



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. E047 OF 2021

DOMISIANO MAINGI.....APPELLANT

VERSUS

MONICAH KAREGI MWAURA..... RESPONDENT

(Being an appeal from the Ruling of Hon. G. Sogomo (P.M.) delivered on 11<sup>th</sup> March, 2021, in Tigania PM ELC No. 55 of 2019)

JUDGMENT

1. **Domisiano Maingi** hereinafter the appellant seeks to overturn the ruling and order issued on **11<sup>th</sup> March 2021** by **Hon. Sogomo** in **Tigania PM ELC No. 55 of 2019** on the following grounds:

- a. That the learned Principal Magistrate **Hon. G. Sogomo** erred in law and fact by allowing the respondents application dated **11<sup>th</sup> October 2020** to the extent of the prayers sought in her plaint dated **23<sup>rd</sup> August, 2019**.
- b. That the learned trial magistrate erred in law and in fact in not appreciating that there were two parcels of land and the surveyor considered and brought a report in respect of only one parcel of land.
- c. That the learned Principal Magistrate erred in law and in fact by not considering the appellants amended defence and the submissions by the appellant in arriving at his decision.
- d. That the learned Principal Magistrate erred in law and in fact in not appreciating that each party contended that he or she was on his or her parcel of land and the only reasonable report should have covered the two parcels in dispute and to what extent the other party had encroached on the other land.
- e. That the learned trial Magistrate erred in law and in fact in considering extraneous issues and not the submissions filed before the court.
- f. That the decision of the honourable Magistrate was against the evidence before the court and against the weight of the submissions in its entirety.

2. As a court of first appeal it has to rehearse, rehear and re-appraise itself on the record so as to establish if the trial court based its ruling on both correct facts and the law as held in ***Selle –vs- Associated Motor Boat Co. Ltd [1969]***.

3. By a plaint dated **23.8.2019**, the appellant who was the defendant had been sued by the respondent (plaintiff) allegedly for forcefully fencing off his **Land Parcel No. Nyambene/Akithi 111/3657**. By amended defence dated **28.1.2021** the appellant alleged as the registered owner of **L.P Tigania West/Akithi 111/1339**, only fenced his own land and denied interfering with the respondent access to his land.

4. On **15.7.2020** the respondent sought and was granted an order for the sub-County surveyor of Tigania West to visit the **Parcel No. Nyambene/Akithi 11/3657** with a view of establishing and fixing the boundaries, prepare a report and submit to court in 60 days. Parties were to share logistic costs equally.

5. Further on **9.9.2020** another order was made in the presence of Mr. Ondieki advocate then appearing for the appellant that the OCS Tigania police station do provide security during the scene visit. A report dated **19.11.2020** was eventually filed in court on **25.11.2020**. The appellant's counsel did not object to its filing but sought for more time on **3.12.2020** to consult his client since the report was showing the appellant to have encroached on the respondent's land.

6. By an application dated **11.12.2020** brought under **Section 1A, 1B and 3A of Civil Procedure Act** the respondent sought for the adoption of the report together with the sketch map on the basis that a surveyor's report is an expert evidence and hence could not be doubted. The application was supported by affidavit of the respondent sworn on **11.12.2020** stating the scene visit took place on **11.11.2020** in the presence of a Mr. Mwangi representing the appellant, claimed the surveyor had established there was encroachment of her land by the appellant hence the court should order removal of the fence to allow her take up possession and fence as per the surveyor's marked beacons. In her view there was nothing left to hear in the matter.

7. The appellant through an affidavit sworn on 5<sup>th</sup> January 2021 opposed the notice of motion. The first ground was that the respondent's claim was for **0.08 Ha** but the surveyor's report if acted upon would allow the respondent take up more i.e. **0.64 Ha** from him contrary to public policy. Secondly the appellant was of the view the surveyor had overstepped his mandate per the court order and had not marked the boundaries of **Parcel No. Nyambene/Akithi 111/3567**. Thirdly the appellant was of the view if the report was adopted the respondent would have been awarded more acreage than prayed for. To grant the orders sought the appellant submitted it would amount to deprivation of his land in an unjust manner.

8. Both parties filed written submissions dated **1.1.2021** and **28.1.2021** respectively. Over and above what was in the replying affidavit the appellant sought for an order that both the District Land Registrar and County Surveyor do visit the scene and mark the boundaries of the two Parcels 1337 and 3657 as a way of solving the issue amicably.

9. Through a ruling delivered on 11.3.2021 the trial court allowed the motion, adopted the surveyor's report hence ostensibly allowing the plaintiffs' claim.

10. The appellant's submits the trial Magistrate erred in law and fact in allowing the application dated **11.10.2020**. First summary judgment is provided under **Order 36 of the Civil Procedure Rules**. Even though the application was not brought under this provision the trial court appears to have relied on the case of ***Continental Butchery Ltd. -vs- Samson Musilu Nthiwa***. In that case the court stated:

**“with a view to eliminate delay in the administration of justice which would keep litigation out of their just dues or enjoyment of their property, the court is empowered in an appropriate suit to enter judgment for the claim for the plaintiff unless summary procedure provided by Order 35 subject to there being no triable issues which would entitle a defendant leave to defend. If a bonafide triable issue is raised the defendant must be given unconditional leave to defend but no so in a case in which the court feels justified in thinking that the defence raised axe sham.”**

11. **Order 36 Rule(1) (b)** states:

**“The recovery of land, with or without a claim for rent or mesne profits by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or a trespasser, where the defendant has appeared but not filed a defence, the plaintiff may apply for judgment for the amount claimed, or part thereof, and interested, or for recovery of the land and rent or mesne profits.”**

**Under sub-rule (2) the defendant may show either by affidavit or by oral evidence, or that he should have leave to defend the suit.”**

In this suit there was already a defence duly filed by the appellant.

