



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC APPEAL NO. 16 OF 2020

MARTIN SIMIYU WATOKA (Suing as legal Representative of the Estate of

STEPHEN WATOKA CHEMITI).....APPELLANT

VERSUS

GLADYS BARASA.....1ST RESPONDENT

AUGUSTINE SIMIYU WEKESA.....2ND RESPONDENT

(Being an Appeal from the Judgment of HON. S. O. MOGUTE – (PRINCIPAL MAGISTRATE)

delivered on 17th July 2019 in BUNGOMA CHIEF MAGISTRATE – CIVIL CASE No 263 of 2015)

J U D G M E N T

MARTIN SIMIYU WATOKA (suing as the legal representative of the Estate of **STEPHEN WATOKA CHEMITI**) the Appellant herein first moved to the **BUNGOMA CHIEF MAGISTRATE’S COURT** vide his plaint filed on 3rd June 2015 in **Civil Case No 263 of 2015**. He sought the main remedy that **GLADYS BARASA** and **AUGUSTINE SIMIYU WEKESA** (the 1st and 2nd Respondents respectively) be evicted and permanently enjoined, by themselves, their agents, servants or any other person claiming under them, from tilling, ploughing selling, leasing or occupying the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/3057** (the suit land) so that the beneficiaries thereof can share it peacefully.

The basis of his claim was that he is a beneficiary to the Estate of **STEPHEN WATOKA CHEMITI** and therefore has an interest in the suit land. That the Respondents are also beneficiaries to the Estate of **WEKESA MASIBO** whose land parcel **NO EAST BUKUSU/SOUTH KANDUYI/653** borders the suit land. However, on diverse dates, the Respondents illegally and without any colour of right have unlawfully and/or forcefully entered the suit land and erected semi – permanent houses thereon.

The Respondents filed their defence on 23rd June 2015 in which they denied that the Appellant is a legal representative or beneficiary to the Estate of the late **STEPHEN WATOKA CHEMITI**. They also denied having illegally or forcefully entered the suit land and put up semi – permanent structures thereon or having destroyed any common boundary between the two parcels of land. They pleaded further that the Appellant’s claim was misconceived and premised on an erroneous, unprofessional and biased survey report dated 13th April 2015 prepared by the **COUNTY SURVEYOR BUNGOMA** in which he purported to find that the Respondents had trespassed into the suit land. That in preparing the said report, the said surveyor not only failed to hear the Respondents but also failed to use the scale map. In the alternative and without prejudice, the Respondents pleaded that even if the parcel which they occupy forms part of the suit land, which they nevertheless denied, they have been in peaceful, quiet continuous, open and un – interrupted possession of the same for over 40 years the 2nd Respondent having been born there while the 1st Respondent was married to the 2nd Respondent’s brother in 1978 and have extensively developed it by building houses and cultivating crops. The Respondents pleaded finally that the Appellant’s suit was statutorily barred by the provisions of **Section 7** of the **Limitation of Actions Act** and a Preliminary Objection would be raised to have it struck out since no leave was obtained to file the suit out of time and the Appellant had also failed to disclose the date, month or year when the alleged cause of action arose in a clear attempt to circumvent the provisions of **Section 7** of the **Limitation of Actions Act**.

The Appellant filed a reply to the defence in which he reiterated the contents of his plaint and denied that the suit is time barred or that the Respondents have been in peaceful, quiet, continuous open and un – interrupted possession of the suit land for the alleged period.

The dispute fell for hearing before **HON S. O. MOGUTE – PRINCIPAL MAGISTRATE** on 17th October 2018. After hearing the Appellant and his witness **MR EMMANUEL B. NASONGO** a Land Surveyor as well as the Respondents and their witness **RICHARD**

NYONGESA WEKESA, the trial Magistrate delivered his Judgment on 17th July 2019 in which he dismissed the Appellant's case with costs.

That triggered this appeal which was promptly filed on 9th August 2019.

