



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

LAND APPEAL NUMBER 1 OF 2019

DR. GEORGE HAZARIA OBONG'O.....APPELLANT

VERSUS

BENJAMIN OLIECH ONYANGO.....RESPONDENT

(Being an appeal from the Judgement and Order of Hon J.P.Nandi, Senior Resident Magistrate (SRM),

as he then was, rendered on 19th December 2018 in Oyugis Principal Magistrate's court Land Case No. 96 of 2016).

JUDGEMENT

A) INTRODUCTION

1. The present appeal was ignited by the judgement of the trial court, Honourable J.P Nandi, SRM, as he then was) dated and delivered on 19th December 2018 where the learned trial magistrate dismissed the appellant's case with costs to the respondent. The appellant had sought against the respondent, a declaration that the respondent does not own the suit land, LR No. Central Karachuonyo/Konyango/2605 measuring approximately 0.20 hectares in area as well as an order of eviction to compel the respondent to remove stones, sand or any other item from the suit land and general damages for trespass thereon.

2. The appellant is represented by the firm of G.S.Okoth and company Advocates.

3. The respondent is represented by the firm of H.O Mimba and company Advocates.

B) THE GIST OF THE APPELLANT'S CLAIM BEFORE THE TRIAL COURT

4. Briefly, it was the appellant's case that by a written sale agreement made on 12th March 1989 between the appellant and James Akeyo Owuor, the latter sold to the former a portion of land measuring 43 paces by 70 paces out of LR NO. Central Karachuonyo/Konyango/1190 (the suit land herein) at a consideration of Ksh 20,000/= which the former paid in full. Immediately, the vendor put the appellant into possession of the suit land. That between the year 1989 and 1991, the appellant erected a permanent commercial building measuring 100ft by 100ft in size on the frontal part of the said portion of the suit land.

5. The appellant further claimed that a mutation of the suit land done on or about 14th June 1993 created three plots namely Plot Nos. 2604, 2605 and 2606 measuring 0.07 hectares, 0.2 hectares and 0.02 hectares in area (The first, second and third subdivision of the suit land respectively). That a sketch survey map of the portion of the suit land showed an error that the frontage of the portion of land where the appellant's building sits, covers a shorter width than even the size of the building. On or about 19th May, 2016, the respondent discovered the error and trespassed into second subdivision of the portion of the suit land by dumping building quarry in the form of cut stones and sand thereon. Thus, it provoked the suit before the trial court.

6. The appellant who was the plaintiff (PW1) before the trial court relied on his list of documents dated 2nd June 2016 (PExhibits 1 to 9) in his testimony. He called two (2) witnesses namely Harrison Owuor Akeyo (PW2) and Benson Otieno Owenga (PW3) to reinforce his claim.

C. THE GIST OF THE RESPONDENT'S CASE BEFORE THE TRIAL COURT

7. By a statement of defence dated 20th July 2016, the respondent who was the defendant before the trial court denied the appellant's claim, termed the same unmerited and sought its dismissal with costs. He stated interalia that the appellant sued him to cover up the fact that the (appellant) had trespassed into his land.

8. The respondent (DW1) testified in part that the surveyor and Land Registrar surveyed the disputed portion and prepared a report thereof. That the appellant encroached onto the suit land. DW1 stated in part;-

“The plaintiff has blocked access to my land as he has constructed structures on my land.”

D.THE TRIAL COURT’S FINDINGS IN BRIEF

9. The learned trial magistrate made reference to the appellant’s plaint dated 6th June 2016 including the orders sought therein, the respondent’s statement of defence, the Land Registrar’s report dated 23rd August 2016 in respect of the portion of the suit land and found the appellant’s case in the negative. He observed that the said report was unchallenged and clearly shows what is on the ground. The trial court therefore found that the appellant had failed to prove his case against the respondent to the requisite standard hence dismissed it with costs to the respondent.

