



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL 59 OF 2019

LAWRENCE NGETU MUGAMBI.....APPELLANT

VERSUS

TERESIA KATHIGA KINYUA.....RESPONDENT

(This being an appeal from the Judgement and decree of Hon. J. Irura P.M in PMCC No. 90 of 2010 delivered on 27/3/2019)

JUDGMENT

Introduction

1. The respondent filed the suit vide a plaint dated 5/8/2010 seeking a declaration that she is the sole proprietor and owner of Plot No. 182 Nkubu Market, an order of injunction against the appellant, eviction orders against the appellant and mesne profits. It was the respondent's case that she bought plot No. 182 Nkubu Market measuring 40 x 80 feet, but the appellant entered her plot and constructed a permanent building thereon.
2. The appellant denied the claims of the respondent through a statement of defence dated 3.9.2010 contending that him and Kigininyina and Sons Distributors Company Ltd where he is a director lawfully constructed the commercial building on plot No 260 Nkubu Market.
3. During the hearing, **PW1 TERESIA KATHIGA KINYUA** told the court that in the year 1999, one Martin Mbaya informed her that there was a plot No. 182 Nkubu which was being sold by the officials of Mugune Kigane Women Group. They were shown the beacons of the plot by the officials and in 2003 they took possession. She has enjoyed quiet possession from 1999 to 2009 when the appellant started unlawfully constructing on her plot.
4. **PW2 ICHILIO NDIINA KINYUA**, husband to PW1 corroborated the evidence of pw1 adding that his wife bought the suit plot for sh. Ksh. 220,000. After the transaction, they took possession of the plot but did not start building immediately because of lack of funds. In the year 2003 Nkubu Polytechnic purported to fence off the plot claiming it was theirs but they were served with a letter dated 10/4/2003 and never interfered with it again. In the year 2009 the appellant fenced his plot together with that of PW1 and started building thereon. A notice was issued to him to stop the construction but he refused to comply.
5. **DW1 LAWRENCE NGETU** told the court that his plot is No. 260 Nkubu and he has no claim over Plot No. 182. He carried out construction on his plot which measures 40 x 80 feet. His plot is on the beacons that were on the plot which he purchased. He therefore did not encroach on Pw1's land.
6. The Hon. Principal Magistrate in her judgement dated 27/3/2019 relied on a report by the district surveyor dated 24/9/2018 which stated that the appellant herein had encroached on the respondents parcel, for he was allocated a 40 x 80 parcel and instead he constructed on ½ an acre which was more than his entitlement. The trial court consequently allowed the claim of the respondent which included Ksh. 400,000 in general damages.
7. Being aggrieved by the said judgement, the appellant lodged this appeal citing 7 grounds which can be collapsed into 3;
 - a. *That the learned trial magistrate erred in law and fact by finding that the appellant had encroached on the respondents plot when the respondent had no allotment letter to prove her case.*
 - b. *That the learned trial magistrate erred in law and fact by failing to find that the respondent did not produce a part development plan (PDP) or beacon certificate to establish her claim in respect of her plot.*
 - c. *That the learned trial magistrate erred in law and fact in that she failed to find that the respondent did not prove the exact value of her suit property thus giving an excessive figure of Ksh 400,000 as nominal damages.*

Appellants Submissions

8. The appellant in his submissions argued that the respondent did not prove her case to the required standard as she did not prove that she was the legal owner of the property. The respondent additionally did not produce PDP, a beacon certificate or an allotment letter. On this point, the appellant relied on the cases of **Ochako Obinchu vs. Zachary Oyoti Nyamongo (2018) eKLR**, **Rosemary Wanjiru Njiraini vs. AG & Officer in charge of station, Molo police station (2017) eKLR**.

9. On the issue of damages, appellant argued that the trial court awarding Ksh. 400,000 was way too high. After all the respondent did not adduce any evidence as to the state of her property before and after the said trespass. On this point, the appellants relied on the cases of **Norbin Kenya Ltd. vs. AG (2002) eKLR** and **Philip Auchio Crispinus Ngayo (2014)eKLR**.

Respondents Submissions

10. The respondent on the other hand argued that there was no dispute that she was the absolute owner of Plot No. 182 Nkubu Market. It was also clear from the testimony of the appellant that the respondent was the owner of Plot 182 Nkubu Market. That on 26/1/2011, the trial court carried out a scene visit in the presence of the parties counsels where it was found that the plot in question had a perimeter stone fence with a story office premises that has a complete ground floor but the 1st floor was yet to be roofed. The report of the County Surveyor confirmed that the appellant had occupied ½ an acre which was more than the 40 x 80 feet allotted to him and that the respondent had not occupied her plot.

11. On the issue of Mesne Profits, the respondent argued that the appellant had been in illegal possession of the respondent's parcel for a period of over 10 years which amounts to trespass. The respondent has not been able to use her plot since the year 2009 as she was blocked by the appellant. The trial court awarded mere nominal damages considering the extensive period which the appellant trespassed on the suit plot. In support of these arguments, the respondent proffered the following authorities; **Rajan Shah trading as Rajan Shah & partners vs. Bipin P. Shah (2016)eKLR**, **Giella vs. Cassman Brown (1973) EA**.

Analysis and Determination

12. The court will essentially be determining whether the trial court erred in granting orders of permanent injunction against the appellant as well as his eviction from respondent's portion of the land, whether the court also erred in awarding damages for trespass and whether the award was excessive.

13. It was the appellant's argument that the respondent did not establish her claim on Plot No. 182 Nkubu Market but on perusal of the record, it was never in dispute that she was the proprietor of the said parcel. What was in issue was whether the appellant herein had encroached on respondent's parcel, since the two plots were adjacent to each other. In his own evidence, the appellant had stated as follows;

"I bought an allotment from Meru county council on 4.5.1998 measuring 40by 80. My plot was 40 by 80 ft".

14. The records of 26.1.2011 indicate that the court had visited the scene where it was observed that the whole plot is fenced with a perimeter stone wall. The premises were developed with a beer business in operation. The plaintiff was claiming part of that plot. The surveyor was to later visit the suit premises vide the consent of the parties as per the proceedings of 29.11.2017. The report by the district surveyor was compiled on 24.9.2018 where he confirmed the proprietorship of the two parcels. He indicated that the appellant was occupying ½ of an acre (0.2ha), which was more than his entitlement. Each party was supposed to occupy 40 by 80 ft. He noted that respondent was not in occupation of the plot. Thus in summary, the appellant had his plot, but had also taken over the plot of the respondent.

15. The appellant appears to anchor a lot of weight on the fact that he had PDPs whereas the respondent had none. However, the Physical Development Plans (PDPs), also commonly known as Part Development Plans are planning tools, used for general purposes of determining land use in a particular area of the city, municipality or council (read county) as provided under the physical planning Act. Thus the PDPs cannot be used to confer or determine rights in the land.

16. The foregoing analysis is in tandem with the determination made by the trial court.

17. On the second issue of trespass, the report by the district surveyor was clear that appellant had encroached on the plot of the respondent since each party was allocated plots which measured 40 x 80 feet yet appellant was occupying 1/2 of an acre. The said report was never challenged. In the circumstances, I find that on a balance of probabilities the respondent herein proved her case on a balance of probability on the issue of trespass.

18. On the final issue of excessive nominal damages, I make reference to **'Medina' and the 'Mediana' [1900] AC 113, 116**, where the Earl of Halsbury LC as he then was defined nominal damages as follows:-

"Nominal damages is a technical phrase which means that you have negated anything like real damages, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term nominal damages does not mean small damages".

19. In the case of **Butt vs Khan [1981] 1KLR 349** it was held that;

"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirety

erroneous estimate. It must be shown that the Judge proceeded on some wrong principles, or that he misapprehended the evidence in some material respect, and arrived at a figure which was inordinately high or low.”

20. In this case there was evidence that the appellant herein had encroached on the respondent’s plot for a period of over ten years where the latter was denied access and usage of her plot. I find, that the award of damages is not so high to warrant the interference of this court.

21. In light of the above, I find that the appeal herein is without merit and is consequently dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 14TH DAY OF JULY, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the advocates for the parties through a notice. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE