REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT GARISSA

CIVIL APPEAL NO. 5 OF 2019

MOHAMMED KAHIYA OSMAN.....APPELLANT

VERSUS

ABDI FARAH.....RESPONDENT

SAHARA HASSAN DIKIR.....INTERESTED PARTY

(Being an Appeal from the judgement and Decree of the Senior Resident Magistrate Court

at Wajir by thehonourable Mr. A.K. Mokoross Senior Resident Magistrate given

at Wajir on the 11th Day of April 2019 in Wajir Civil Case No. 3 of 2018.)

JUDGEMENT

1. The appellant herein was the plaintiff in the trial Court. The Respondent was the 1st Defendant while the Interested party was equally an Interested Party. At the trial Court the appellant had sought from the following orders;

> **(a) An order for eviction of the Defendant from the suit property known as land reference number 13607/162 in Wajir Township together with his servants and/or his agents from his suit property.**
>
> **(b) An Order of demolition of all structures illegally erected by the defendant on the suit property known as Land Reference Number 13607/162 in Wajir Township.**
>
> **(c) Costs of the suit together with court rates.**

2. It was the appellant's averment that he is the registered owner of Land Reference Number 13607/162 (*herein referred to as the suit property*) and that sometimes in the year 2015 the Defendant and interested party without his consent entered into and took possession of part of the suit property. That the Defendant has continually denied him access of the suit premises. The Respondent denied the claim and averred that he has been occupying plot Number R1319 owned by the Interested party for thirty (30) years. That the suit premises did not include the parcel of land he occupied.

3. The matter proceeded for hearing where each party testified and called their respective witness. They equally filed written submissions to buttress their evidence.

4. The trial Court upon considering the evidence and submission of the parties found that whereas the Appellant had proved that he was the registered owner of the suit premises he had not proved the element of trespass and/or encroachment. It was the courts finding that the two lands i.e Land reference 13607/162 and Plot Number R1319 are distinguishable. That the appellant had not proven on a balance of probabilities that the Respondent was occupying Land reference 13607/162 as opposed to R1319. It was his finding that the appellant is not entitled to the Orders sought. The trial court also held that the parties to bear their own costs.

5. Aggrieved by the aforesaid decision, the Appellant filed its memorandum of Appeal on 30th April 2019 raising four grounds of appeal i.e.

> **a. That the Honorable magistrate erred in law and in fact by failing to find that the defendant has and continue to encroach on the Plaintiff's property being L.r. No. 13607/162 Wajir Township and thereby failing to issue the Order of eviction sought by the plaintiff.**

b. That the Honorable magistrate erred in law and in fact by finding that the plaintiff did not prove on a balance of probabilities that the Defendant had and continues to encroach on the plaintiff's property being L.r. No. 13607/162 Wajir Township thereby dismissing the plaintiff's claim.

c. That the trial Magistrate misdirected himself in law and in fact in failing to find that the Defendant did not produce any document to prove the existence of the alleged plot he purports to be in occupation of being parcel number R1319 and therefore find that he is encroaching on the plaintiff's property being L.r. No. 13607/162 Wajir Township as the same abuts a road.

d. That the Honorable Magistrate erred in law and in fact by finding that the County Lands Surveyor did not adduce evidence on who was the rightful owner of the suit property and whether the Defendant had encroached on the same whereas he specifically stated that the plaintiff's title deed to the suit property was authentic and therefore it is only the plaintiff who could be the rightful owner of the suit property.

6. On 24th June 2021 this court directed the parties to canvass the appeal through written submissions. At the time of writing this judgement only the appellant had filed its submissions.

7. The appellant submitted that he is the is the registered owner of the suit land and the fact of ownership was not contested in the trial court. That pw2 had confirmed encroachment by the Respondent. That the entirety of the Respondents evidence did not show the existence of the alleged plot R1319 which the Respondent alleged his workshop and structures sit on. That the respondent also failed to show proof of the location of the alleged plot on the ground by way of survey map or plan hence the lower court was in error in holding that there was a possibility that the Respondent held valid documents in relation to land Parcel Number R1319.

Analysis and Determination

8. As a first appellate court, this court's role is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. This duty was well stated **in Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123** in the following terms:

> **"Briefly put they are that this court must 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 this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).**

9. **PW1 the appellant** herein testified that he is the registered owner of the suit premises. That the respondent and interested party trespassed on the same in the year 2015. That despite his demand to have them vacate they have neglected/ignored and failed to vacate from the same. He told the court that the suit land abuts the road and that the defendant has established a car wash business on the road side. That he has to ask permission from the Defendant to pass to the road.

10. He produced the following document in support of is testimony **Copy of Title Mfi-1, Search Certificate Exh 2, Copy of letter from the County Government of Wajir MFI-2.**

11. In cross examination he told the court that they have been in dispute with the Respondent and is father for over 10 years. That he followed due procedure to be allocated the suit premises. In cross examination he told the court that he had produced the title with a map attached to it.

12. **PW2 Abdullahi Abdilatif** the County Lands Surveyor testified that he cannot ascertain who is the genuine owner of the suit premises and sought to limit himself to the authenticity of the title. He testified that the County Government had contracted a Company Geodev to conduct survey for purpose of title. That it was then realized that some of the plots had been surveyed. That they therefore cancelled the resurvey conducted by Geodev. He told the court that they asked people with title to present them and it is only the appellant who presented the same.

13. In cross-examination he testified that more than 50 plots had been surveyed. That a search at Ardhi House will show the appellant's land. He also told the court that he is aware of the dispute between the appellant and the Respondent. That it is the Respondent who closed the road and encroached on the appellant's land. He confirmed that at the time the appellant raised his complaint he informed him that the property is located opposite Wajir Mosque. That the survey plan has coordinate points and it will show you the plan.

14. **DW1 Abdi Farah Hussein** testified that five (5) clans have settled in the town where the suit premises are located; Arab, Hindi, Borana, Isack and Harti. That her mother belongs to the Harti clan. That the suit land belongs to her mother (*the interested party herein*). That her mother got the land in the year 1982. That at the time she got the land a committee had been formed chaired by the District Commissioner. That the interested party built an arial house which has stood for over forty (40) years.

15. It was his testimony that the plot owned by the appellant was previously owned by a person known as Gini, who was forcefully evicted from the same. That the appellant fenced the property and rented a building for telecommunication. It was DW1's contention that if indeed the plot the plaintiff is claiming it belongs to him, he would have fenced off the same at this time.

16. He further testified that issues between him and the appellant started in the year 2013. That at the time he had stayed and operated a car wash for over 12 years. That the issues between him and the appellant was instigated by a person known as Ibrahim. He would later be

arrested and charged. The criminal charges were however withdrawn and the appellant resolved to bring this suit.

17. In cross examination, he testified that both parcels of lands are fenced with Iron sheets and there is an access road between the two parcels measuring six (6) feet.

18. **DW2 Khalif Omar Bunow** was a former councilor for the area between 2007-2013. His testimony was a restatement of what Dw1 had testified. He confirmed that the land belonged to the interested party since 1982 and that the appellant, respondent and interested party have been neighbours for over 30 years. It was his testimony that he had known the interested party as the owner of the land since his childhood. That the land measures 50ftx100ft and that there is an iron sheet fence between the two plots. He confirmed that there is a six (6) feet access road between the plots and that there is no fence between the appellant's land and the car wash.

19. **DW3 Abdinasir Ahmed** also testified that the suit land belongs to the interested party. That the defendant has a car wash on the land, the interested party has iron sheet structures/kiosk while the plaintiff has rental houses on his land. He confirmed that the County Government had conducted a survey on the land. That there is a boundary between the two plots.

20. **DW4 Sahara Hassan Dirir (the interested party herein)** testified that when she acquired the land the same was an open field. That the appellant had a wholesale near the land and there was a disputed portion of land given to Gini. That Gini was evicted from the land and the appellant took possession of the same. That Gini got land in Grifti.

21. It was his further testimony that some land owners were issued title deeds but his father did not get a title deed. That in the year 2013, the county government conducted a survey and they issued her with Plot Number 973. She told the court that she had built a dash on the land over thirty-five (35) years ago but later on removed the dash and built iron sheet houses. He confirmed that the appellant had developed his plot and they had given him a road between his plot and their plot.

22. She confirmed that she had granted the defendant the plot to conduct his carwash business. She pleaded with the court that since the appellant had already developed his plot he should not be allowed to trespass her plot.

23. In cross-examination she testified that there is no fence between her plot and that of the defendant. That the mabati structures has been built on plot No. 954. That there is also a road between his plot and the appellant's plot. A vehicle cannot however pass between their plots.

24. The four grounds of appeal seek to determine one issue; **Whether the trial Magistrate erred in failing to find that the Respondent had and continues to encroach on the plaintiff's property being L.r. No. 13607/162 Wajir Township thereby failing to issue eviction orders against the Respondent.**

25. To properly discern the grounds of appeal, this court has to establish the ownership of the suit premises and whether the trial magistrate made a proper evaluation and analysis of the evidence adduced before him.

26. Both parties to this appeal laid claim to the suit premises. The appellant on the one claimed that the land belongs to him and that he has since been issued with a title for the same. The respondent on the other hand stated that the interested party owned the suit land and has been in occupation of the same for over thirty (30) years. Whereas the appellant claimed the land in dispute measured 140ft x 98ft, the Respondent averred that the same measured 50ft x 100 ft.