E. THE GIST OF THE INSTANT APPEAL

10. Being aggrieved by the decision of the trial court, the appellant lodged this appeal by way of a memorandum of appeal dated 10th January 2019. The grounds of appeal are that;

a. The learned trial magistrate misdirected himself on several matters of law and fact.

b. The learned trial magistrate erred in law of practice and procedure.

c. The learned trial magistrate erred in law of evidence in basing his judgement on a surveyor’s report which was never produced as evidence by the surveyor and put to test on cross-examination and thereby the magistrate entered the arena and made decisions on evidence collected by himself.

d. The learned trial magistrate erred in law by failing to note that a plaintiff claiming damages for trespass to land does not have to prove ownership of the land but has to prove only possession thereof at the material time.

e. The learned trial magistrate erred in law in failing to note that having built the houses on the land and being in possession thereof for over 20 years, the appellant had overriding interest over the whole land of the respondent.

f. The learned trial magistrate erred in law of procedure in failing to note that even if the plaintiff’s land parcel No. C. Karachuonyo/Kanyango/1532 had erroneously been enclosed into land parcel No. C. Karachuonyo/Kanyango/2605 (which is denied) the respondent would be barred by section 7 of the Limitation of Actions Act (cap 22) from claiming the same.

g. The learned trial magistrate erred in law of evidence in deciding the case against the weight of the evidence.

h. The learned trial magistrate erred in law of practice and procedure in failing to state the damages he would have awarded for trespass to land if he had allowed the plaintiff’s case.

11. On 24th October 2019, this court directed that the appeal be argued by way of written submissions. Accordingly, learned counsel for the appellant filed submissions dated 4th February 2020 while learned counsel for the respondent filed submissions dated 5th February 2020.

12. Learned counsel for the appellant contended inter alia, that the learned trial magistrate misdirected himself by ordering for the survey report on its own motion yet the instant dispute does not involve the ownership of the portion of the suit land. That the dispute is at hand is alleged trespass over the land and the damages awardable to the appellant in the circumstances.

13. Counsel argued that the respondent committed deliberate and reckless trespass on the portion of the suit land. Therefore, he urged this court to award Ksh 100,000/= as aggravated damages together with interest and costs of this appeal and the original suit in favour of the appellant. To buttress his arguments, counsel relied on several authorities including *Clerk and Lindsell on Torts 18th Edition page 923*, *Salmond on Law of Torts 16th Edition pages 38 to 49* and *Gathure v Beverly (1965)EA 514*.

14. On the other hand, learned counsel for the respondent asserted that the trial court dealt very well with the dispute and that this court cannot change the Land Registrar’s report in favour of the appellant as he desires. Counsel termed the present appeal want of merit, an abuse of the court process and urged this court to uphold the trial court’s decision.

15. I have carefully considered all the grounds of appeal, the rival submissions including all the authorities cited herein vis-à-vis the trial court’s judgement and the entire record. This being the first appeal from the trial court, I am duty bound to subject the entire evidence to a fresh and exhaustive re-evaluation and re-appraisal and to make my own inferences of fact as held in the case of **Selle and another-vs-Associated Motor Boat co Ltd and others (1968) EA 163**.

16. In the case of *Peterson v Sunday Post Ltd(1958)EA 424 at 429*, Sir Kenneth O’Connor, P, remarked that:-

“The appellate court has indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution.” (emphasis added)

17. Be that as it may, this court is not bound by the conclusion reached by the trial court as I am entitled to depart from it if the same is founded on wrong principles of fact and or law and evidence; see *Selle case (supra) and PIL Kenya Ltd-vs- Oppong (2009)KLR 442*.

18. The grounds of appeal precisely and concisely point to issues of the alleged trespass and the report of the Land Registrar. So, did the learned trial magistrate misdirect himself on the issues?

19. It is discernable from the record of the trial court that on 22nd June, 2016 the appellant and the respondent were represented by learned counsel, Mrs Mimba and learned counsel, Mr Ochieng respectively. Instantly, counsel for the appellant prayed that:-

“We can involve the land Surveyor and the Registrar to visit the land and determine the boundary between the disputed parcels and file the report.”

20. As a result, the trial court directed and ordered;

“The District Land Registrar and District Surveyor to visit parcel Central Karachuonyo/Konyango/1190 and 1532 to determine the boundaries and establish if any party has encroached on anyone land. The parties to share equally the costs of the exercise. The district land registrar and surveyor to file their report in court on or before 3/8/2016. The interim order extended till then.”

21. Notably, the parties' respective pleadings before the trial court reveal the alleged trespass in this appeal. Therefore, pursuant to the character of the dispute and upon request of the appellant's counsel, the trial court promptly and correctly referred the matter to the Land Registrar as provided for under **sections 18 and 19 of the Land Registration Act, 2016 (2012)**.

22. Following the trial court's order, a report reference number C.Karachuonyo/Kanyango/1190 dated 23rd August, 2016, clearly shows a land boundary dispute between the appellant and the respondent. From the observation numbers (a), (b) and (c) in the report, the appellant had encroached into the respondent's land. That the appellant had fenced off the suit land, LR No. 2605 together with part of LR No. Central Karachuonyo/Kanyango/1532.

23. In dismissing the appellant's case for want of proof against the respondent, the trial magistrate held in part:-

“The above report (the trial court meant the Land Registrar's report) clearly shows what is on the ground. The same shows that the defendant's portion of 42m along the highway to Homa Bay is inside plot C. Karachuonyo/Konyango/2605. The report was given to the parties and they did not dispute or file any report challenging the same.”

24. The trial court referred to the Land Registrar's report which is opinion evidence as stipulated under sections 48 and 54 of the Evidence Act chapter 80 Laws of Kenya. I note the entire report including the observation made therein.

25. In the case of *CD Desouza -vs- BR Sharma (1953)26 KLR 41 at 45*, it was held that section 48(ibid) makes provision for evidence of expert witnesses. However, as a general rule, expert (opinion) evidence is not binding on the court which is at liberty to accept or reject it depending on the facts and circumstances of the case before it; see also *Amosam Builders Developers Lt- vs- Gachie and 2 others (2009)KLR 628*.

26. As already noted, the instant appeal emerged from the trial court's suit involving a boundary dispute touching on the suit land. On that score, I endorse the position taken by my brother John Mutungi J in *Andrew Marigwa-vs- Josephat Ondieki Kebati (2017) eKLR* that the court lacked technical ability to deal with the land boundary dispute. That the court made a reference of the matter to the Land Registrar and the county surveyor who are mandated under the Land Registration Act 2016 (2012) to deal with such disputes.

27. The court further observed that:-

“The Land Registrar is the custodian of records relating to land, have the technical ability or capacity to determine, establish and fix boundaries of parcels of land as required under the Land Registration Act, 2012.”

28. In the instant appeal, I am of the considered view that the Land Registrar's report determined the land boundary dispute before the trial court. Thus, the learned trial magistrate was faultless in upholding the report and dismissed the appellant's suit with costs. I therefore find no reason to disturb the trial court's decision. As such, this appeal is devoid of merits.

29. The upshot is that the present appeal mounted by way of a memorandum of appeal dated 10th January 2019 be and is hereby dismissed.

30. By dint of the proviso to section 27(1) of the Civil Procedure Act chapter 21 Laws of Kenya, the costs of this appeal and the original suit shall be borne by the appellant.

Delivered, Signed and Dated at Migori through email pursuant to, inter alia, Articles 7 (3) (b), 159 (2) (b) and (d) of the Constitution of Kenya, 2010, Section 3A of Civil Procedure Act chapter 21 Laws of Kenya and Sections 3 and 19 of the Environment and Land Court Act, 2015 (2011) due to the prevailing Corona Virus pandemic, this 20th day of May, 2020.

G.M.A. ONGONDO

JUDGE