



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCA CASE NO. 38 OF 2019

MOSES KACHISA MOYI.....APPELLANT

VERSUS

ANDATI SUMBA

SUMBA MATSESHE

FANIS KHATENJE MATSESHE.....RESPONDENTS

JUDGEMENT

Moses Kachisa Moyi the above named appellant being aggrieved and dissatisfied by the judgment of Hon. F. Makoyo – SRM in Butere SRMCC No. 12 of 2016 delivered on 24/10/2019 appeals to this honourable court against the whole of the said judgment set forth on the following grounds:-

1. That the learned trial magistrate erred in law and fact in failing to appreciate the proper effect and purpose of the evidence and in arriving at a decision which is not supported by or is against the weight of the evidence.
2. That the learned trial magistrate erred in law and fact in failing to allow the defendant defense and his submission.
3. That the learned trial magistrate erred in law and fact in failing to appreciate the fact that the appellant had an arguable case.
4. That the learned trial magistrate erred in law and fact in failing to appreciate the reasons advanced by the appellant and fact that he is the legal occupier of the suit parcel of land.
5. That the learned trial magistrate erred in law and fact in failing to consider the evidence presented by the appellant to the honourable court to support his case.
6. That the learned trial magistrate erred in fact and law in finding that the case against the appellant had been proved on a balance of probability.
7. That the learned trial magistrate erred in law and in fact in finding that the appellant did not have a good defence worth the courts time for determination.
8. That the learned trial magistrate erred in law and in fact in finding that the appellant should bear the costs of the suit.
9. That the learned trial magistrate erred in law and in fact in all circumstances of the matters, failed to achieve the objective, function and purpose of the court and to do justice as regards the suit that is before him and accordingly erred in law by making orders that he did.

The appellant prays that judgment and decision of the court be set aside and the appeal be allowed with costs.

The appellant submitted that he sued the respondent for an order of permanent injunction restraining them from trespassing on his parcel of land Marama/Shinamwenyuli/2743 and compensation for unlawful use of the said land since the year 2011 as well of costs of the suit. That the prayers sought were specific as they were for injunction and compensation, it was not the duty of the court to speculate. The appellant duty was to prove that he was indeed entitled to the prayers which he produced all the relevant documents to prove his case. That the learned

magistrate did take into account facts that were neither pleaded nor canvassed by the parties to the case. That the magistrate did not consider all facts and law required to the best of his ability. That the magistrate did raise issues in his judgment which were not canvassed and or brought out during the hearing.

That the respondents failed to prove their defence case on whether they have not trespassed into his land in suit and what the court decided on was not in the interest of justice. That the learned magistrate failed to analyze the evidence before him hence arrived at the wrong decision. He reiterate his submissions on the ownership of the land, the documents as produced were conclusive proof that indeed the land belonged to him. He was seeking injunctive orders and compensation it was not boundary dispute. The rules for grant of an injunction as provided by order 40 rule 1 and 2 of the Civil Procedure Rules have been met. He relied on the case of Mrao Limited vs. First American Bank of Kenya Limited and 2 others where the court set down the principles for grant of a temporary injunction.

This court has considered the appeal and the submissions therein. The appellant filed this appeal vide his Memorandum of Appeal herein setting forth grounds on the face of the Memorandum of appeal. Basically that the learned trial magistrate erred in law and fact in failing to appreciate the fact that the appellant had an arguable case. The appellant submitted that he sued the respondent for an order of permanent injunction restraining them from trespassing on his parcel of land Marama/Shinamwenyuli/2743 and compensation for unlawful use of the said land since the year 2011 as well of costs of the suit.

I have perused the lower court record in detail. The plaintiff's case is that he is the sole proprietor of the suit parcel of land and the defendants have trespassed and encroached on the land without colour of right. It is not in dispute that the appellant is the registered proprietor of the suit land however no evidence was tendered to prove the trespass by the respondents. Indeed the trial magistrate in his judgement stated as follows;

“The plaintiff has produced documents to the suit land indicating that he is the registered owner. For the plaintiff to succeed in the claims for injunction and compensation it is upon him to establish that the defendants are trespassers on his land. He placed no evidence before this court that the defendants have trespassed on the suit land.”

I find that the appellant needs to engage the Land Registrar and Surveyor to establish if indeed trespass has occurred on his land and for them to set out the boundaries. I find that the learned trial magistrate did not err in law and fact in arriving at a decision.

In *Mwanasokoni v Kenya Bus Service* (1982 - 88) 1 KAR 870, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision was judiciously arrived at. I find this appeal is not merited and dismiss it with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 23RD DAY OF JUNE 2020.

N.A. MATHEKA

JUDGE