In seeking to over – turn the said Judgment, the Appellant has put forward the following six (6) grounds: -

- 1. That the learned Magistrate erred in law and in fact when he failed to find that the Respondents had illegally encroached and were occupying the Appellant's land parcel NO EAST BUKUSU/SOUTH KANDUYI /3057 despite admission by the Respondents in their evidence.**
- 2. That the learned Magistrate erred in law and in fact when he failed to appreciate the evidence of the Respondents that they were occupying the Appellant's land without any right.**
- 3. That the learned Magistrate erred in law and in fact when he failed to find that the Respondents' witness had admitted that he was present when survey was done and was called by the Land Registrar and Surveyor.**
- 4. That the learned Magistrate erred in law and in fact by failing to find that Appellant had proved his case against the Respondents on a balance of probabilities and the Respondents witness admitting that the Surveyor's report filed in Court contained an accurate position of the ground.**
- 5. That the learned Magistrate erred in law and in fact when he failed to appreciate the fact that the Respondents' witness admitted that the 2nd Respondent was present when the survey was done.**
- 6. That the learned Magistrate erred in law and in fact in not finding that the land Registrar and Surveyor were present during the survey contrary to the evidence on record.**

The Appellant therefore sought orders that the Judgment dismissing his suit be set aside and be substituted with one allowing it. He also sought for costs.

The appeal was canvassed by way of written submissions. Those were filed by **MR ANWAR** instructed by the firm of **ANWAR & COMPANY ADVOCATES** for the Appellant and by **MR WERE** instructed by the firm of **WERE & COMPANY ADVOCATES** for the Respondents.

I have considered the record of appeal and the submissions by Counsel.

As a first appellate Court, my role is to re – evaluate all the evidence that was available in the lower Court and to reach my own conclusions in respect thereof. In **OLUOCH ERIC GOGO .V. UNIVERSAL CORPORATION LIMITED 2015 eKLR** The Court restated the duty of an appellate Court as follows: -

“As a first appellate Court, the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of SELLE & ANOTHER .V. ASSOCIATED MOTOR BOAT CO. LTD 1968 E.A 123, my duty is to evaluate and re – examine the evidence adduced in the trial Court in order to reach a finding, taking into account the fact that this Court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect.”

That role was reiterated by the Court of Appeal in **ABOK JAMES ODERA t/a A. J. ODERA & ASSOCIATES .V. JOHN PATRICK MACHIRA t/a MACHIRA & CO ADVOCATES 2013 eKLR** as follows: -

“This being a first appeal, we are reminded of our primary role as a first appellate Court namely, to re – evaluate, re – assess and re – analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

Likewise, in **SELLE AND ANOTHER .V. ASSOCIATED MOTOR BOAT CO LTD 1968 E.A 123**, it was held that: -

“An appeal to this Court from a trial by the High Court is by way of a re – trial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must re-consider the evidence, evaluate it itself and draw it's 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 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 HAMEED SAIF .V. ALI MOHAMED SHOLAN 1955 E.A.C.A 270.”

Guided by the above principles, the record of appeal and the submissions by Counsel, I must now re-consider and re-evaluate the evidence that was tendered before the trial Magistrate to determine whether or not he erred in law and in fact in dismissing the Appellant's case.

The Appellant called as his witness during the trial **MR EMMANUEL BARASA NASONGO PW 2** (the record wrongly captures his last name as **WASOMO**) who produced as part of the Appellant's documentary evidence, a report that he had prepared on 13th April 2015 (Appellant's Exhibit No 5) following a visit to the suit land. That report had been prepared in respect of **BUNGOMA HIGH COURT SUCCESSION CAUSE No 50 of 2014** following the directions issued by **H. A. OMONDI J** (as she then was) on 10th December 2014. That succession cause had been filed by the Appellant in respect of the Estate of **STEPHEN WATOKA CHEMITI** and he had sought an order that the boundary of the suit land be established to enable him share out the suit land among the beneficiaries of the said Estate. In granting the Appellant the said order, the Judge made the following direction which is relevant to this Judgment.

“The District Land Registrar Bungoma and District Surveyor to visit the parcel NO E. BUKUSU/S. KANDUYI/3057 to establish the boundary of the same and it's acreage. This exercise must be carried out in the presence of the purchasers or persons occupying the portion which has been disposed off, and this order must be served on them at least 7 days prior to the exercise.”

That order culminated in the report dated 13th April 2015 and signed by the Surveyor **MR E. B. NASONGO** and which was produced as the Appellant's evidence during the trial. The pertinent observation by the said Surveyor is in paragraph 3 where he stated that: -

3 “After establishment of the original boundaries of L.R NO E. BUKUSU/S. KANDUYI/3057 with respect to other adjacent parcels, it was found that beneficiaries from L.R NO E. BUKUSU/S. KANDUYI/655 have trespassed and erected semi – permanent houses with other developments thereon in L.R NO E. BUKUSU/S. KANDUYI/3057.”

