REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND AT MERU

ELC APPEAL NO. 39 OF 2019

JOSEPH MBAABU MUGAMBI.....APPELLANT

VERSUS

LOISE MWARI M'MIRITI.....1ST RESPONDENT

SILAS KIRAITHE MBURUGU.....2ND RESPONDENT

GERALD W. KINOTI.....3RD RESPONDENT

RAEL MUTUNDU MIANO.....4TH RESPONDENT

MUTWIRI TRACIUS MUGAMBI DANIEL.....5TH RESPONDENT

M'NTHAKA KATHURI.....6TH RESPONDENT

(An appeal from the judgment of HON. J. IRURA Principal Magistrate delivered in Nkubu Law Court on 30.1.2019 in PMCC NO.19 of 2020)

JUDGMENT

1. The appellant being the 1st defendant in the trial court was sued by the 1st respondent vide the initial plaint dated 24.2.2010, where the following orders were sought;

> ***(a) A permanent order of injunction restraining the defendant, his agent, servant and/or employee or whomsoever acting on his behalf or instructions from entering, invading, moving into, trespassing upon and/or in any other manner whatever from interfering with the plaintiff's ownership, use occupation and/or possession of land parcel No. Nkuene/Taita/427. Further the defendant be evicted form the plaintiff's aforesaid parcel of land.***
>
> ***(b) An order directing the defendant to demolish the illegal structures and/or buildings unlawfully erected upon the plaintiff's aforesaid land parcel and to dispose the waste and or any other refuse therefrom away from the plaintiff's aforesaid land parcel.***
>
> ***(c) In the alternative and without prejudice to prayer (b) above, the plaintiff be allowed to demolish the illegal structures and/or buildings erected on her aforesaid land parcel and dispose off the waste therefrom at the defendant's costs and the OCS Nkubu Police station to provide security.***

(d) Costs of this suit".

2. The appellant had filed his statement of defence on 15.3.2010, where he denied the allegations of trespass while contending that he lawfully bought his parcel no. **Nkuene/ Taita/ 428** in 1997 where he commenced construction of permanent buildings. He denied that the court had jurisdiction to hear the matter.

3. In the course of the trial, the 2nd to 6th respondents were enjoined in the suit as 2nd, 6th, 3rd, 4th and 5th defendants. I have seen a statement of defence of the 2nd defendant (now 2nd respondent), but the document is not dated, nor does it have a date of filing. I have not seen the pleadings of the other defendants although they gave evidence during the trial.

4. On 30/01/2019 the trial court entered judgment in favour of the plaintiff/ 1st respondent as follows:

a) "A permanent injunction restraining the 1st defendant, his agents, servants, heirs and/or employees or whomsoever acting on his behalf or instructions from entering, invading, moving into, trespassing on and/or in any manner whatever from interfering with the plaintiff's ownership, use, occupation and/or possession of land parcel No. NKUENE/TAITA/427. Further the 1st defendant be evicted from the plaintiff's aforesaid parcel of land.

b) It is also ordered that the 1st defendant to demolish the illegal structures and/or buildings unlawfully erected upon the plaintiff's aforesaid parcel of land within 45 days from the date of this judgment.

c) In default of (b) above, the plaintiff shall be at liberty to demolish the illegal structures and/or buildings erected on her aforesaid land parcel and dispose of the waste therefrom at the 1st defendant's cost and the OCS Nkubu police station to provide security.

d) The plaintiff is awarded Kshs. 400,000/- general damages for trespass together with interest at court rates from the date of judgment until payment in full.

e) Costs of the suit".

5. The appellant being aggrieved by the decision filed a memorandum of Appeal based on the following ten (10) grounds;

(i) "That the learned trial magistrate erred in law and fact in holding that the plaintiff had proved her case against the appellant on a balance of probabilities.

(ii) The learned trial magistrate erred in law and fact in holding that the appellant had not challenged the 1st respondent's evidence.

(iii) That the learned trial magistrate erred in law in failing to properly consider and apply the evidence of the appellant before arriving at her findings/decision.

(iv) That the learned trial magistrate erred in fact and in law in failing to consider, appreciate and apply the evidence by the 2nd to 6th respondents admitting the fact that their plots were on the wrong position on the ground hence substantially and directly contributing to the dispute between the appellant and the 1st respondent.

(v) That the learned magistrate erred in law in failing to consider and making any finding on the issues raised by the appellant under the provisions of order 1 rule 24 cap 21 (Laws of Kenya).

(vi) That the learned magistrate erred in law in failing to consider and apply all the findings and

recommendaitons contained in the report by the District Land Registrar and Surveyor.

(vii) That the learned magistrate erred in considering only part of the report by the District Land Registrar and Surveyor.

(viii) That the learned magistrate erred in law and in fact in awarding general damages which had not been pleaded and or sought for in the plaint or proved at all.

(ix) That the award of damages of Kshs.400,000/= by the learned magistrate was grossly erroneous, baseless and illegal.

(x) That the judgment of the learned magistrate was against the evidence tendered before her".

6. The appeal was canvassed by way of written submissions. The appellant submitted that the trial court had no jurisdiction to entertain the suit as the matter was a boundary dispute which only the Land Registrar has the requisite jurisdiction to hear and determine. Consequently, the trial magistrate erred by finding that the 1st respondent had proved the suit against the appellant only. She failed to evaluate and properly apply the two reports made by the Land Registrar and the Surveyor.

7. On the issue of jurisdiction, the appellant relied on the case of **Meru HCC ELC No. 143 of 2008,** where this court found that it is only the Land Registrar who has jurisdiction to settle land boundary disputes over registered land. Moreover, the trial magistrate failed to determine the issues raised against the 2nd to 6th respondents who were enjoined to the suit under ***Order 1 Rule 24***. As for damages awarded, they were not pleaded, supported or warranted.

8. The 1st respondent submitted that the issue of the trial court's jurisdiction is not one of the grounds of appeal in the memorandum of appeal. Neither has the appellant sought leave to be heard on this issue or amend his memorandum of appeal as per ***Order 42 Rule 4 of the Civil Procedure Rules***. Either way, the trial court had jurisdiction to hear the suit as the matter was not a boundary dispute.

9. It was further submitted that the trial court did not err in finding that the 1st respondent had proved her case, that the appellant had trespassed on her land parcel and that the award of damages was merited. 1st respondent contended that the trial court had no jurisdiction to determine the issues raised against the 2nd to 6th respondent as it was purely a boundary dispute which the land registrar is empowered to determine under ***Section 18 (2) of the Land Registration Act 2012***. The 1st respondent urges the court to dismiss the appeal with costs to the respondents.

10. The 2nd respondent submitted that the appeal is unmerited for the trial court only made a determination of the case before it and never made any finding for the 2nd respondent against the appellant since no such prayer was sought.

11. The 4th and 5th respondents who are in person submitted by reiterating what had been stated by the appellant. I have not seen any submissions by the 3rd and 6th respondents.

DETERMINATION

12. As the first appellate court, this court's role is to evaluate, assess and analyze the extracts on record and to make its own determination having in mind that it did not have the advantage of hearing witnesses. See: **Selle & Another vs. Associated Motor Board Company Ltd [1968] EA 123.**

13. I will first endavour to lay out the evidence as tendered before the trial court.

14. **PW1 Loise Mwari M'Miriti (1st respondent),** testified that she is the owner of **Plot No. 427** while the 1st defendant is her neighbor whose **plot is no, 428** which borders hers. She bought her plot in 2007

from one Grace Rutere who told her that the plot was as a result of the subdivision of **parcel No. 408.** She was shown the beacons and she also bought the sketch map. In 2009 the 1st defendant started construction and encroached on her plot. There was no boundary when she purchased her plot.

15. PW1 further affirmed that she heard the surveyor state that all the resultant plots are not at their respective places on the ground, that the said report states that the 2nd defendant was the first to construct his plot and he encroached on other plots. She admitted that there was a problem with all the plots, which problem was brought by Kiraithe (2nd defendant/ 2nd respondent), but her claim is against the 1st defendant not the other owners of the resultant plots. She has no claim with the other defendants apart from the 1st defendant as he is the one who encroached on her plot.

16. **DW1 Joseph Mbaabu, (the appellant)** adopted his statement as his evidence. He stated that he is the owner of **Plot No. Nkuene/Taita/428** measuring **20 by 80 ft** which he bought in 1997 which was a result of a subdivision of a land belonging to Meshack Gikabu. It was only the plaintiff's and his plot which were not constructed. The 2nd defendant was the first to build and the other plots were being measured from Kiraithe's plot. He constructed four permanent rooms at the rear in 1997 which covered about 20ft of his plot. However, when he started constructing at the front, the plaintiff started complaining. He has a title deed which would not have been issued to him if the plot was not in order. He sought to have the other defendants enjoined as the surveyors report indicated that none of the plots was in its respective position. He occupied his plot as per what he was shown by Meshack.

17. **DW2 Silas Kiraithe Mburugu (2nd respondent)** adopted his statement and documents as his evidence. He stated that he purchased his plot from Meshack. At that time no other person had bought the plots. He bought plots **No. 434** and 435 which he did not take measurements of as the original owner is the one who showed him the portions he had bought. He began construction in 1980 and that he did not displace any other plots while constructing. He has his title deeds regarding the two plots.

18. **DW3 Rael Mutundu Miano (4th respondent),** stated that she is the owner of **plot No. 429**. She constructed on the said plot in 1984. She declared that there is no plot owner who is in his right position on the ground as each owner has encroached on the neighboring plot. The problem was brought about by the person who initially constructed on the land as he encroached on the next plots. It is not the 1st defendant who is at fault. She stated that where her plot is on the ground is not where she has constructed her building.

19. **DW4 Mugambi Tracius Mutwiri Daniel (5th respondent),** stated that he is the owner of **Plot No. 437** which he bought from Meshack in 1997. His plot was pointed out to him together with those of the owners of plots **No. 428** belonging to 1st defendant and **429** belonging to 3rd defendant of which they constructed on their plots at the same time. The owner of plot **No. 427** came after they had already constructed. When surveyors came to the plot they realized that each one of them had occupied a different portion from their respective portions on the ground. The 2nd defendant was the 1st to build and measurements were being taken from his plot.DW4 conceded that the plots in the block have a problem which was caused by the 2nd defendant.

20. **DW5 Stephen Gitonga Daniel, (who ought to be the 6th respondent),** stated that he is the owner of **Plot NO. 432** which is in the name of **M'Nthaka Kathuri**, his father (deceased) who gave him the said plot. He constructed a shop and some rooms at the rear in 1990 on the portion where the title deed indicated. When he was building, it was only the 2nd and 4th defendants who had built. He found the plot next to his under construction as well as that of 3rd defendant. That the surveyor stated that their plots had encroached unto each other.

21. **DW6 Gerald Kinoti (3rd respondent),** adopted his statement as his evidence. He stated that he is the owner of **plot No. 433** measuring **20 ft by 80ft** which he found had already been constructed on. He inquired as to who had built on it and he was informed that the 2nd defendant had given the same to a

friend and Kiraithe promised to give him another plot in exchange which he has not done so todate.

Analysis

22. I frame the issues for determination as follows;

i. Whether the trial magistrate had jurisdiction to determine the matter.

ii. Whether the trial magistrate erred in failing to evaluate the contents of the scene visit reports.

iii. Whether, the court erred in failing to consider the claim of the 1st defendant as against the other defendants.

iv. Whether the court erred in awarding damages to the 1st respondent as against the appellant.

v. What relief is available to the parties.

Jurisdiction

23. From the record, the issue of jurisdiction has been raised by the appellant, 4th and 5th respondents in their submissions. This issue was not listed as a ground of appeal and the 1st respondent urges the court to have the submissions of the appellant expunged from the record on this point of jurisdiction.

24. **Order 42 rule 4 of the civil procedure rules** provides that:

"The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule: Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground".

25. From the foregoing proviso, this court has the mandate to determine the issue of jurisdiction even though the same was not raised in the memorandum of appeal.

26. Jurisdiction is everything for without it a court has no power to make one more step. It has to down its tools in respect of the matter before it the moment it holds the opinion that it has no jurisdiction. *See* ***Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1***. Whether or not the issue of jurisdiction is raised does not mean that a court may be bestowed with jurisdiction where it has none, since it cannot confer to itself what it does not have which would result in baseless decisions which amount to nothing. Therefore, this issue must be raised at any particular point but preferably as soon as possible.

27. In the case of **Alvin Kamande Njenga v Gacheru [2016] eKLR** Odunga J held as follows:

"It is therefore clear that even where jurisdiction is not raised that does not necessarily confer jurisdiction on the Court if it has none. It is for this reason that an issue of jurisdiction may be raised at any stage of the proceedings even on appeal though it is always prudent to raise it as soon as the occasion arises."

28. To be able to establish whether the trial court had jurisdiction, I must identify the issue at a hand. According to the pleadings of the 1st respondent, her neighbor, had trespassed and encroached on her Plot and constructed on it interfering with her land. From the evidence adduced, the original parcel was

Nkuene/Taita/408 which brought about the subdivisions which are owned by the respondents and the appellant. The evidence adduced by the parties and as seen from the reports of the experts indicate that the 2nd respondent was the first person to buy and construct on his **Plots Nos. 434 and 435** of which he went beyond his rightful share. Measurements of the other plots were being taken from his (2nd respondent's) plot, and this appears to be the root of the problem for it resulted in each person encroaching on another person's plot.

29. On the face of it, this may appear to be just a boundary dispute. However, there is a deeper problem. Some plots, particularly nos. **428, 429, 430,432** and **433** have the actual measurements but not the correct positions on the ground as there was displacement caused by plots number **434** and **435**. Further, it is noted that all the plots are built up except that one of 1st respondent. The plots were also built long before the appearance of the the 1st respondent. It appears that the nature of the construction is permanent buildings. Thus this is not a straight forward case of rectification or establishment of the boundaries. There lies a bigger issue as to what happens to the buildings which are not in their proper title on the ground.

30. I find that the input of the experts that is the surveyor and the Land Registrar was very crucial in this matter. However, the dispute itself is not a pure boundary dispute hence the magistrate had jurisdiction to deal with the matter.

The scene visit reports

31. As early as 23.2.2011, the issue of a scene visit was raised culminating in a scene visit conducted by even the court on 2.11.2011. An extract of the proccedings of 2.11.2011 are as follows;

> "***The court visits the scene in the presence of the parties herein and their advocates. The District Land Registrar and District Surveyor confirm the measurements and the two plots in dispute in addition to the other adjacent plots and road mountings at the scene. Thereafter the court advised the District Surveyor and District Registrar to file a written report of the findings made on the ground which report shall be filed to aid the court in arriving at the just conclusion to the dispute herein".***

32. Thus the issue of the scene visit gave rise to two reports. One is dated **20.1.2012** by the Surveyor, while the other one is dated **12.5.2015** by the Land Registrar. It is apparent that the two reports played a central role in establishing where the problem was. However, the Judgment of the trial court did not capture the import of the reports. It appears that the court was concerned with the claim of the 1st respondent alone, that her plot had been encroached upon by the appellant. The court will therefore proceed to analyse the said reports to establish their impact in this dispute.

