REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL APPEAL 40 OF 2019

MOSES MUNGATIA MUTUNGI.....APPELLANT/APPLICANT

-VERSUS-

HANNAH NYAGATHIRI NG'ANG'A.....1ST RESPONDENT

GODWIN MUTONGA NG'ANG'A.....2ND RESPONDENT

JUDGMENT

INTRODUCTION

1. The Appellant herein filed and/or commenced the subject Appeal by filing the Memorandum of Appeal dated the 20th of May 2019, and in respect of which the Appellant has itemized five grounds of Appeal. For brevity, the grounds of Appeal are as hereunder;

i. The Learned Magistrate erred in dismissing the Plaintiff's suit wholesome and failed to consider the Plaintiff's Documentary evidence on record.

ii. The Learned Magistrate erred in both law and in fact in failing to consider that the Plaintiffs did not have capacity to institute the Court proceedings.

iii. The Learned Magistrate erred in both law and in fact in failing to follow Due procedure with regard to ***Order 11 of the Civil Procedure Rules, 2010.***

iv. The Learned Magistrate erred in both law and in fact in failing to consider that the suit premises in question was not within the premises of the Plaintffs.

v. The Learned Magistrate erred in both law and in fact in failing to consider the submissions of the Plaintiff.

2. The subject Appeal came up for directions on the 7th of December 2020, whereupon the Honorable Judge proceeded to and directed that the Appeal be canvassed and/or disposed of by way of written submissions. Consequently, the parties herein proceeded to and indeed filed their respective submissions.

3. On behalf of the Appellant, the elaborate submissions were filed on the 12th of January 2020, whereas the Respondent's submissions were filed on the 26th of January 2020.

SUBMISSIONS BY THE PARTIES

Appellant's Submissions

4. The Appellant herein has broken down his submissions into five sub-grounds, the first of which, the Appellant has addressed the fact that the Learned trial Magistrate erred in dismissing the Appellant's defence wholesome and allegedly failed to consider the Defendant's documentary evidence.

5. The other sub-heading that has attracted submissions by the Appellant herein is the issue of lack of *locus standi* on the part of the Plaintiffs to commence the suit.

6. The third sub-heading is a curious one, but relates to the accusation against the Trial Court having failed to follow the Due procedure as

pertains to the provisions of **Order 11 of the Civil Procedure Rules.**

7. The fourth item that forms the basis of the Appellant's complaint relates to the finding that the premises, which were occupied by the Appellant, was within the suit premises.

8. Fifthly, the Appellant has addressed the item as pertains to the failure by the Trial Court to consider the submissions by the Defendant.

Respondents Submissions

9. Having been served with the submissions by the Appellant, and which raises five topical issues, the Respondents proceeded to and filed their Rejoinder submissions, in respect of which, the Respondents responded to and/or answered the allegations/submissions by the Appellant.

10. I must also point out that both the Appellant and the Respondents herein relied on various caselaw, in ventilating their respective positions.

ISSUES FOR DETERMINATION

11. Having considered the Memorandum of Appeal, whose contents I have reproduced herein before, and also having perused the submissions filed by the respective parties, I am of the considered view that the subject Appeal only raises two pertinent issues, which require consideration and resolution by this Court.

12. For clarity, the issues that are pertinent and germane are as hereunder;

> *i. Whether the Respondents were seized and/or possessed of the requisite locus standi to commence and/or maintain the subject proceedings.*
>
> *ii. Whether the impugned structure and/or construction by the Appellant sits on and has therefore encroached onto the suit properties, and if so, whether the Appellant is a trespasser.*

13. Before venturing to address the two pertinent issues that have been isolated and/or itemized herein before, it is imperative and/or appropriate to address three preliminary issues, which are apparent on the face of the Memorandum of Appeal.

14. Firstly, the Appellant herein has complained in ground one that the Learned magistrate erred in dismissing the Plaintiffs' suit wholesome and in failing to consider the Plaintiffs Documentary evidence on record.

15. I have looked at the Record of Appeal, and it is apparent that the Memorandum of Appeal was never amended. In this regard, the Memorandum of Appeal dated the 20th of May 2019, constitutes and/or comprises of the operative pleading that is being relied upon by the Appellant.

16. I must also say that the subject Appeal has been mounted by the Appellant, who was the Defendant in the Subordinate Court. Consequently, the Appellant herein, was never the Plaintiff in the Subordinate Court, and cannot be heard to complain about the dismissal of the Plaintiffs' suit and the failure to consider the Plaintiffs' documentary evidence. Suffice it to say, that the Appellant herein is not holding forte for the Plaintiffs who certainly are the Respondents in the Appeal.

