REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

CIVIL APPEAL NO. 16 OF 2019

JAPHETH M. WEPUKHULU....APPELLANT

VERSUS

FRED SIMIYU .....RESPONDENT

(Being an appeal from the Judgment delivered by Hon. Nancy N. Barasa – Senior Resident Magistrate, Webuye on 7/5/2019 in the Wby Elc Case No. 155 Of 2017).

J U D G M E N T

The standard of proof in civil cases is on a balance of probability. The burden of proof is on the party alleging the existence of a fact which he wants the Court to believe.

Section 107 (1) and (2) of the Evidence Act provides as follows: -

> **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"**
>
> **(2) "When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person"**

In **MILLER .V. MINISTER OF PENSIONS 1947 ALL E.R 372, LORD DENNING** puts this standard in the following terms: -

> **"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case is which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."**

In **JAMES MUNIU MUCHERU .V. NATIONAL BANK OF KENYA LTD C.A CIVIL APPEAL NO 365 OF 2017 [2019 eKLR]**, the Court stated as follows: -

> **"Indeed, it is settled law that in civil cases the standard of proof is on a balance of probability. This is in effect to say that the Courts will make a finding based on which party's version of the story is more believable."**

And what is the role of pleadings in litigation? In **CMC AVIATION LTD .V. CRUISAIR LTD NO 1 1978 KLR 103 [1976 – 80 1 KLR 835] MADAN J** (as he then was) had the following to say: -

> **"Pleadings contain the averments of the parties concerned. Until they are proved or disapproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un – proven. Averments in no way satisfy, for example the definition of 'evidence' as anything that make clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth."**

That is the position of the role of pleadings and has been followed by Courts in the County. And the law is that a party who fails to adduce

evidence in support of his case, those pleadings remain mere statements. That was also reiterated in the case of **STEPHEN GACHAU GITHAIGA .V. MARGARET WAMBUI WERU & ATTORNEY GENERAL 2015 eKLR** cited by **MR ANWAR** counsel for the Appellant in his submissions.

This appeal will be determined in light of the above legal principles.

JAPHETH M. WEPUKHULU (the Appellant herein) and one **JULIUS JUMA MARAKA** are the registered proprietors of the land parcel **NO NDIVISI/ MUCHI/2805**. By a plaint dated 4th December 2017 and originally filed at the **CHIEF MAGISTRATE COURT BUNGOMA** before being transferred to the **PRINCIPAL MAGISTRATE'S COURT AT WEBUYE**, the Appellant sought Judgment against **FRED SIMIYU** (the Respondent herein) in the following terms:-

a. A declaration that the plaintiff's parcel of land known as NDIVISI/MUCHI/2805 is served with an access road of 5 metres width and 60 metres length and which the plaintiff and his tenants are entitled to use, and

b. An order compelling the defendant to open up the access road to the plaintiff's parcel of land known as NDIVISI/MUCHI/2805 by demolishing the structures, gates and walls constructed in the accused road or by removing any other thing on the access road.

c. Costs of this suit.

d. Any other relief that the Honourable Court may deem fit and just to grant.

The basis of the suit was that the Appellant is the owner of the land parcel **NO NDIVISI/MUCHI/2805** measuring 0.06 Hectares on which he has constructed residential houses occupied by 17 tenants and their families and the Respondent is the owner of the adjacent parcel of land being **NDIVISI/MUCHI/2819**. That the two parcels are served by a common access read measuring 5 metres wide and 60 metres long which the plaintiff and his tenants have been using since 1988. However, from 10th November 2017, the Respondent illegally and without any colour of right erected two steel gates thus blocking the access road and is on the verge of constructing a perimeter wall also blocking the same road. Particulars of the illegality by the part of the Respondent were pleaded in paragraph 7 as: -

1. Erecting two steel gates on the access road.

2. Constructing a perimeter wall on the access road.

3.Blocking the plaintiff and his tenants from using the access road.