Grounds No 1, 3, 5 and 6 of the Memorandum of Appeal faults the trial Magistrate for failing to find that the Respondents had encroached onto the suit land, for failing to find that the Respondents witness had admitted that he was present when the survey was done and was called by the Land Registrar and Surveyor and for failing to appreciate the fact that the Respondents' witness admitted that the 2nd Respondent was present as well as the Surveyor and Land Registrar.

In trashing the Surveyor's report dated 13th April 2015, the trial Magistrate rendered himself as follows relying on the case of **ABDALLAH S. HASSAN & OTHERS .V. DISTRICT LAND REGISTRAR KAKAMEGA & OTHERS 2016 eKLR** which had been cited by **MR WERE** as authority for the proposition that the Land Registrar could not delegate his responsibility to the Land Surveyor. This is what the trial Magistrate said at page 30 of the typed proceedings: -

“Taking into account the above decision and the order issued by Justice H. A. OMONDI, it is my finding that the said order was not complied with as required. The District Land Registrar Bungoma to do as directed by the said order. The order states that he was expected to visit land parcel NO E. BUKUSU/S. KANDUYI/3057 together with the District Surveyor to establish the boundary of the same and it's acreage. This was to be carried out in the presence of persons occupying the portion which had been sold. The evidence on record clearly shows that the defendants who were allegedly in occupation of the disputed land were not at the site when the surveyor carried out the survey exercise. This was in contravention of the mandatory terms given in the above order by Justice OMONDI.”

The trial Magistrate then goes on to add that: -

“It is my finding that the survey exercise was conducted in the absence of the defendants. There is no evidence in the Court record to show that the defendants were notified of the survey exercise and they failed to attend the same. In the case of NYAMAKIA NDIGE & ANOTHER .V. WILSON MUCHENGO NYAMBANE 2016 eKLR, the High Court set aside the ex parte proceedings conducted by the surveyor and observed that “who summoned them and how?” It was the Land Registrar who was obliged to issue summons to them. Did he do so? He did not say he summoned them and no summons was made available and in those circumstances, the Court can only come to the conclusion that they were not summoned and hence the rules of natural justice were not satisfied. No party ought to be condemned without being heard.”

Picking up from there, **MR WERE** Counsel for the Respondents has submitted that it was not legal for the Land Registrar to delegate his duty to the surveyor or anyone else to determine the boundary dispute. **MR WERE** was fortified in that regard by the fact that the report of the surveyor dated 13th April 2015 was only signed by the Land Registrar showing that he received it on 11th May 2015 almost 2 months after the exercise. Further, the fact that the report was copied to him meant that the Land Registrar did not author it. **MR ANWAR** however submitted that the Land Registrar was present during the survey exercise and that is why he made remarks on the top that it be forwarded to the Court.

I have looked at the report by the surveyor dated 13th April 2015. It is clear on the face of it that it was prepared by the Land Surveyor and copied to the Land Registrar Bungoma. On the top left corner of the said report are the following remarks signed and bearing the stamp of the District Registrar Bungoma.

“Forward to High Court Registrar for Bungoma P & A No 50 of 2014”

In his testimony during the trial **MR EMMANUEL BARASA NASONGO** had the following to say: -

“I visited the said land with the Land Registrar on 17.3.2015. I established the boundary for the above land and parcel NO E. BUKUSU/S.KANDUYI/65. My observation was that the beneficiaries on land parcel NO E. BUKUSU/S. KANDUYI/655 had erected semi – permanent houses on land parcel NO E. BUKUSU/S. KANDUYI/3057. This was because there was no boundary at that time. I placed the boundary at the time. The Land Registrar placed the natural vegetation between the two parcels of land to establish the

boundary.”

In his testimony, the Appellant told the Court that both the Surveyor and the Land Registrar visited the land in the presence of both Respondents. The Respondents however denied having been present when the survey exercise was done. When he was cross – examined, the surveyor said: -

“The order by the High Court stated that the exercise must be carried out in the presence of the purchaser and those occupying the land. The people occupying the land were present. Gladys Barasa and Augustine Simiyu Wekesa were not present. I don’t know them.

Clearly therefore, if the surveyor does not know **GLADYS BARASA** and **AUGUSTINE SIMIYU WEKESA** who are the Respondents herein, he certainly cannot say whether or not they were present. However, he stated that the people occupying the land were present. Any doubt as to whether or not the Respondents and the Land Registrar were present during the exercise was however settled by the Respondents’ own witness. This is how their witness **RICHARD NYONGEA WEKESA** put it when cross – examined by **MR ANWAR**: -

“I reside in land parcel NO 556. On 27.3.2015 the Surveyor and Land Registrar came and called me and they did their survey work. Stephen Makokha neighbour was present. Vincent Mutende, Michael Mutembo, Augustine (2nd defendant) were present when survey was done.”

Therefore, un-like the surveyor who was not familiar with the Respondents, when their own witness confirms that the 2nd Respondent was present, this Court must believe him. And the 2nd defendant could only have been present because he was informed about the survey exercise. The trial Magistrate therefore erred when he said: -

“It is my finding that the survey exercise was conducted in the absence of the defendants. There is no evidence in the Court record to show that the defendants were notified of the survey exercise and they failed to attend the same.”

At least there was evidence from the Respondents’ own witness, and who obviously knows them, that the Surveyor and Land Registrar visited the suit land and the 2nd Respondent was present. And since the 1st Respondent is a sister – in – law to the 2nd Respondent, she was well represented at the survey exercise. It cannot therefore be correct for **MR WERE** to submit that the survey exercise proceeded ex – parte and that the **AUDI ALTERAM PARTEM RULE** was violated.

The trial Magistrate also erred when he made the finding that the Land Registrar delegated his duties to the Surveyor. This is how he rendered himself in the impugned Judgment: -

“A delegate cannot himself delegate. The Land Registrar could not therefore delegate delegated authority. There is neither express nor implied authority in the statute for the Land Registrar to have delegated to another person.”

That is not borne out of the evidence on record. It is now clear even from the respondents’ own witness that both the Surveyor and Land Registrar were present during the survey exercise. Although the report was only signed by the Surveyor, the Land Registrar endorsed it and directed that it be transmitted to the High Court Registrar pursuant to the directions of **H. A. OMONDI J** (as she then was). The Land Registrar was therefore clearly owning the said report as a product of both him and the Surveyor. The claim that the land Registrar delegated to Surveyor is therefore rather far-fetched. In the face of those very clear findings in the report, the trial Magistrate erred in law and in fact when he failed to find that the Respondents had illegally encroached on the Appellant’s land. That was a report from expert witnesses and no evidence had been led to rebut it. It was an error for the trial Magistrate not to defer to such evidence.

Most significantly however, the Respondents had an avenue open to them by which to challenge the report dated 13th April 2015 if they doubted it’s veracity. **Section 86(1)** of the **Land Registration Act** provides that: -

“If any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on the Registrar by this Act, the Registrar or any aggrieved person shall state a case for the opinion of the Court, and thereupon the Court shall give it’s opinion, which shall be binding upon the parties.”

The Respondents knew about the survey report long before the Appellant moved to the Subordinate Court seeking orders against them. That is why in paragraph 11 of their defence they refer to it as **“erroneous, unprofessional and/or biased.”** **The Land Registration Act** has provided them with a remedy of challenging it. However, they have elected not to do so. Where a remedy is provided in law to address a particular grievance, it must be exhausted. It is therefore too late in the day for the Respondents to cast aspersions on the report dated 13th April 2005.

In grounds 2 of the Memorandum of Appeal, the Appellant faults the trial Magistrate for failing to appreciate the evidence of the Respondents that they were occupying the Appellant’s land without any right. In his Judgment, the trial Magistrate took the view that the Appellant’s suit was statute barred and further, that the Appellants did not plead any encroachment on the suit land. This is what the trial Magistrate stated towards the end of the Judgment: -

***“The defence raised the issue of limitation that the suit was time barred by virtue of the provisions of Section 7 of the Limitation of Actions Act Cap 22 laws of Kenya. Having perused the pleadings filed herein, I note that the plaintiff did not disclose when the cause of action arose.*”**

The plaintiff’s evidence on record that the defendants encroached the suit land in the year 2006 has no basis because the same is not pleaded in the plaint. Further, the plaintiff’s statement does not disclose the time date (year) the cause of action arose.”

It is true that the plaintiff did not indicate in his plaint exactly when the Respondents entered the suit land. This is how he pleaded in paragraph 6 of the plaint: -

“That on diverse dates, the defendants illegally and without any colour of right unlawfully and/or forcefully entered unto land parcel NO BUKUSU/S. KANDUYI/3057 and are in such occupation whereof they have erected semi – permanent houses and are in continual usage of the plaintiff’s land.”

When the plaintiff filed this suit on 3rd June 2015, he was acting in person. The firm of **ANWAR & CO ADVOCATES** only came on record for him on 7th December 2017. Pleadings drawn by prose litigants invariably tend to be less than elegant. But it is sufficient if the Court can discern from them what the parties have brought forward for its determination. The plaintiff may not have used the word **“encroached”** in his plaint as the trial Magistrate stated. However, the plaintiff pleaded in paragraph 6 which I have already referred to above that the Respondents ***“illegally and without any colour of right unlawfully and/or forcefully entered unto land parcel NO BUKUSU/S. KANDUYI/3057 and are in such occupation whereof they have erected semi – permanent houses and are in continual usage of the plaintiff’s land.”*** There can be no doubt in my mind, and the trial Magistrate should have found as much, that what the Appellant was alleging against the Respondent was a trespass on the suit land. In **BLACK’S LAW DICTIONARY 10TH EDITION**, trespass is defined as: -

“An unlawful act committed against the person or property of another; esp wrongful entry on another’s real property.”

The trial Magistrate therefore erred both in law and in fact when he failed to find that the Appellant had proved his case against the Respondents on a balance of probabilities because his pleadings were also wanting.

On the issue of the Appellant’s suit being time barred, **MR WERE** citing the provisions of **Section 7** of the **Limitation of Actions Act** made the following submission: -

***“In the suit, the Appellant being aware of these mandatory provisions intentionally concealed and/or failed to disclose a material fact i.e. the date when the cause of action arose. He failed to state the date when the defendants started occupying the suit land in the following documents*”**

Your Honour, this failure to plead or disclose the date when the cause of action arose was not an accidental slip but a deliberate and mischievous attempt by the plaintiff to conceal the glaring fact that the suit was helplessly time barred. The plaintiff is trying to circumvent and evade the clear and mandatory provisions of Section 7 of the Limitation of Actions Act.”

As is now clear, the Appellant’s grievance was one of trespass to land. Trespass is a continuous tort. In **NGURUMAN LTD .V. SHOMPOLE GROUP RANCH & OTHERS C.A CIVIL APPEAL No 73 of 2004 [2007 eKLR]**, the Court cited **CLERKS & LINDSEL ON TORTS 16TH EDITION PARAGRAPH 23 – 01** as follows:-

“Every continuance of a trespass is a fresh trespass in respect of which a new cause of action arises from day to day as long as the trespass continues.”

Therefore, in a situation like the one obtaining here where a person has trespassed onto land belonging to another and put up structures thereon, the trespass continues and is actionable at the instance of the land owner for as long as the trespass continues. A new cause of action accrues every day and cannot therefore be barred by the statute of limitation.

There was a half-hearted attempt by the Respondents to mount a claim for the suit land by way of adverse possession. In paragraph 13 of their defence, they pleaded ***“that even if the parcel of land they claim forms part of L.R BUKUSU/S. KANDUYI/3057 which is nevertheless denied, the defendants have been in peaceful, quiet, continuous, open and uninterrupted possession of the land for over 40 years.”***

No claim for land by way of adverse possession can be sustained where the claimant, in the same breath, denies occupying the land in dispute. This Court can therefore only describe the suggestion by the Respondents that they are entitled to the suit land through adverse possession as a little more than a shot in the dark.

Ultimately therefore, and following my re – evaluation of all the evidence that was before the trial Magistrate, I am satisfied that this appeal must be allowed and the Judgment of the trial Court set aside. **Section 78(1)** of the **Civil Procedure Act** sets out the powers of an appellate Court. **Section 78(2)** of the same Act goes on to provide as follows: -

78(2) "Subject as foresaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on Court of original jurisdiction in respect of suits instituted therein."

Having allowed this appeal, this Court makes the following final disposal orders: -

- 1. The Judgment dismissing the Appellant's suit as delivered by the trial Court is set aside and substituted with one allowing it.**
- 2. The Respondents shall within three (3) months of this Judgment vacate and remove the semi – permanent structures constructed on the land parcel NO EAST BUKUSU SOUTH KANDUYI/3057.**
- 3. In default of (2) above, the Respondents shall be evicted from the land parcel NO EAST BUKUSU/SOUTH KANDUYI/3057.**
- 4. The Respondents are hereby permanently restrained by themselves, their agents, servants or any other person(s) claiming under them from tiling, ploughing, selling, leasing or occupying the land parcel NO EAST BUKUSU/SOUTH KANDUYI/3057.**
- 5. The Respondents shall meet the costs of this appeal and in the Court below.**

Right of Appeal explained.

Boaz N. Olao.

J U D G E

22nd July 2021.

Judgment dated, signed and delivered at **BUNGOMA** this 22nd day of July 2021 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

Boaz N. Olao.

J U D G E

22nd July 2021.