REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANGA

ELC APPEAL NO. 17 OF 2020

KIHARA KIUNJURI.....APPELLANT

VERSUS

HARRISSON MACHARIA WAITHAKA.....1ST RESPONDENT

JAMES MAHINGE MWANGI.....2ND RESPONDENT

WANGENYE KURIA.....3RD RESPONDENT

(Being an Appeal from the Judgement and Decree delivered on 16th October, 2019,

by Hon. P. M. Kiama (SPM) in Kangema Chief Magistrates Court Civil Suit 18 of 2014)

JUDGEMENT

BRIEF FACTS

The Appellant herein **Kihara Kiunjuri,** was the Plaintiff in **Kangema CMCC 18 of 2014**, while the Respondents **Harrisson Macharia Waithaka, James Mahinge Mwangi** and **Wangenye Kuria** were the Defendants in the said suit.

By a Plaint dated **23rd April, 2014**, the Plaintiff (Appellant) brought this suit against the Defendants and sought for orders that; -

a. A declaration that the corridor in issue belongs to Plot No. 10B, and hence the Plaintiff exclusively.

b. A permanent injunction restraining the Defendants jointly and severally by themselves, their servants or agents from entering, remaining in or trespassing onto the corridor on Plot No. 10B, Kangema.

c. Costs of the suit.

In his statement of claim, the Plaintiff (Appellant) averred that he is the owner of **Plot No. 10B**, in **Kangema Township,** having purchased the same from **Jacob Chira,** on **30th October, 1969**. He further averred that the said plot was **80 * 42 feet,** and is half of the original **Plot No. 10,** Kangema. The Plaintiff (Appellant) averred that at the time of purchasing, **Plot No. 10B, Kangema**, it was Vacant while **Plot No. 10A,** Kangema, belonging to the Defendants, was developed.

Further that upon purchase of his plot, the Plaintiff(Appellant) constructed a shop with a corridor, leading from the front of the shop to the rear rooms which the Plaintiff(Appellant) has been utilizing exclusively. He also stated that it was not until about **August 2013**, when he decided to improve his property by constructing more floors, that the Defendants/Respondents started trespassing on his corridor claiming that the same was jointly owned between the Plaintiff and themselves.

The suit was contested and the Defendants/Respondents jointly filed a Memorandum of Appearance through the **Law Firm** of **J. N. Mbuthia & Co Advocates**. The Defendants/Respondents subsequently filed their Statement of Defence and Counter Claim dated **13th May 2014**. In their Statement of Defence, the Defendants/Respondents confirmed that the Plaintiff(Appellant) is the owner of Kangema **Plot No. 10B,** and that they had no interests whatsoever in the said plot. However, they contended that the Plaintiff had gotten the measurements of his plot completely wrong and as a result, he had annexed a sizeable portion of **Plot 10A**, which belonged to the Defendants/Respondents.

The Defendants further averred that the corridor is issue, which was the subject of the case, is almost entirely on the portion owned by themselves, but the Plaintiff/Appellants has taken it over and has commenced construction in a way that denied the Defendants(Appellants) access to the said corridor.

They further averred that they sought the assistance of a Surveyor to determine the boundary for the two Plots and in accordance with the report of the Surveyor, the Plaintiff was found to be the trespasser.

By a Counter Claim dated **13th May, 2014,** the Defendants (Respondents) claimed against the Plaintiff(Appellant) and sought for; -

a. An Injunction stopping the Plaintiff from continuing with the construction of the building on Plot 10B, Kangema until it is determined whether the said building is within the confines of the Plaintiff's Plot.

b. That the Land Registrar and the Government Surveyor do visit the boundary between Plot 10A and 10B, and point out its position.

c. An Order that all the construction which the Plaintiff has done on the Defendants premises be pulled down and removed from the Defendants premises at the Plaintiff's cost.

d. General damaged be awarded against the Plaintiff for trespass

e. The costs of this Counter claim be awarded to the Defendants

f. Interest

g. Any further or better relief this court may find expedient.