27. Section **107(1) of the Evidence Act (Chapter 80 of the Laws of Kenya),** which provides:

107. (1) 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.

28. In her testimony, the interested party stated that she had been in the suit land since the year 1982 has been that in the year 2013, the County Government was conducting survey on land neighbouring the suit land. That it was during this time that titles were issued but the interested Party's husband was not issued with one. She relied on confirmation letters from the County Council of Wajir which stated that she is the owner of Land parcel R1319. The appellant relied on the title issued to him in the year 1993.

29. I have looked at the four (4) grounds of appeal and the the proceedings befoe the trial court as well as the evidence adduced by the parties.

30. The Appellant who was the Plaintiff in the Lower Court had sued the Respondents for order of demolition and eviction as well as costs of the suit.

31. The appellant had testified on oath stating that the Respondents/defendants had trespassed/encroached on his land described as Land Parcel Number 13607/162.

32. He produced a letter from the County government of Wajir and certificate of official search and a certificate of title as P. Exhibits No. 1.

33. The certificate of title is attached with a deed plan No. 75095 dated 16th July, 1993 indicating that the property is measuring approximately 140 by 83 feet with an acreage of 0.1103 Ha.

34. The letter from the County Government of Wajir dated 18th October, 2017 confirms that the said property belongs to the Plaintiff/Appellant.

35. The Appellant/Plaintiff called Abdullahi Abdilatiff (PW2) as his witness who confirmed that he was the one who had written the letter dated 19/10/17.

36. The witness confirmed that he had no authority to say who owns the plot in dispute but could only testify on the authenticity of the title produced by the Plaintiff.

37. Whereas the court did not doubt the Appellant/Plaintiff as the proprietor of land parcel No. 13607/162, he observed that the Appellant/Plaintiff did not prove to the required standard that the land occupied by the Defendant is indeed land parcel No.13607/162 belonging to the Plaintiff/appellant.

38. At paragraph 36-43, the trial magistrate observed as follows;

"WHETHER IT HAS BEEN PROVED TO THE REQUIRED STANDARD THAT THE LAND OCCUPIED BY THE DEFENDANT IS PARCEL NUMBER 13607/162

> *36. This in my opinion is the crux of the matter and I have to say that the parties, more so the Plaintiff, were not too helpful in guiding the court on this aspect.*
>
> *37. I say so because whereas the Plaintiff alleges encroachment on the land by the Defendant, he never invited the court to visit the scene in order point out the said encroachment and/or avail a surveyor's report detailing the extent of the encroachment (if any).*
>
> *38. Instead, he called the County Surveyor as a witness but as already captured in the summary of evidence, the Surveyor only dwelt on the authenticity of the title deed held by the Plaintiff and not on the issue in controversy herein; to wit; whether the defendant had encroached on the said land.*
>
> *39. I will illustrate with excerpts from the surveyor's testimony the most telling being his statement during examination –in-chief that "**I wish to clarify that I have no authority to say who owns the plot but I will testify on the authenticity of the title."***
>
> *40. Again in cross-examination, the Surveyor says; "As a Surveyor I cannot tell you who owns the houses on the plots".*
>
> *41. To say the least, his testimony leaves me with the firm impression that he never visited the disputed land or that if he visited the said land, he did not want to be involved in the determination of who actually owned the land in dispute.*
>
> *42. The net result is that the court is left in a quandary and cannot, based purely on oral and documentary evidence, determine whether the defendant has or has not encroached onto the plaintiff's land.*
>
> *43. The matter is further complicated by the conceded fact that the defendant has been and continues to be in occupation of the disputed plot."*

39. I find that the trial magistrate properly evaluated the evidence and the testimony of the witnesses and arrived at a proper determination that indeed the Appellant had not proved his claim on the required standard.

40. The certificate of title was not sufficient evidence that the Respondent/Defendant had encroached his land parcel No. 13607/162.

41. The issue whether the defendant/respondent had encroached his land parcel No. 13607/162 would have been resolved by a Surveyor's report which was not undertaken.

42. The Surveyor who was called by the appellant/plaintiff did not assist much as he did not even visit the suit premises and did not file a report showing whether the defendant/respondent had encroached the plaintiff/appellant's land.

43. I am satisfied that the trial court properly directed himself to the evidence and the material placed before him in arriving at his decision.

44. One other issue which came out during the hearing was the testimony by the respondent/defendant that she has occupied the disputed land which she described as land parcel Number R1319 which he stated was allocated to her by the County Council of Wajir (defunct). He relied on confirmation letters produced in her evidence. He stated that the plaintiff land which is measuring 50 x 100 feet is an ancestral land which was allocated to his mother in 1982.

