and the boundaries were live fences that had existed for a long time. There is a river on parcel 5969 and he factored this feature in his report. He didn't use the titles as his orders were to look for existing boundaries.

17. He further stated that the land registry issues titles, DLASO and demarcation office prepare boundaries and his office has no say on what acreage to put on a title deed.

18. **DW1 Grace Karimi James** adopted her statement dated 10.10.2017 as her evidence. She averred that she is the registered owner of land parcel AMWATHI/MAUA/8204 measuring approximately 0.45 acres and the allegations leveled against her are malicious and meant to take away part of the land. That prior to the year 1998, her deceased husband and the plaintiff had a dispute over 0.15 acres of land that was occupied by her husband on the land bordering the plaintiffs land parcel no.528. Upon his death, they entered into a consent with the plaintiff to the effect that the 0.15 acres be taken by the defendant while the plaintiff takes the defendant's land parcel no. 9717 measuring 0.15 acres. The defendant then consolidated the 0.15 acres with her parcel no. 8204 making a total of 0.45 acres. It was therefore misleading for the plaintiff to claim that he gifted her any land. Since 1998, the plaintiff has never challenged the settlement thus the suit herein is an after thought, time barred and res judicata and it should be dismissed with costs.

19. In cross examination she stated that her mother gave her 0.30 acres and the plaintiff gave her 0.15 acres. She reiterated that the land she got from the plaintiff was an exchange whereby the plaintiff got an equal portion of land (0.15 acres). The land exchange was not occasioned

by the burial of defendant's husband on plaintiff's land as he was not buried on the land of the plaintiff. In Re-exam she averred that her mother gave her parcel 9717 in DLASO proceedings, of which 30 points was in Luuma but originally at Karimi and her husband's points were also in Karimi. The 2 parcels were however not next to each other.

20. **DW2 Andrew Mungathia** also adopted the contents of his statement dated 10.10.2017 as his evidence. He is a son of DW1. His evidence is more or less similar to that of his mother. In cross examination he stated that it was the mother of the defendant one Rose Mukoiti who gave her parcel 8204 and it was 30 points. It was divided into two, 8204 and 9717, of which they gave the plaintiff the latter plot. In re-exam, he averred that when they exchanged the parcels with the plaintiff, the dispute ended and when the surveyor came they hadn't encroached. The land officers also visited the land after the exchange.

21. The trial court in its determination held that the plaintiff had not proven his case and there was no evidence that the defendant had encroached on his land, thus plaintiff's case was dismissed, and he was condemned to pay half of the defendant's cost.

22. From the memorandum of appeal filed in this appeal and the submissions made in respect thereof I find that the issue for the court's determination is whether the trial magistrate's court erred in failing to find that **the respondent had encroached/trespassed on the plaintiff's suit land and in failing to grant an order of permanent injunction restraining the defendant from dealing with the suit property.**

23. Section 3 (1) of the Trespass Act, Cap 294 provides that:

"Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."

Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership.

24. **Section 107 of the Evidence Act** provides that

"Whoever desires any court to give judgment 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".

25. **Section 109** of the aforementioned act further provides:

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person".

26. Thus he who alleges bears the burden of proving, see **-Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR**. The burden of proof therefore fell squarely upon the appellant to table cogent evidence before the trial court to prove that indeed the respondent had encroached upon his land.

27. From the evidence adduced by the parties, it is not quite clear how the defendant got the parcel 8204. But again the burden of proof was not to shift upon the respondent. What both parties state is that years ago (defence side puts the period as before 1998), they exchanged land, respondent received 0.15 acres of appellants land, while the latter also received 0.15 acres. It is pertinent to note that the appellant was mute on this issue of land exchange in his evidence in chief. What more, he contends that he had gifted the parcel 8204 to the respondent only for the latter to encroach on the land. However, during cross examination, the appellant had stated that;

"When I transferred the land when Grace's husband was dead, I gave her 0.15 points. We went to the land committee when I was giving the 0.15 acres. Her son was there. Andrew is son to Grace and he was there. I din't give Grace literally, we exchanged the land. She gave me parcel 9717 when I gave her the 0.15 acres which she was living on. Its 8204. I am demanding/claiming it. She had been given by my brother Kobia. I can't tell the size. It is still there and she lives there. I am not claiming the 8204. She has encroached on my land. 8204 is about 0.20 to 0.30 acres. I exchanged with her 0.15 acres. I am still utilizing the 0.15 acres she gave me after we exchanged the plots".

28. It is not lost to this court that the appellant had initially denied knowledge of parcel 9717 still at the early stages of cross examination.

29. During the course of trial in the magistrates' court, a surveyor did visit the scene and filed a report regarding ground status of the suit plots. The appellant avers that the surveyors report was gathered illegally, against the court order and in his absence. This is however a false allegation. The surveyor in his evidence in court stated that the parties were present during the scene visit and the appellant disagreed with the boundaries as pointed out. This averment was not in any way challenged by the appellant in court.

30. Further, it is noted that the issue of the scene visit had dragged on for about one year from 18.4.2018. On 26.7 2018, counsel for the appellant had addressed the court as follows;

"I pray for an order that the surveyor do visit the suit lands being Amwathi/5969, Maua and Amwathi/Maua 8204 within the next 3 months. The surveyor to survey the same and prepare the report. The land registrar be included".

31. The matter was eventually mentioned on 18.4.2019 to confirm if the report had been filed. The court informed counsels for the parties

that ***“The surveyors report is on record. The same may be supplied to the party’s counsels”***. With that report, the appellant went ahead to call the surveyor as their witness! In light of this analysis, the appellant cannot turn around to challenge the said report after judgment was delivered against him.

32. The fact that the surveyor went alone and not accompanied by the Land Registrar did not make the entire exercise an illegality. It is not lost to this court that the surveyor actually pointed out that appellants land on the ground is less by almost half compared to what is in the title. This is an issue which was clearly picked up by the trial court when he stated that;

“From the surveyor’s findings above, it is clear that the defendant is occupying what her title documents indicate. It is also clear that the plaintiff’s land on the ground is almost half of what his title documents indicate. To say that the defendant is the one encroaching on plaintiff’s land would be tantamount to making an election that the defendant is to lose the land she is occupying so as to satisfy plaintiff’s demand without justification. This would in turn bring another problem as the defendant’s land would equally be less. It is clear that the problem herein was occasioned by the lands office (be it DLASO, Surveyor’s and/or land registrar) when they issued a title deed to the plaintiff without confirming that the land is available on the ground”.

33. According to the surveyor, there was no unsurveyed land between the two litigants. Further, the land of the respondent combined, that is parcels 528 and 8204 was 0.44 acres. During cross examination, the appellant had in reference to respondent’s land stated that;

“On the ground today, she has fenced. If the court confirms that whatever she is using from both parcels is 0.45 acres or less, I have no problem”.

34. This statement seals the fate of the appellant as respondent’s land is even less albeit just slightly. There is no evidence that the respondent was responsible for the missing acreages in appellant’s title.

35. In conclusion, I do agree with the lower court’s holding and i find that the appellant did not adduce sufficient evidence to prove that the respondent had trespassed on his land or had encroached on it. Thus the orders sought by the appellant were unmerited. This appeal is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MERU THIS 22ND DAY OF SEPTEMBER, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the advocates for the parties through a notice issued on 3.9.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE