REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC APPEAL NO. 6 OF 2019

MELISA BULUMA ..... APPELANT

VERSUS

JANE ADHIAMBO TAMBO..... RESPONDENT

(Being an appeal from the Judgement and decree of the Honourable Mr. Christopher Yalwala Principal Magistrate in Kisumu in CMC ELC 264 of 2018 delivered on 12th March 2019)

JUDGMENT

This is an appeal arising from the Judgment of Honourable Christopher Yalwala Principal Magistrate Kisumu delivered on 12th March 2019 in Kisumu CMC ELC No. 264 of 2018.

The Appellant filed a Memorandum of Appeal dated 28th March 2019, appealing against the whole judgment on the grounds that the Learned Magistrate erred in law and in fact by:

1. Framing and determining an issue concerning boundary that was never an issue for determination by the parties during the hearing nor pleaded or raised by either.

2. Failing to appreciate that the Respondent having failed to attend and adduce evidence to the contrary, the Appellant's case remained uncontroverted.

3. Dismissing the Appellant's entire suit on want of jurisdiction and a missing surveyor's report when there was sufficient uncontroverted evidence that the Respondent had entered and remained in the Appellant's suit property by virtue of constructing a wall therein.

4. Failing to appreciate that from the pleadings and evidence adduced in court, the issue in dispute was ownership of land parcel LR No. 1660 (Grant Number. IR 59663) to which the Respondent pleaded had been repossessed by the defunct Municipal Council of Kisumu and allocated to her as Plot Number 22SG and 24SG.

5. Failing to take into consideration the submissions made by the Appellant.

6. The judgment was against the weight of evidence

The Appellant seeks orders allowing the appeal, setting aside the judgment and an order entering judgment for the Appellant as pleaded in her plaint dated 28th March 2017.

The brief background to this appeal can be gathered from the record of appeal that the Appellant filed a suit against the Respondent vide a plaint dated 27th March 2017 seeking for eviction orders against the Defendant from the Plaintiff's portion of land and costs of the suit.

From the record of appeal, the Appellant stated that she was the registered owner of parcel of land known as Grant No. IR 59663 (LR 16600) and that on or about 2010, the defunct Municipal Council illegally allocated portions of her land known as plot Nos. 22SG and 24SG. That the Commissioner of Lands had determined that the repossession and allocation was illegal and the Chairman of the National Land Commission in its finding of 10th November 2016, found that the Municipal Council of Kisumu's letters of offers as inconsequential and non-existent in law. That the Respondent trespassed into the suit parcel and was constructing permanent structures therein to the exclusion of the Appellant and despite the Appellant's appeals to the Defendant to move out.

The Respondent, in her Statement of Defence dated 14th July 2017 denied the Appellant's claims but did not give evidence during the trial hence the defence case was closed.

The court delivered its judgment on 12th March 2019 where the Learned Magistrate held that from the Appellant's testimony that it was only the perimeter fence which had encroached on her land and not the Respondent's building. That the Appellant in her testimony did not know the extent of the encroachment by the Respondent's wall hence the Appellant's claim was based on the erection of the perimeter wall as a boundary between her land and the Respondent's land. The Learned Magistrate held that the claim was not about double allocation or ownership for that matter but the boundary between the parties, an issue which the court could not ascertain without expert evidence from the surveyor.

The Learned Magistrate made reference to Section 18 (2) of the Land Registration Act which provides that a dispute over a boundary should not be filed before court unless the boundary has been determined by the Land Registrar and dismissed the plaintiff's case with costs.

Counsel made oral submission to the appeal.

Appellant's Submissions

Counsel for the Appellant submitted that the issue before the trial court could not have been a boundary dispute as the Appellant's title was a grant which had confirmed boundaries having been surveyed and was therefore not subject to Section 18 (2) of the Land Registration Act.

Counsel submitted that the Appellant's case proceeded by way of formal proof which was uncontroverted. Counsel further submitted that a wall did not necessarily mean a boundary and that a wall could be erected on any part of the plot.