After the close of Pleadings, the matter proceeded by way of viva voce evidence. The Plaintiff testified, and called one more witness, a Land Surveyor. The 3rd Defendant testified on behalf of the 1st and 2nd Defendants who are deceased and also called a Land Surveyor, who testified on the scene of the dispute**.**

PLAINTIFF'S (APPELLANT'S) CASE

PW 1 Angeline Wanjiru Mwangi testified that she is a Surveyor working with the County Government of Murang'a. It was her testimony that the two plots were one before the said plot was subdivided into **Plot 10A** and **10B** in 1970. Further that after subdivision, each Plot measured 20 * 80 feet. It was her testimony that the corridor in dispute belonged to **Plot 10B,** owned by **Kihara Kiunjuri.**

Further, with regard to the matter before the Court, she visited the scene, consulted the Market Files for both **Plots10A** and **10B** and she prepared a report on **12th January 2015,** for Plot No. 57 and 58, which was initially **Plot 10**, which she produced as P. EXB. 1.

On cross examination by Mr. Mbuthia, counsel for the Defendants, she conceded that during her visit to the scene, she did not take any measurements and that she could not tell where the corridor in dispute was located, unless she takes measurements. On being shown the Map (D. EXB 1), she was able to see **Plots No. 57 & 58,** and it was her testimony that Plots No. 57, appeared bigger in size. She also testified that when she visited the scene, she did not see any beacon at the front of the building and that she only saw a beacon at the far end on Plot 57.

PW 2 Bidan Kihara Kiunjuri (Appellant) adopted his witness statement dated **23rd April, 2014**, and filed in Court on the same day. He also produce building plans and receipts which were marked P. EXB. 1- P. EXB. 6. The Plaintiff testified that he is the owner of **Plot 10B,** and he acquired it after he had entered an agreement with one **Jacob Wachira**. That by the time he purchased the said plot, it was vacant, and he is the one who constructed the shops and the corridor that is now in dispute.

On Cross examination, the Plaintiff conceded that the said sale agreement did not indicate the area of the plot purchased. He conceded further that the Defendants had already constructed on their plot by the time he occupied his plot. It was the Plaintiff's testimony that each of the plots in question had a door leading to the disputed corridor but, the Plaintiff never allowed the Defendants to use the said corridor.

DEFENDANTS' (RESPONDENTS') CASE

DW 1 Daniel Wangenye Kuria also known as **Wangenye Kuria** was the 3rd Defendant in the matter. He testified on behalf of the 1st and 2nd Defendants, who were deceased. He adopted his witness statement, and identified all the documents in the List of Documents dated **13th May 2014**, and the Defendants' further list of documents dated **31st March 2015.** He produced a Copy of the Physical Plans for Kangema Market as (D. EXB. 3), Surveyors Report by E. M. Gakinya as (D. EXB. 4), Map of Kangema Urban Council from the Director of Surveys (D. EXB. 5), and Map of Kangema Urban Council drawn by Wanyeki (D. EXB. 6) respectively.

He further testified that he knows both Plots 10A and 10B, and that those plots were also known as **Plots 57 and 58** respectively. He also testified that the Plaintiff was the owner of **Plot 10B,** while the Defendants jointly owned **Plot 10A.** That he knew about the disputed corridor and that it was built by the Plaintiff. He also stated that he was aware that most of that corridor was constructed on **Plot 10A or 57**. It was his further statement that they had access to the disputed corridor until when the Plaintiff blocked their access. In addition, he stated that two surveyors had visited the suit land during the scene visit and that from their Maps, **Plot 57 (10A)** was the bigger plot.

James Gichuhi Mwaniki, stated that he is a Land surveyor by profession. He identified a Map **FR193/3/FR,** which was acquired from Survey of Kenya, Head Quarters. It was his testimony that the said map was prepared by the Department of Physical Planning and was executed by Mr. Wanyeki.

Further, that a surveyor went to the site and did the measurements for both **Plots No. 57 and Plot No. 58**. That from the measurements, the two Plots are not equal and that **Plot No. 57** is bigger than **Plot No. 58**. He intended to the Court the beacons demarcating both plots. He further testified that the Veranda in dispute is shared between **Plots No. 57** and **58.** He produced as exhibits the Map which was marked as D. EXB. 1. He also testified that he made a report on **12th February 2015,** in line with a request made to identify and verify **Plot No. 57** and **Plot No. 58** as per the summary plan.

It was his further testimony; that the buildings in site were approved in **1987,** and by then a building was in existence. That **Plot No. 10** is the one that was subdivided to give rise to **Plot No. 57** and **Plot No. 58** registered in Kangema Register Map. That all the beacons are in their correct position and that **Plot 57** is part of the corridor. That at the time the Surveyor visited the site and made the report, he was neither aware of a dispute nor was he aware of the existence of Court case. That 600cm is the area of encroachment and the width of **Plot 57**. is **5.7 metres** to the boundary while that of **Plot 58 is 6.31 metres.** That the dimensions of **Plot 58 are 6.11 metres** and for **Plot 57 are 6.25 metres**.