33. The land registrar's report dated 12/05/2015 contains the following content:

> ***"When the measurements were taken it was noticed that the measurements on the ground and mutation of the original parcel Nkuene/Taita/408 are in agreement. The parties involved have encroached into each other's Parcels when erecting their buildings i.e plots 434 & 435 are bigger on the ground as opposed to measurements on the mutation. Plot 431 loses 2ft on the southern side while plot 427 loses 9ft 2 inches on the same side. On the northern side the plot loses 3ft as opposed to measurements on the mutation. Plots 428, 429, 430, 432 and 433 maintain correct measurements but not the correct position on the ground. This displacement was caused by plots 434 and 435 acquiring more ground than what was indicated on the mutation."***

34. The report of the surveyor dated 20.1.2012 indicates that the original parcel no. **Nkuene/ Taita/408** was subdivided on **7.9.1977** into 9 plots and new numbers were given as **Nkuene/Taita 427-435**. The surveyor concluded that plot numbers **434** and **435** are bigger on the ground which resulted in the plot number **427** being smaller.

35. The issue is not about the titles. Even the mutation forms agree with the actual acreages in the title. The problem came to be when the owner of plots number **434** and **435**, who happens to be the 2nd respondent occupied more space on the ground which had the ripple effect of displacing all the other plots. Thus the initial mess was created by the 2nd respondent. The reports of the Surveyor and the Land registrar therefore have to be taken into account in the resolution of the dispute hererin.

Whether, the court erred in failing to consider the claim of the 1st defendant as against the other defendants

36. The appellant did file an application to have the other respondents enjoined in the suit before the trial court. And in a ruling dated 9.5.2018, the trial court while allowing the application for joinder stated as follows;

> ***"I have also had a chance to read through the District surveyors report filed in court and dated 14.5.2015 at the bottom which indicates that the dispute involves plots numbers 428-435 which resulted from the subdivision of Nkuene /Taita/408. According to the said reports, the parties involved have encroached on each others' parcels of land as they were erecting their respective building. According to the reports, plots 434 and 435 are bigger on the ground as opposed to the mutations measurement. It is on this ground that the 1st defendant who is the owner of plot no 428 has brought this application. The plaintiff opposes the application as she has no claim over the intended parties to be joined in the suit. However, I am of the considered opinion that for fair and expeditious administration of justice , it is necessary to have the owners of the plot which would be affected by the orders of this court in this matter to be enjoined in the suit for a just conclusion of the issues before court".***

37. From the above analysis, it is clear that the trial magistrate had at that point of ruling on joinder of parties appreciated the gravity of the matter to the effect that the dispute did not just concern the appellant and 1st respendent. It is noted that after the said ruling the appellant did proceed to issue a notice to the other respondents in line with provisions of **Order 1 rule 24 of the Civil Procedure rules**. However, in the final judgment, this issue was completely eclipsed. It was therefore erroneous of the trial magistrate to fail to consider the issues raised by the appellant in terms of the aforementioned provisions of law, when the said issues had clearly been brought into the open by the Surveyor and the Land Registrar.

38. Again, it is the duty of this court to consider and determine the aforementioned claim. The evidence of **Rael Mutundu (DW3**) was that there is no plot owner who is in his right position. **Mugambi Tracius (DW4**) stated that his plot is no **437**, but he has constructed on **plot 429** belonging to **Rael**. **DW5** , **Stephen Gitonga** had stated that there is a problem with the plots , since where they have built is not where their respective portions are. While **DW6, Gerald Kinoti** stated that his plot no. **433**, has been built by Kiraithe. The evidence of these respondents is in tandem with the Surveyor and Land Registrars report. Dw2, Kiraithe, the author of the mess has admitted that he was the first one to buy the plots no **434** and **435** from Meshack and he commenced building without taking any measurements.

39. What resonates from the evidence adduced before the trial court is that all the parties were aware of the problem. The problem was created by 2nd respondent, while the rest of the parties perpetuated it in one way or the other. No one is innocent even though the degree of blame varies. I will start with the appellant, 4th, 5th and 6th respondents (DW3, DW4 and DW6 respectively) who appear to be on the same level of blame. These parties had only found constructions by Kiraithe when they bought their respective plots. They however measured their portions and commenced constructions using Kiraithes plot as the land mark. I consider that as a very pedestrian way of identification of ones plot.