It was counsel's submission that the appellant produced a grant including a letter from the Commissioner of Lands and the findings of National Land Commission to demonstrate that the defendant's allocation had been nullified by NLC as it was illegal. That the Commissioner of Lands reverted the suit land to the appellant.

Counsel therefore submitted that upon the reversion of the land to the appellant, the appellant moved to court for eviction orders which case was heard and dismissed on the grounds that the issue was a boundary dispute which the court did not have the requisite jurisdiction to handle.

Counsel for the appellant submitted that the Learned Trial Magistrate erred in finding that the issue was a boundary dispute which was never pleaded and no evidence was tendered to that effect. Counsel therefore urged the court to grant the orders of eviction as prayed with costs.

Respondent's Submissions

Counsel for the Respondent submitted that the Appellant was the one who alleged in her plaint that the Respondent was allocated part of her land and that the Respondent had trespassed onto her land. Counsel cited ***Kenya National Highway Authority v Shalein Masood Mughai & 5 others*** **[2017] eKLR** for the proposition that it is only an expert that can determine the extent of encroachment. Counsel submitted that the Appellant could not determine the extent of encroachment and thereby failed to discharge the burden of proof as provided under Section 107 and 108 of the Evidence Act.

Counsel further relied on the case of **Dave Vs Business Machines 1974 EA Law Reports** to emphasize the point that the plaintiff did not prove her case against the defendant. Counsel urged the court to dismiss the appeal with costs to the respondent

Analysis and Determination

The duty of this Court as a first appellate court is to reconsider the evidence, reevaluate and make its own conclusions. This duty was set out by the Court of Appeal in the case of **Kenya Ports Authority versus Kusthon (Kenya) Limited (2009) 2EA 212** where the court held inter alia, that:-

"*On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence*"

It was also held in the case of ***Mwangi v Wambugu*** **[1984] KLR 453** that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence.

I have considered the Record of Appeal as well as the submissions by Counsel and come to the conclusion that the issue for determination is as to whether the Learned Magistrate erred in finding that the issue for determination in the appellant's suit at the lower court was a boundary dispute hence the court lacked jurisdiction as per section 18(2) of the Land Registration Act. The next issue for determination is whether the appellant was entitled to the orders sought for eviction as her evidence was uncontroverted.

The appellant in her plaint in the lower court gave a chronology of how she got the suit land and the process she went through to get back her land when it had allegedly been illegally allocated to the defendant. It is on record that she produced the relevant documentation in respect of

the suit land and the findings from the National Land Commission which was acted upon by the Commissioner of Lands and the land reverted back to her. The fact that the plaint laid a basis of the process of acquisition of the suit land did not change the final prayers that the appellant sought for that is eviction orders.

From the record, the appellant testified to prove her case for eviction of the respondent on the portion of her land which the respondent had encroached upon. The appellant was under a duty to establish that she is the rightful owner of the suit plot and that the respondent had trespassed before an order of eviction of the respondent. From the evidence on record the appellant proved that she was the rightful owner of the suit land and therefore urged the court to find that the respondent had trespassed on her land and order for eviction.

Section 18(2) and **19(2)** of the Land Registration Act 2012 provides that

> *18(2) The court shall not entertain any action or other proceedings relating to dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.*
>
> *19(2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.*

The question is whether the appellant's claim falls under section 18(2) of the Land Registration Act. This being a grant where boundaries have been fixed, does it fall under boundaries that have been fixed in accordance to this section? The appellant's suit land had distinct boundaries and the court could not frame an issue which was not in dispute and dismiss the case.

Fixed boundaries were an inherent features of land registered under the repealed Registration of Titles Act. Angote J in ***Abdalla Mohamed Salim & another v Omar Mahmud Shallo & another*** **[2014] eKLR** further elaborated as follows:

> "On the other hand, land registered under the Registration of Titles Act required a cadastral survey to be prepared, which is based on a fixed boundary survey principle. Such a survey has an accurate linear and angular measurements to aid the registration of a title of on plot. The boundaries of land registered under the Registration of Titles Act can easily be identified by any surveyor because of the fixed nature of its beacons."

The evidence on record indicates that there was a fixed boundary which was identifiable from the documents produced. The trial Magistrate considered issues that were not before him by blaming the appellant for not having brought in the evidence or a report from the surveyor. If the case was a boundary dispute, then there was no need for proceeding with the full hearing then later finding that the court did not have jurisdiction to handle the matter. This is a matter that should have been dealt with as a preliminary issue on the jurisdiction of the court to handle the matter. The court has powers on its own motion to strike out or dismiss a matter that falls under section 18(2) of the Land Registration Act.

On the issue of how to treat the defence and documents filed by the respondent in the trial court without giving evidence to substantiate the documents vide testimony in court, in ***Shaneebal Limited vs County Government of Machakos [2018] eKLR,*** **Odunga J** while quoting with approval various court decisions held as follows (in relation to failure to tender evidence in support of averments in a defence:

> *".....According to* ***Edward Muriga through Stanley Muriga vs Nathaniel D. Shulter Civil Appeal No. 23 of 1997,*** *where a defendant does not adduce evidence the plaintiff's evidence is to be believed as allegations by the defence is not evidence. In* ***CMC Aviation Ltd vs Cruisair Ltd (No. 1) [1978] KLR 103; [1976-80] 1KLR 835, Madan J (****as he then was) expressed himself as hereunder:*

Pleadings contain the averments of the parties concerned. Until they are proved or disproved, 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 makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth...."

The respondent having not tendered any evidence means that the defence and the list of documents filed remained as mere allegations with no proof or being subjected to cross examination. They remained in the court file as such and the court could not base its decision on unsubstantiated defence.

This leads us to the issue whether the Learned Magistrate dealt with unpleaded issue and found that the issue revolved around boundary. The Court of Appeal in ***Mareco Limited v Future Limited & another*** **[2017] eKLR** held that:

> *"It is trite that issues for determination by a court flow from the pleadings. A court cannot make pronouncement on issues not raised in the pleadings filed by parties and to do so would be tantamount to acting outside its mandate. The same was succinctly put by this Court in* ***Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others [2014] eKLR*** *-*
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> > *"As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score."*

Counsel for the Appellant submitted that the issue concerning the boundary was not an issue for determination and neither was it raised or pleaded by the parties. The Learned Magistrate held that:

> "...the plaintiff's claim is for eviction of the defendant based on alleged encroachment. That is as per paragraph 7 of the plaint and prayer (a) thereof... When cross-examined, she stated that the defendant has constructed a perimeter wall on the land and it is only the said wall which had encroached on her land and not the defendant's apartment/building. She also stated that she did not know the extent of encroachment by that wall into her parcel of land. From the foregoing it is clear that the plaintiff's claim is based on the erection of the perimeter wall as a boundary between her land, the subject matter hereof and the defendant's land."

The excerpt from the judgment does clearly show that the Learned Magistrate concluded that the issue for determination was in respect of a boundary. The question is, on what part of the plot had the wall been erected which amounted to trespass? If all cases filed in court for trespass and eviction were to be concluded that they are boundary disputes therefore the court does not have jurisdiction to handle, then there would be no need for the courts to hear land matters involving trespass.

There are specific cases which fall under the purview of section 18(2) of the Land Registration Act and courts have made pronouncements to that effect when parties have not followed the laid down procedures of ascertaining boundaries. In this particular case the Learned Trial Magistrate applied the provisions of section 18(2) wrongly and therefore dismissed the appellant's case.

From the foregoing and having considered the evidence on record the submissions by counsel, I find that the appeal has merit and is therefore allowed as prayed with costs to the appellant

DATED and **DELIVERED** at **KISUMU** this **4TH** DAY OF **SEPTEMBER, 2020.**

M. A. ODENY

JUDGE

JUDGMENT READ, and **SIGNED** in open court in the presence of;

Mr. Odeny for Appellant and Mr. Omondi for Respondent.

M. A. ODENY

JUDGE