45. He stated that even before the allocation, they had lived on the plot for more than 40 years. He stated that they fenced the plot and he has constructed a car wash and live on the plot.

46. These are undisputed facts as the plaintiff/appellant seeks an order for demolition and eviction of the respondent/defendant.

47. If indeed the plaintiff/appellant was issued title deed for the suit property on 1st June, 1993, but took no steps to remove the defendant/respondent who had encroached the land and who had even built a car wash which the defendant/respondent is operating to date, I find that the claim by the appellant/plaintiff for demolition and eviction ostensibly is a claim based on the law of trespass.

48. Section 4 of the Limitations of Actions Act stipulates various limitation periods for various causes of action. In particular, Section 4(2)

stipulates as follows; -

> **"(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:**
>
> **Provided that an action for libel or slander may not be brought after the end of twelve months from such date."**

49. In **Eliud Njoroge Gachiri v Stephen Kamau Ng'ang'a [2018] eKLR** the court held as much on the context of a continuing trespass;

> **"the provisions of the Limitations of Actions Act section 4(2) which provide that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. This presupposes a case of a onetime trespass. The term accrue in the context of a cause of action means to arrive, to commence, to come into existence or to become a present enforceable demand or right the time of accrual of a cause of action is a question of fact (see Blacks Law dictionary at Page 23). However, in a case of a continuing trespass, a trespass consists of a series acts done on consecutive days that are of the same nature and that are renewed or continued from day to day so that the acts in the aggregate form one indivisible harm.**

50. In **Simon Ndwiga Murage v Embu Water and Sanitation Co. Ltd [2020] eKLR** the Court discerned the concept of continuing trespass as follows;

> **"…..The court is of the opinion that the Respondent's alleged acts of cutting down napier grass, digging the trenches, and installing the water pipes were not continuing acts. Those acts were all undertaken between 2011 and 2012. The *consequences* of those actions may be long lasting but that would not keep the cause of action alive forever. No authority was cited by the Appellant to demonstrate that consequential damage would prevent time from running under the Act for as long as the consequences persisted.**
>
> **21. It was submitted by the Appellant that the mere fact that he sought a permanent injunction to restrain the Respondent from digging additional trenches in future was clear evidence that his cause of action was a continuing one. No authority was cited in support of such contention hence the court is unable to accept the same. The prayer for injunction was based upon the Respondent's actions which were pleaded in the plaint. Those actions took place in 2011 and 2012. It is inconceivable that the Appellant would have a basis for seeking a permanent injunction against the Respondent other than the actions of 2011 and 2012. An order of permanent injunction could not be sought in a vacuum.**
>
> **25.The court is of the opinion that the trial court did not err in finding and holding that the Appellant's suit was statute-barred under Section 4(2) of the Act. The Respondent's alleged violations clearly took place in 2011 and 2012. There was no element of continuing trespass or continuing violation of any sort. The alleged long term consequential damage could not extend the period of limitation *ad infinitum.* The court does not accept that as long as the trenches remained improperly covered then the Appellant's cause of action would remain alive indefinitely. The court is also of the opinion that the trial court did not err when it held that the Appellant's suit did not disclose a reasonable cause of action. It is trite law that a statute-barred plaint cannot disclose a reasonable cause of action…."**

51. In this case the appellant has conceded that the Respondents had a car wash in the suit land. The respondent had stated that they had built dash structures and changed the same to iron sheets. All this transpired with the knowledge of the appellant. From the evidence the same transpired prior to the appellant getting in to the aforesaid land and even during the time he alleged he had occupation of the same. The same cannot therefore be construed to be a continuing trespass.

52. I also agree with the trial magistrate that this is a proper case where the parties, and ideally the appellant ought to have sought leave of the court to conduct a site visit. I have considered the evidence of the surveyor and I agree with the trial magistrate that the same was distinguishable. The surveyor led evidence to the authenticity of the title. He never sought to distinguish the title held by the appellant and the claim of ownership documents averred by the Respondent. A report was not filed to give the actual status of the land on the ground.

53. The case in the trial court did not really seek injunctive Orders and eviction Orders the same is disguised to seek a declaration that the appellant is the genuine owner of the suit premises.

54. It is therefore this court's finding that the trial magistrate did not err in finding that the appellant did not prove its case on a balance of probabilities.

55. The upshot therefore is that the appeal herein lacks merit and the same is hereby dismissed with costs to the Respondent.

DATED, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 26TH DAY NOVEMBER, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of;

1. Mr. Muhuni for the Appellant
2. Respondent/Advocate: Absent
3. Fardowsa: Court Assistant