After *viva voce* evidence, the parties filed their written submissions and on **16th October 2019**, the trial court entered judgment in favour of the Defendants (Respondents) plus costs and stated as follows;

> **"I find that based on the documents availed on behalf of the Defendants namely beacon certificate, copy of the Physical Plans for Kangema Market, Map of Kangema Urban Council Area from the Director of Survey, the disputed corridor forms part of the Defendants' Plot No. 10A (formerly 57) which as per the evidence on record is bigger in size than that owned by the Plaintiff.**
>
> **I therefore find that the Plaintiff has failed to prove his case on a balance of probability and find that part of the development being undertaken by the Plaintiff may be inside the Defendants' plot.**
>
> **Hence, the Plaintiff's suit is hereby dismissed with costs to the Defendants.**
>
> **For the reasons given herein above, I hereby allow the Defendants' counter claim dated 13/5/2014, in terms of prayer: - (a) and (b).**
>
> **(c) The Land Registrar and Government Surveyor having ascertained the extent of encroachment by the Plaintiff on the Defendants' plot, all the construction and structures build on the Defendants' plot be pulled down at the Plaintiff's costs.**
>
> **(d) Since this Court has found that the Plaintiff has indeed encroached or trespassed on a portion of the Defendants' Plot 10A (57), the Defendants' are hereby awarded General damages for trespass against the Plaintiff in the sum of Kshs. 100,000/=. (e) Costs of the counter claim are awarded to the Defendants with interests at Court rates."**

The Plaintiff/Appellant was aggrieved by the above determination of the Court in favour of the Defendants(Respondents) herein and has sought to challenge the said Judgment through the Memorandum of Appeal dated **12th November, 2019,** and sought for orders that;

> **1. The said Judgment be set aside and be substituted with a Judgment allowing the Appellant's claim in the Plaint.**

The grounds upon which the Appellant sought for the Appeal to be allowed are;

> **1. The Learned Magistrate erred in fact and in law in finding that the appellant had not proved his case on a balance of probabilities.**
>
> **2. The Learned Magistrate erred in law in finding that parts of the developments in the Appellant's plot were undertaken on the Defendants(Respondents) plot when there was no concise and precise evidence indicating the size and extent of the alleged encroachment.**
>
> **3. The Learned Magistrate erred in law and in fact in making an Order for the Land Registrar and the Government Surveyor to visit the boundary between Plot No. 10A and Plot No. 10B and point out its position and at the same time finding the Appellant had trespassed into the Respondents' plot before the position of the boundary is established.**
>
> **4. The Learned Magistrate erred in law and in fact in granting an injunction, ordering demolition and awarding damages for trespass when the position of the boundary has not been established.**
>
> **5. The Learned Magistrate erred in law and in fact in dismissing the Appellant's case with costs and allowing the Respondents' Counterclaim with costs.**

On 12th July, 2021, the Court directed that the Appeal be canvassed by way of written submissions and the Appellant through the **Law Firm of Ndumu Kimani & Co Advocates,** filed his written submissions on **10th August 2021,** and submitted that from the evidence he adduced at the trial Court, he had proved that the disputed corridor was on **Plot No. 10A (57)**, and therefore he had proven his case on a balance of probabilities.

The Appellants further submitted that the disputed boundary was not fixed and it was therefore not possible to establish the extent (if any) of encroachment. He also submitted that the estimated encroached area of about **600 cm,** as indicated by the Respondents' surveyor was erroneous as the same could only denote length and not area, as it was not stated in square centimetres.

It was further submitted that in his Judgment, the trial Court found that the boundary had not been established and therefore the finding of trespass could not be made before a boundary was fixed. That an order for an Injunction, demolition and damages could not be made until the boundary was fixed. He relied on the evidence adduced before the trial Court and urged the Court to allow the Appeal.

The Respondents filed their written submissions on **25th August 2021,** through the **Law Firm of J. N. Mbuthia & Co. Advocates,** and submitted that there was evidence that the Appellant had encroached into the Respondents' side by **600cm** which measurement was very precise and concise and as a result, what was to be demolished is what crossed the common boundary by **600 cm**. It was submitted that the Appellant filed the instant **Appeal,** based on a misunderstanding of the Judgment of the trial Court and hence the Appeal should be dismissed.

It was further submitted that the trial Magistrates duty was to assess the evidence and give it the weight it deserved and make a conclusion, which duty the Learned Magistrate discharged effectively. They relied on various provisions of the Law and urged the Court to dismiss the Appeal with costs.

The Court has considered the evidence adduced in court as well as the submissions filed by parties herein. The Court recognizes that it neither saw nor heard the witnesses and must therefore give allowance to that. The Court has also carefully considered the findings of the trial Court, and the Submissions of Counsels and finds as follows; -

As this is a first Appeal, it is the Court's duty to analyze and re-assess the evidence on record and then reach its own independent decision in the matter as provided by **Section 78** of the **Civil Procedure Act. See the case of *Kenya Ports Authority versus Kusthon (Kenya) Limited (2009) 2EA 212 where the Court of Appeal held inter alia, that:-***

> ***"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"***

Therefore, the court is under a duty to delve at some length into factual details and revisit the facts as presented before the trial court, analyze the same, evaluate it and arrive at an independent conclusion, but always remembering, and giving allowance for it as the trial court had the advantage of hearing the parties.

However, in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** the Court of Appeal held that:

> **"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.''**

Further, as the Court determines this Appeal, it takes into account that it will only interfere with the discretion of the trial Court where it is shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. See the case of ***Mbogo vs Shah (1968) EA at Page 93,*** where the Court held that:-

> ***"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior Court, unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted on because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

Having now carefully read and considered the Record of Appeal, the Grounds of Appeal, the written submissions by the parties, and the Judgment by the trial Court, the Court and finds that the issues for determination are:-

> **a) Whether the disputed corridor is on Plot 10A or Plot 10B**
>
> **b) Whether a case for trespass, demolition and a permanent injunction has been established against the Plaintiff.**
>
> **c) Whether the Appeal is merited.**

1. Whether the disputed corridor is on Plot 10.A or Plot 10.B

It is not in doubt that there exists both **Plot No. 10A** and **Plot No. 10B.** It is also not in doubt that **Plot No. 10A** and **Plot No. 10B** are also known as **Plot No. 57** and **Plot No. 58**, respectively and that they were subdivided from the same initial parcel of land known as **Plot No.10** within **Kangema township.** Further, it is not in dispute that **Plot No. 10B (58)** is owned by the Appellant herein while **Plot No. 10A (57),** is owned by the Respondents. What is in contention is whether the two **Plots 10A and 10B**, vary in size and on which plot if any, the disputed

corridor belongs.

In his evidence, the Appellant testified that he bought **his plot** more specifically **Plot No. 10B** from **Jacob Wachira**. That at the time of purchase, the Plot had an already constructed shop and that the sale agreement did not indicate the area of the plot he bought. He also testified that he knew that his Plot was **bigger,** and did not know what the Map stated. That the disputed corridor was on his plot and he had never allowed the Defendants (Respondents) access to the same, despite them having a door on their plot that led to the said corridor. The Plaintiff(Appellant) confirmed that indeed, a surveyor had visited the plot and showed the beacons and measurement.

In support of his case, the Appellant called to the stand **Angeline Wanjiru Mwangi** as his witness, who testified as that she is Land Surveyor by profession working with the County Government of Muranga. That she prepared a report concerning **Plot No. 57** and **58,** which was initially **Plot 10.** It was her testimony that both plots were equal and each measured **20 * 80 feet**, and that the disputed corridor was part of **Plot 10B,** which was owned by **Kihara Kiunjuri** (the Appellant). In addition, she attested that she visited the site prior to preparing her report, but she did not take any measurements. However, on being shown the map and confirming that the same was authentic, she attested that from the said map **Plot No. 57,** was bigger.

DW 1 on the other hand, was also a Land Surveyor, who testified before the trial Court during a visit to the scene. He produced as exhibit the **Folio Register** and **Registry Index Map** for the area together with a Surveyor's Report prepared by **E. M. Gakinya and Associates**. He also testified that **Plot No.57** was bigger than **Plot No. 58,** and showed the beacons to the court. He further, testified that the disputed corridor was in the middle of **Plot No. 57** and **Plot No. 58**. That the structure being constructed was on **Plot No. 57** and portion of it measuring about **600 cm** in area was on **Plot No. 58.** He measured both plots and established that the dimensions of **Plot 58 were 5.7 metres** * **6.11** metres and the dimensions of **Plot 57 were 6.31 metres * 6.25 metres.**

The Appellant is not a Surveyor and therefore not an expert. He had no way of independently establishing the size of the plot he purchased and the same was not indicated in the sale agreement. The Appellant called an expert witness in support of his case. However, the evidence of the said Surveyor was not credible as she admitted in court that she did not take any measurements when she visited the scene and only wrote her report from what she saw. In addition, her evidence was that both plots were equal in size and when shown, the Index map, she confirmed that **Plot 57** was bigger than **Plot 58.** Her report was challenged and on being weighed against the evidence produced, failed to tilt the balance of probability in the Appellant's favour.