17. Before departing from the subject issue, it is imperative to take cognizance of the Doctrine of Departure, which bars and/or prohibits a party from urging and/or agitating a cause of action or an issue that is at variance with the pleadings filed. Simply put, in this case, the Appellant is bound by the Memorandum of Appeal.

18. In any event, it is important to underscore the legal position as pertains to pleadings and the role played by same. In this regard, I can do no better than to quote the decision in the case of **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR** where the Honorable Court observed as hereunder;

> *"first, **ADETOUN OLADEJI (NIG) LTD Vs. NIGERIA BREWERIES PLC** S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;*
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> ***"….it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."***
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> *Other judges on the case expressed themselves in similar terms, with Judge Christopher Mitchell J.S.C. rendering himself thus;*
>
> ***"In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."***

19. Based on the foregoing decision, it is my finding that the submissions agitated by the Appellant in respect of the first sub-item in the submissions, is at variance with Ground 1 of the Memorandum of Appeal. In this regard, the Appellant cannot now be heard to submit that the Learned Trial Magistrate erred in dismissing the Appellant's defence wholesome and in failing to consider the Defendant's documentary evidence on record.

20. In my humble view, that submission goes to no ground of Appeal and thus, same is irrelevant and undeserving of further treatment, other than a pronouncement that the Appellant should exercise due diligence while crafting Pleadings to be filed before the Court.

21. The Second preliminary issue relates to ground three of the Memorandum of Appeal, where the Appellant is complaining about failure to follow the provisions of **Order 11 of the Civil Procedure Rules, 2010.** Suffice it to say, the provisions of Order 11 concern pre-trial procedures, comprising of case conference, trial conference and settlement conference, where appropriate.

22. As pertains to the subject matter, the parties herein appeared before the Trial Magistrate on the 31st of July 2018, and on which date, Learned Counsel, Mr. Nyambane, informed the Honorable Court that same had not complied with the Provisions of Order 11 of the Civil Procedures Rules and thus sought for timelines to comply.

23. Pursuant to and in line with the request by the Counsel for the Defendant, now Appellant, the Learned Trial Magistrate made further orders and particularly, directed the Defendant to comply with the pre-trial procedures within 20 days from the date of the order.

24. On the other hand, the Plaintiff's Counsel thereafter proceeded to request that the matter be set down for hearing, even as the Defendant was endeavoring to comply with the pre-trial directions.

25. On his part, the Defendant's Counsel indicated to the Honorable Chief Magistrate that he had no objection and that the matter could be set down for hearing. In this regard, the Learned Chief Magistrate made an order that by consent, hearing of the main suit shall be on 11th of September 2018.

26. I must point out that on the 11th of September 2018, both the Counsel for the Plaintiff, now Respondent, and Counsel for the Defendant, now Appellant, were both present and the hearing commenced. For clarity, both the Plaintiffs and Defendant's cases were heard on the same day.

27. On the backdrop of what I have just stated, it is perplexing that the Appellant's Counsel can now be heard to complain that the Trial Court failed to follow Due procedure as pertains to **Order 11 of the Civil Procedure Rules, 2010.**

28. On my part, I have not seen any infraction and/or breach of the provisions of Order 11 of the Civil Procedure Rules, 2010. Nevertheless, if there was any breach, the Appellant's Counsel, who participated in the fixing of the hearing date by consent and proceeded to conduct the hearing, would have raised his concern before the Trial Court.

29. Suffice it to say, that having participated in the plenary hearing and the Defendant, now Appellant, having tendered evidence and produced his documentary exhibits, the complaint as pertains to ground 3 of the Memorandum of Appeal is **Moot.**

30. The third preliminary issue relates to ground 5 of the Memorandum of Appeal, and in this regard, I must similarly point out that the Appellant not having been the Plaintiff in the Subordinate Court, same cannot be heard to make a complaint that colors ground 3 of the Memorandum of Appeal.

31. Without repeating the sentiments that I expressed while dealing with the first preliminary issue, the best I can do is to draw the Appellant's Counsel's attention to the provisions of **Order 2 Rule 6 of the Civil Procedure Rules, 2010** which provides as hereunder;

> ***"[Order 2, rule 6.] Departure.***
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> *6. (1) No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit. (2) Sub-rule (1) shall not prejudice the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative."*

32. Having addressed the preliminary issues, I must now go back to the two pertinent issues, upon which the subject Appeal must be decided.

ANALYSIS AND DETERMINATION

Issue Number One

Whether the Respondents were seized and/or possessed of the requisite locus standi to commence and/or maintain the subject proceedings.