4. Causing the plaintiff's parcel to have no access road.

This has caused the Appellant hardship as his tenants are threatening to move out of his residential houses and efforts to settle this dispute amicably fell on deaf ears. The Respondent has resisted efforts by the Land Registrar and Surveyor to settle the dispute hence this suit.

The Respondent did not enter appearance or file a defence and on 19th March 2019, the suit came up for hearing before **HON. N. BARASA (SRM)** where the Appellant was the only witness who testified. He told the Court that the Respondent who is his neighbour and the owner of land parcel **NDIVISI/MUCHI/ 2819** had blocked the access road to his land by constructing steel doors. He carried out a survey and a report by the surveyor established that the Respondent's structures were on the access road. He proved as part of his documentary photographs of the steel gates (plaintiff's Exhibit 1) and the Surveyor's report (plaintiffs Exhibit 2). He therefore asked the Court to assist him demolish the two gates.

At the Appellant's request, the trial magistrate visited the scene and recorded her observations. The Appellant also produced the sale agreement showing that the access road measuring 5 metres by 60 metres was factored (Appellant's Exhibit 4) and the mutation forms (Appellant's Exhibit 5).

Counsel for the Appellant thereafter filed submissions and in a reserved Judgment delivered on 7th May 2019, the trial magistrate dismissed the Appellant's suit with no orders as to costs.

That Judgment has provoked this appeal in what the Appellant has raised the following nine grounds in seeking to have it set aside: -

1. The learned magistrate erred in law and in fact by not appreciating that the gist of the suit herein was the construction of steel gates on the access road by the defendant and the blockage thereof.

2. The learned magistrate erred in law and in fact by dismissing the Appellant's suit whilst there was over – whelming evidence that steel gates were constructed on the access road leading to the Appellant's parcel.

3. The learned magistrate erred in fact and in law by making the ownership of all that parcel of land known as NDIVISI/MUCHI/2804 and 2819 as an issue for determination when in real sense, their ownership was not in question.

4. The learned magistrate erred in fact an in law by failing to appreciate that NDIVISI/MUCHI/2819 is a sub – division of NDIVISI/MUCHI/2804 when in fact the Appellant had tendered before the Court mutations showing sub – division of

NDIVISI/MUCHI/2804 to NDIVISI/MUCHI/2818 and NDIVISI/MUCHI/2819.

5. The learned magistrate erred in fact and in law by failing to appreciate that there was no other evidence negating the evidence of the Appellant that it is the Respondent herein who constructed the steal gates blocking the access road.

6. The learned magistrate erred in fact and in law by failing to appreciate that in civil matters, the burden of proof is that of a balance of probabilities and not beyond reasonable doubt and that the Appellant had proved his case on the required balance.

7. The learned magistrate erred in fact and in law by failing to realize that an access road remains the same even after sub – division.

8. The learned magistrate erred in fact and in law by failing to appreciate that a party cannot and ought not to construct on an access road.

9. The learned magistrate erred in fact and in law by failing to appreciate that the effect of her Judgment takes away the right of the Appellant to use the access road.

Though served, the Respondent did not attend Court for directions and the only submissions on record are those of **MR ANWAR** counsel for the Appellant.

I have considered the record of appeal and the submissions by **MR ANWAR**.

In my view, this appeal stands or falls on a consideration of grounds 1, 2, 3, 5 and 6.

Grounds 1, 2, and 5 can be considered together and they fault the trial magistrate for not appreciating that the gist of the suit was the construction of the steel gates on an access road by the Respondent and dismissing the Appellant's suit in the face of over – whelming evidence which was not rebutted.