40. For the 1st respondent , she came to the scene in year 2007 long after all the other plots had been occupied. Each plot is supposed to measure 20 by 80 feet which means that they are generally small plots. It follows that when 1st respondent came to the scene, the problem was already visible with the naked eye. I would place the 3rd respondent (Gerald Kinoti –DW6) in this category though he doesn't state when he

joined the fray but he found his plot already built up. It is clear that these respondents (1st and 3rd) did not conduct due diligence to ascertain the status of the land they were buying on the ground. In the case of **John Mburu Kiarie vs. William Kimani Njuguna & 3 Others, Thika ELC NO. 468 of 2017**, I held that;

> ***"due diligence should be taken a notch higher by getting to know the root of the title and the ground status of the land."***.

41. As for the 2nd defendant, he bears the greatest degree of blame as he is the one who occasioned the displacement of the other plots and he even took up the plot of the 3rd respondent.

42. I have found it necessary to lay out the above analysis for the parties to prepare themselves for the painful journey of reversion.The dispute needs to be resolved, and this cannot be done by using a smplistice method of just sueing a neghbour. For the parties to know and to get back to their proper positions on the ground, the experts would need to go back to the ground and place the beacons or demarcate the extent of each plot.

Damages

43. As rightly submitted by the appellant, the 1st respondent had not pleaded any claim for general damages. It is trite law that a claim is anchored on the pleadings, then it is subjected to prove. There is no evidence to show how the trial magistrate arrived at a conclusion that 1st respondent was entitled to damages. The award of damages was therefore erroneous and un warranted.

The relief

44. In giving the final orders herein, the court has taken into account several factors; that the subdivision of original land no 408 occurred decades ago in 1977, that the titles and the mutations of the suit parcels are intact, that none of the parties are on their proper place on the ground of which all the parties were aware of, and that to a large extent the area is built up with permanent buildings.The court will strive to ensure that the dispute does not plunge back into the abyss of confusion and uncertainity. I therefore conclude that this appeal has merits and the same is allowed on the following terms;

> **1) The entire judgment in Nkubu case no. 19 of 2010 delivered on 30.1.2019 is hereby set aside. In its place, an order is hereby issued for the Land Registrar with the assistance of the Surveyor to go to the ground and place the beacons or mark out the boundaries for all the plots arising out of the subdivision of NKUENE/ TAITA/408 using the previous scene visit reports.**
>
> **2) After the exercise of boundary marking, each party/ plot owner will be at liberty to pursue any of the following options;**
>
> > **i. Move to their respective portions of the land, which process will entail acquisition of whatever is affixed on that land in line with the maxim "*quicquid plantatur solo solo cedit*".**
> >
> > **ii. Invoke the provisions of section 152 E and F of the land Act to proceed with eviction. The party who opts the route of eviction will be at liberty to demolish any buildings erected on their parcels but at their own costs.**
> >
> > **iii. Parties can enter into negotiations with a view to exchanging their plots of which the Land Rigistrar shall facilitate any such transfer whereby the consent of the land control borad shall be dispensed with.**
> >
> > **iv. Parties can enter into negotiations with a view of settling the matter through**

compensation.

3) In the event that the parties encounter any hurdles in terms of acquisition , eviction, exchange/transfer or compensation as outlined in clause 2) above, a party will be at liberty to enforce their claim through fresh litigation of which time for purposes of limitation shall start running from the date of delivery of this judgment, hence time is of essence.

4) Each party is to bear their own costs of this suit as well as costs in the lower court.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 19TH FEBRUARY, 2020 IN THE PRESENCE OF:-

C/A: Kananu

H.G for 1st respondent

J.G Gitonga for 1st respondent

Muthomi K holding brief for Gichunge for 2nd respondent

Gichuki for 6th respondent

5th respondent

HON. LUCY. N. MBUGUA

ELC JUDGE