33. The starting point as pertains to the first issue herein relates to the capacity to file and/or maintain civil proceedings on behalf of the estate of a deceased person. In this regard, it is imperative to take cognizance of the provisions of **Section 82 of Law of Succession Act,** which provides as hereunder;

> ***82. Powers of personal representatives***

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best: Provided that—

(i) any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

(ii) no immovable property shall be sold before confirmation of the grant; CAP. 160 Law of Succession [Rev. 2017] 32

(c) to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;

(d) to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation: Provided that except so far as otherwise expressly provided by any will—

(i) no appropriation shall be made so as to affect adversely any specific legacy; (ii) no appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the court shall be required.

34. On the other hand, it is also important to observe that the importance of taking out and/or obtaining a Grant of Letters of Administration before commencing any proceedings in respect of the estate of a deceased, has also attracted judicial pronouncement.

35. In respect of the foregoing observation, I harken to refer to the Decision in the case of **Virginia Edith Wambui Otieno vs Joash Ochieng Ouko [1987] eKLR** whereby the Honorable Court stated as hereunder;

> *"But the difficulty remains that the general rule in relation to administration is that a party entitled to administration can do nothing as administrator before letters of administration are granted. Section 80(2) of the Law of Succession Act provides that a grant of letters of administration, with or without the will annexed, shall only take effect as from the date of the grant. In contrast section 80(1) provides that a grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such. This means that in the case of an executor he may perform most of the acts appertaining to his office before probate including the bringing of a fresh action, because he derives title from the will and the property of the deceased vest in him from the moment of the intestate's death (see 1 Williams on Executors and Administrators (14th edn) paras 84 et seq and 230 et seq). But an administrator is not entitled to bring as action as administrator before he has taken out letters of administration. If he does the action is incompetent at the date of its inception. The doctrine of the relation back of an administrator's title, on obtaining a grant of letters of administration, to the date of the intestate's death, cannot be invoked so as to render the action competent (see Ingall v Moran [1944] 1 KB, and the case which follow namely Burns v Campbell [1952] KB 15). This doctrine is as old as Wankford v Wankford [1702] where Powys J said:*
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> *'but an administrator cannot act before letters of administration granted to him.'*

36. Perhaps if more emphasis on the point was necessary, I would thereafter invoke the Decision in the case of **Trouistik International Ltd vs Jane Mbeyu & Another [1993] eKLR** where the Honorable Court stated as hereunder;

> *"The administrator is not entitled to bring an action as administrator before he has taken letters of administration. If he does, the action is incompetent at the date of its inception."*

37. Having underlined the obtaining legal position, the question therefore is whether the Respondents herein who filed the suit as the administrators of the estate of Francis Mutonga Ng'ang'a, now deceased, had obtained Grant of Letters of Administration, prior to the filing and/or commencement of the suit in the Subordinate Court.

38. I have perused the Record of Appeal, and at Page 13 thereof, I have found a copy of Limited Grant of Letters of Administration, *Ad Litem.* However, the said grant is neither dated nor signed.

39. On the other hand, the said Document appears to have been a copy of the Grant of Letters which was annexed to some Application. For clarity, it is not the Document which was produced as exhibit during the Hearing.

40. Be that as it may, I have perused the original record of the lower court, as well as the list of exhibits which were produced before the Court on the 11th of September 2018, and one of the exhibits which was produced as exhibit P1, was a copy of the Grant of Letters of

Administration, issued in favor of the two Respondents herein and duly signed by Hon. Justice W. Musyoka ,Judge, on the 9th of December 2016. For clarity, the subject suit was filed in the lower court on the 3rd of May 2018.

41. In my humble view, by the time the Respondents filed the suit in the lower court, same had sought for and obtained the Grant of Letters of Administration. Consequently, the Respondents had the requisite *locus standi.*

42. Before I depart from this issue, it is startling that the Appellant's Counsel, who was obliged to compile the Record of Appeal, on the basis of the pleadings, documents and exhibits produced in the Subordinate Court, chose to omit a critical document/exhibit.

43. I am not sure why such omission was taken, but I shudder to think that the Appellant's Counsel, wanted to use the omission, to the Appellant's advantage and thus to non-suit the Respondents.

44. In my humble view, such tendency ought to be discouraged, if not frowned upon. It behooves a party and by extension, the Advocate for the party, to place before the Court all the Documentary exhibits produced in the Court of first instance.

Issue Number Two

Whether the impugned structure and/or construction by the Appellant sits on and has therefore encroached onto the suit properties, and if so, whether the Appellant is a trespasser.

45. As the duly appointed legal administrators of one Francis Mutonga Ng'ang'a, now deceased, the Respondents herein had the requisite capacity to protect and preserve all the properties belonging to and registered in the name of the deceased. Such properties include the suit properties herein.

46. On the other hand, as the legal administrators of the estate of the deceased, the Respondents herein are imbued with the same rights and/or interests as those that inhered in the deceased, in terms of right to possess, occupy and use. In this regard, the Respondents are entitled to the rights stipulated under the provisions of **Sections 24 and 25 of the Land Registration Act, 2012.**

47. Nevertheless, the central issue for determination before the Chief Magistrate's Court, was whether the offensive structure and/or construction, which belonged to the Appellant herein, fell within the suit premises and if so, whether the Appellant was a trespasser.

48. According to the Appellant, the structures and/or construction complained of and which have been used as a Barber shop, do not fall within the suit properties.

49. On the other hand, the Appellant has in his submission introduced a new twist to the matter by contending that the structure/kiosk complained against is situate on a Road Reserve.

50. I say the Appellant has introduced a new twist, because no evidence was placed before the Trial Court that the place where the offensive structure was standing, was a Road Reserve. For clarity, it is an issue that is now being sneaked in vide submission.

51. Suffice it to say, that submissions are not evidence, and that submissions cannot replace evidence, in its infinite aspects and/or perspectives.

52. In support of the foregoing observation, I can do no better than to rely on the Decision in the case of **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR** where the Honorable Court observed as hereunder;

> *"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "**marketing language**", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented. In any event all the 1st respondent would claim and prove as loss could only relate to the shares in the companies and not the properties of the companies. And even that he did not do."*

53. Despite the allegation which was being sneaked through the submissions that the offensive structure was situate on a Road Reserve, it is worthy to note that the Appellant herein had himself produced and tendered before the Honorable Court, three documents namely;

> *i. Letter dated 7th July 2015, by his own Advocates Ms. Omao, Omosa & Co. Advocates, in respect of which he confirmed and acknowledged that the structure which he had built and wherein he conducted business was within the premises belonging to and registered in the name of the deceased – see page 40 of the Record of Appeal.*
>
> *ii. Letter dated 3rd June 2015, authored by himself where he claims that he had an agreement with the deceased who allowed him, a place to construct his kiosk. See page 42 of the Record of Appeal.*
>
> *iii. The Appellant produced the Single Business Permit License which shows that the offensive kiosk is standing on Plot No. 88. See pages 49,50 and 51 of the Record of Appeal.*

54. On the basis of the three Documents, which were produced by the Appellant himself, it is apparent and/or evident that the offensive

kiosk/structure, falls within the suit property that belongs to and was registered in the name of the deceased.

55. Whereas the Appellant contends that the deceased allowed him to construct the subject kiosk, within a portion of the suit properties, no tenable evidence was adduced and/or tendered before the Honorable Court.

56. Nevertheless, even assuming that the deceased had allowed the Appellant to enter upon and construct the offensive kiosk within the suit properties, (which has not been proven), such kind of arrangement could only culminate into a License, which would terminate with the death of the Grantor.

57. As things stand, the legal administrators of the estate of the deceased, have not consented to and/or allowed the Appellant to encroach onto or remain upon any portion of the suit properties. In the absence of such consent and/or permission, the Appellant would have no right to remain thereon, and is thus a trespasser.

58. In support of the foregoing submissions, I invoke and rely on the Decision in the case of **Hotenga Njeri Mungai vs Celina Wairimu & 2 others[2020] eKLR** where the Honorable Court observed as hereunder;

> *"As already held above, the Plaintiff is the registered owner of the suit property . The Plaintiff has accused the defendants of encroaching upon her land and erected permanent structures. From the Defendants Defence that was filed in Court, the Defendants acknowledged that they had erected permanent structures on the suit property. It is not in doubt that this was done without the Plaintiff's consent and therefore it was an intrusion upon her land which intrusion was unjustifiable. The Defendants having entered onto the Plaintiff's suit land without any lawful or justifiable cause then their actions amounted to trespass upon the Plaintiff's suit property and the Defendants must be restrained from continuing with the same trespass."*

59. *A fortiori,* the Appellant herein was and is a trespasser on the suit properties.

FINAL DISPOSITION

60. The Learned Chief Magistrate properly appreciated and dealt with the issues that were in dispute in the case before him. In my humble view, he correctly addressed the issues raised vide the oral and documentary evidence and arrived at the correct conclusion.

61. In the premises, the Appeal herein is Devoid of merit.

62. Consequently, the Appeal be and is hereby Dismissed with costs.

63. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF OCTOBER 2021.

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT.

MILIMANI

In the Presence of;

June Nafula Court Assistant

Mr. Kinyua for the Appellant.

Mr. Wesonga for the Respondents.