It is clear from paragraph seven of the Appellant's plaint that the issue which he wanted determined was the claim that the Respondent had illegally erected two steel gates on an access road which the Appellant and his tenants had been using to access the property on land parcel **NO NDIVISI/MUCHI/2805** since 1988 thus occasioning the Appellant and his tenants hardship. It is not in doubt that a property owner has a right to enjoy the use of the property. To do so, he must have un – hindered access thereto. In support of his case, the Appellant not only produced photographs of the offending gates (Appellant's Exhibit 2) but also the Surveyor's report dated 30th November 2017. This dispute had nothing to do about the ownership of the land parcels **NO NDIVISI/MUCHI/2804** and **2819** or indeed the ownership of any parcels of land. Indeed, the trial magistrate visited the scene to observe the gates on 27th March 2019 and the record reads: -

"Court observes the gates are not locked."

Having seen the gates during the site visit and in the light of the un – rebutted evidence of the Appellant, the trial magistrate erred in law and in fact when in the impugned Judgment, she made the ownership of two parcels of land as issue when states therein that: -

"The un – explained question is whether the blocked access road is passing through parcel NO 2819 or 2014 and who are *the current registered owners of the parcel NO 2819 or 2804 and who are the current registered owners of the parcel is it the defendant as pleaded or someone else."*

The trial magistrate then goes on to state: -

"The Court moved to the scene and confirmed the erected steal gates."

Clearly, not only did the trial magistrate have on record the evidence of the Appellant which was not controverted, but also saw the gates at the site which were pointed out by the Appellant. That was the issue which the trial Court was called upon to determine. In the face of that over – whelming evidence, there was a clear error of law and fact when the trial magistrate dismissed the Appellant's case. Grounds 1, 2, 3 and 5 of the appeal are sustained.

Ground 6 of the Memorandum of Appeal takes issue with the trial magistrate for failing to appreciate that in civil cases, the burden of proof is on a balance of probabilities. There is merit in that ground.

At the beginning of this Judgment, I have cited case law on the standard of proof in civil cases which is on a balance of probabilities. The trial magistrate does not address this important principle in the Judgment. Instead, in the penultimate paragraph of the Judgment, the trial magistrate writes: -

"This Court is obligated to establish whether or not the defendant herein who was served and failed to enter appearance is the owner of the parcel bordering the plaintiff and through which the plaintiff's parcel NO NDIVISI/MUCHI/2805 is accessed."

There is no doubt that the cardinal obligation of a Court is to establish the truth or otherwise of the facts and evidence put forward by the protagonists in a case. Only then can it arrive at a just decision by approving one party's version and disapproving the other. That is the whole essence of a trial. However, in a case like this where the other party fails to attend Court to rebut the evidence offered by the other party, it does not become the duty of the Court to step into the shoes of the other party and assume what evidence that party would have adduced. The Appellant's evidence was not only un – controverted but it was also congent enough to warrant the orders sought in the plaint. Indeed, in the same Judgment, the trial magistrate makes the following finding of fact: -

> **"The defendant failed to enter appearance and or file any defence. The plaintiff has demonstrated that he owns the parcel of land NDIVISI/MUCHI/2805 and that the Sub – County Surveyor in his report confirms that indeed the plaintiff has right of access to the said parcel through plot NO NDIVISI/MUCHI/2819 whose owner has erected 2 steal gates hindering free movement of the plaintiff into and out of NDIVISI/MUCHI/2805."**

In light of all the above evidence which was not controverted, there was no basis for the trial magistrate to arrive at the decision that the Appellant had not established his case on a balance of probability.

The up – shot of the above is that this appeal is allowed. The Judgment of the trial Court dismissing the Appellant's suit is set aside and substituted with a Judgment allowing the Appellant's suit.

There shall be no orders as to costs.

Boaz N. Olao.

J U D G E

20th February 2020.

Judgment dated, delivered and signed in Open Court this 20th day of February 2020.

Mr Wekesa for Mr. Anwar for Appellant present

Appellant present

Respondent absent

Joy/Okwaro – Court Assistant

Boaz N. Olao.

J U D G E

20th February 2020.