12. Secondly the claim was for a permanent injunction restraining the appellant from occupying the suit land. It was not based on tenancy relations, mesne profits or rents.

13. Thirdly the application was brought seeking adoption of the report, taking vacant possession and leave to fence off the suit land. While what the court allowed was prayers as per the plaint. In my considered view, the suit was already defended. The appellant had raised triable issues both in the defence and the replying affidavit to the application. In line with **sub rule (2) of Order 36**, the appellant had showed reasons why the suit ought to have been defended on merits.

14. Fourthly, going by the principles on grant of summary judgment, the surveyor's report was sought for by parties and not the court on its own motion. It could only be adopted by consent of the parties. Both parties did not attend personally to the scene at the time the surveyor is said to have marked it. The initial request for a surveyor's report was made in the absence of the appellant. He was then acting in person. His input on the choice of the surveyor was necessary and so was his input on whether to have the report adopted and by extension drastically be used to found summary judgment against him.

15. The appellant objected to the adoption of the report through a replying affidavit and a supplementary affidavit which was allegedly expunged from the court record. The substance and legality of the surveyor's report was being disputed to an extent that the appellant questioned if the surveyor acted within the orders as granted for the scene visit.

16. Fifthly, the appellant raised pertinent issues as to the implication of adopting a report to help the respondent unjustly enrich herself out of the appellant's land contrary to what is in her own title deed. All these in my view amounted to triable issues which if raised went to show the claim was not within the purview of summary trial but required to go for full hearing so that parties may ventilate the issues.

17. The surveyor was not summoned to attend court even if his report was being adopted. If he had attended the court to present the report perhaps the court and the appellant would have had an opportunity to cross-examine him and clarify the issues the appellant was raising.

18. Sixthly, given the aforesaid triable issues the case was not a straight forward one. Such issues could not be answered in a summary

manner. The appellant had not admitted the claim at all both in the defence and the replying affidavit.

19. An expert evidence has been held to merely be part of the evidence which a court has to take into account and does not trump over all other evidence. It should also be tested against known facts. It cannot be considered in vacuum as held in **Stephen Kinini Wangonde –vs- The Ark Ltd. [2016] eKLR.**

20. The appellant insisted the surveyor revisits the land in the presence of a Land Registrar. The power to fix boundaries is given to the Land Registrar and not a land surveyor under **Section 19** of the Land Registration and only thereafter can a party move to court Under **Section 86 and 87** thereof.

21. Further it is common knowledge that there are two types of boundaries as held in **Ali Mohammed Salim –vs- Faisal Hassan Ali [2014] eKLR** and in **Azzuri Ltd.-vs- Pink Properties Ltd. [2017] eKLR.** So in my view the learned trial court erred in law by finding that law witnesses were incapable of guiding the court to a conclusive determination of the dispute at hand. The so called lay people are unfortunately the parties to the case and are entitled under **Article 48, and 49 of the Constitution** to a fair hearing including to testify on the facts ad pleaded in court.

22. Equally a surveyor’s report without another report by the District Land Surveyor cannot in my considered view be conclusive evidence to be taken exclusive of all other relevant evidence as per the witness statements in the court file.

23. The duty to make a determination based on law and evidence is given to the court under **Article 159 of the Constitution.** That solemn duty cannot be surrendered to expert witness such as the surveyor in this case.

24. The appellant had every right to question the surveyor’s report and hence by exercising such right he could not have been said to have been ultra vires. Further had he been given an opportunity before the order was made for a surveyor of his choice, he would have perhaps opted for it. In my view he was not given an opportunity to do so and therefore it is my finding that the court erred in law by finding the appellant had not brought an alternative report to counter the one adopted. He had sought for a report in the presence of a Land Registrar.

25. **Section 18 (2) and 19 (2)** of the **Land Registration Act 2012** provides a court shall not entertain any action or other proceedings relating to a dispute as to boundaries of a registered land unless the boundaries have been determined in accordance with this section. Under **Section 19 (2)** the mandate is for the Land Registrar to hear the parties, deliberate over the issue and make a determination. The respondent herein rushed to court before filing the claim with the Land Registrar. There was no report from the Land Registrar recommending the boundary be re-fixed as per Registration Index Map so that the court could take up jurisdiction over the matter. Indeed the moment the lawyer for the respondent raised the issue and an order was made for fixing of boundaries, the court ought to have downed its tools until a land registrar had made a determination over the boundary as held in **George Kamau Macharia –vs- Dexka Ltd [2019] eKLR** and **Lucy Agape Wayodi –vs- Kenya National Highways Authority & 2 Others [2019] eKLR.**

26. In **Azurri case supra** the court held a surveyor report was of little evidentiary value since he lacked the mandate to determine dispute relating to general boundaries and secondly by using wrong methodology in preparing the report.

27. Due to the foregoing it is my finding the appeal herein has merits, the same is allowed with costs. The lower court order is reversed with an order striking out the suit with costs for lack of jurisdiction. Costs for the appeal and the lower court are granted to the appellant.

**DATED, SIGNED AND DELIVERED via MICROSOFT TEAMS AT MERU THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2021**

**In presence of:**

No appearance for parties

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**