It is clear that the determination of this Appeal revolves around the question of whether the Appellant proved his case on the balance of probabilities. That the burden of proof was on the Appellant to prove his case is not in doubt. In **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR,** it was held that:

> **"As a general preposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore the evidential burden…is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of the Evidence Act, law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the Evidence Act provides, the burden lies in that person who would fail if no evidence at all were given as either side."**

The question then is what amounts to proof on a balance of probabilities. **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526**, stated that:

> **"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."**

In **Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR**, the judges of Appeal held that:

> **"Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say;-**
>
> **"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal, it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties…are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."**

Therefore, it follows that the onus was on the Appellant to prove that the corridor in dispute belonged to **Plot 58** and not **Plot 57**, which I find that the Appellant failed to do. The Appellant neither tendered any evidence showing that **Plot 58** was bigger than **Plot 57,** nor did he rebut the evidence tendered by the Respondents witness showing that indeed **Plot 57**, was the bigger one of the two plots.

Section 109 of the Evidence Act, provides that 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.

2. Whether a case for trespass has been established against the Plaintiff.

Trespass is described under the **Trespass Act, Cap 403,** to mean 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. In **BLACK's LAW DICTIONARY 8TH EDITION**, a continuing trespass is defined as:-

> ***"A trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property".***

Finally, in **CLERK & LINDSEL ON TORTS 16th EDITION, paragraph 23 - 01**, it is stated that:-

> **"Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues".**

This clearly means any unauthorized entry whether present or continuous is trespass.

It is not in dispute that the Respondents are the owners of **Plot No. 10 A (57),** while the Appellant is the owner of **Plot No. 10B (58)**. PW 2 testified that the corridor in question was on his plot and that he did not allow the Respondents to use or access the said corridor. DW 1 also testified that the Appellant had erected a steel door in the corridor in question and therefore denying them access and use of it yet it was on their plot.

Having established that **Plot 10 A (57),** is the bigger one of the two Plots and that the a portion of the corridor in question lies in **Plot 57**, while another portion lies in **Plot 58**, the Court finds that the Appellant's continually trespassed on a portion of the Respondents' property and further, he denied the Respondents access and use to the said portion.

In the case of **Duncan Nderitu Ndegwa v. KP& LC Limited & Another (2013) eKLR,** the Court held as follows;

> ***"...once a trespass to land is established, it is actionable perse, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff's right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants' trespass."***

Based on the foregoing, the Court finds and holds that the Respondents had established a case of trespass against the Appellant.

3. Whether the Appeal is merited.

The Appellant had sought for the **setting aside** of the trial Court's Judgment and that Judgment be entered in his favor as sought for in the Plaint. The trial Court held that the Appellant did not prove his case on the required standard of balance of probabilities. This Court has also come to the same conclusion. Therefore, it follows that the trial Court did not misapprehend neither the law nor facts and therefore the Appeal herein is **not merited.**

Having now carefully **re-evaluated** and **re-assessed** the available evidence before the trial Court, and the **Memorandum of Appeal,** together with the **Written Submissions**, thus Court finds and holds that the trial Magistrate arrived at a proper determination and thus the Court finds no reasons to upset the said determination.

The upshot of the foregoing is that the Appellant's Appeal is found **not merited** and consequently the said Appeal is **disallowed** and **dismissed** entirely. The Judgment and Decree of the trial court are upheld, and the Respondents will have the costs of this Appeal.

It is so ordered.

DATED, SIGNED AND **DELIVERED IN OPEN COURT** AT **MURANG'A** THIS **30TH DAY OF NOVEMBER 2021.**

L. GACHERU

JUDGE

In the presence of;

Alex Mugo - Court Assistant

N/A for the Appellant

Mr. Mbuthia for the Respondents

L. GACHERU

JUDGE