



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA NO. 11 OF 2015

GERALD WANJOHI NJOROGE....APPELLANT

-VERSUS-

JOHN NDUMIA NDONGA.....RESPONDENT

JUDGMENT

1. By a plaint dated **27th October, 2009** the respondent instituted a suit in the lower court to wit Nyeri CMCC No. 599 of 2009 through which he sought judgment against Gerald Wanjohi Njoroge, the appellant herein, for an order of eviction, general damages, costs of the suit, interest and/or any other relief the court might deem fit to grant.
2. The respondent's claim against the appellant was that the appellant had trespassed into his parcel of land to wit Nyeri Municipality Block 111/270 causing him financial loss on account of lack of use of his land.
3. Vide his statement of defence dated **8th December, 2009** and filed on **9th December, 2009**, the defendant (now appellant) impliedly admitted that after their parcels of land were re-surveyed, it was established that a small part of his premises fell on to the plaintiff's plot. He however, contended that by the time the suit herein was filed, he had already removed the structures which had encroached on the plaintiff's land. The defendant further contended that the court had no jurisdiction to entertain the dispute preferred before it as it was about trespass to land.
4. In reply to the defendant's statement of defence, the plaintiff denied the defendant's contention that his encroachment to the suit property was discovered when their parcels of land were re-surveyed. Explaining that no re-survey of their parcels of land was done, he denied the defendant's contention that he had moved out of the suit property at the time the suit was filed.
5. On **11th March, 2010** parties recorded a consent in the following terms:-

“Nyeri Municipal surveyor do visit the suit premises and ascertain the boundary between the plaintiff's and the defendant's plot in the presence of both parties.

The said surveyor to ascertain who between the parties has encroached on the others plot and the nature of such encroachment.

A copy of the surveyor's report to be supplied to court and both counsels.

The cost of the surveyor if any to be shared by parties.

Case to be mentioned on 8th April, 2010.”

6. It would appear that the above consent was not acted upon as another consent was recorded on **10th June, 2010** in the following terms:-

“By consent the district surveyor nyeri to visit the suit premises and ascertain boundaries. Secondly the said surveyor to ascertain as between the plaintiff and the defendant who has encroached another's land and the nature of encroachment. A copy of the report be filed in court within 90 days. Parties to share costs of the surveyor.”

7. Apparently, the surveyor visited the suit property and prepared a report to the effect that nobody had encroached on another's plot. See the ruling by E.K Makori SPM delivered on 24th October, 2012 in respect of an application by the defendant seeking to have

the suit dismissed or struck out on the basis that the report of the surveyor had determined that none of the parties had encroached on another's land.

8. It is however, noteworthy that the court did not dismiss the suit on account of that issue as the report was not conclusive on the issues raised in the suit.

9. When the matter came up for hearing, the plaintiff reiterated the averments contained in his plaint and reply to defence which are to the effect that by the time he brought the suit, the defendant had encroached into his land and that he had refused to vacate despite having asked him to vacate.

10. Explaining that the defendant only removed the structures on his land after he was served with summons, the plaintiff urged the court to award him general damages and costs of the suit.

11. In cross examination, the plaintiff admitted that after he was served with summons to enter appearance, the defendant suggested that they consult a surveyor to point out to them boundaries to their plots.

12. He admitted that after the case was filed, they entered into a consent for a surveyor to visit the land and file a report on the issue of encroachment. He acknowledged that the report of the surveyor stated that none of the parties had encroached on land belonging to another.

13. In re-examination the plaintiff stated that the surveyor was to ascertain the boundary between his plot and that of the defendant.

14. Solomon Kagunda Monge, informed the court that the defendant did not get a surveyor before building his structures.

15. The defendant who testified as D.W.1, stated that he had no building of his in plaintiff's plot. His buildings were on a road reserve.

16. After he received a demand letter from the plaintiff, he suggested that they seek a surveyor's advice. When the matter went to court, they agreed that a surveyor visits the suit land and prepares a report. The report by the surveyor stated that he had not trespassed into the plaintiff's land. He produced his reply to the demand letter and the surveyor's report as **Dexbt 1** and **2** respectively.

17. In cross examination, he denied having demolished some structures after this suit was filed.

18. Upon consideration of the cases urged by both parties, the Trial Magistrate stated:-

“the court has considered the fact that had the plaintiff not taken action the defendant would still be on his part of his portion of the plot. Having left the plot, the court cannot grant prayer (a) of the plaint.

On a balance of probability though, the plaintiff has proved the case that the defendant's act of encroachment on his land caused him loss for lack of usage of the part then under the defendant's control and in that regard the plaintiff deserves general damages.

The court enters judgment for the plaintiff in that the defendant should stay away from the plaintiff's plot or be removed by eviction. In my considered view general damages be paid to the plaintiff in the sum of Kshs.50,000/= with interest from the date of judgment at court rates.

The plaintiff is also awarded the cost of the suit and interest.”

19. Aggrieved by the decision of the lower court, the defendant appealed to this court on the following grounds:-

(i) The decision was against the weight of evidence adduced in the case;

(ii) that the award of damages was excessive.

(iii) The Trial Magistrate ignored the professional evidence of the District Land Surveyor.

(iv) That the decision was against the weight of evidence and law.

20. Pursuant to directions taken on 21st June, 2018 the appeal was disposed of by way of written submissions.

21. Because the respondent did not file his submission's within the time ordered by court, his submissions were expunged from the court record.

22. In his submissions the appellant basically reiterated the averments contained in his memorandum of appeal.

23. I have evaluated the evidence before the lower court and I find the sole issue for the court's determination to be whether the Trial Magistrate was justified in arriving at the decision she arrived at; whether the award for the damages was without any basis and whether the

award for damages was excessive.

24. With regard to that question, I have carefully analyzed the pleadings filed in this suit and the evidence adduced in support thereof. In that regard, whilst the report of the surveyor did not find that any of the parties had encroached on each others land, it is noteworthy that the report cannot be said to be conclusive of the said fact as at the time the suit was filed.

25. As pointed out in paragraph 3 above, the defendant, through his statement of defence dated 8th December, 2009 impliedly admitted that before the suit herein was filed, a small part of his premises fell on to the plaintiff's plot. By dint of the provisions of **Order 2 Rule 6** of the Civil Procedure Rules, it was not open for the defendant to depart from his said pleading, unless by way of amending of his said pleading, by inter alia claiming that at no time had he encroached on the plaintiff' parcel of land yet in his pleadings he had admitted that fact so that the only issue that fell for the court's determination was whether he removed his structures after he was served with summons to enter appearance in this suit or before. With regard to that question, there being no reason to doubt the plaintiff's evidence to the effect that the defendant removed the structures after he was served with summons to enter appearance, I find no reason for interfering with the determination

of the trial court on the issue as to whether the defendant had encroached onto the plaintiff's parcel of land and as to when the encroachment ceased.

26. With regard to the award for general damages for trespass it is now trite law that general damages are awardable in respect of trespass for land without proof of damages.

27. As to whether the award was excessive to warrant interference by this court, I am of the considered view that an award of shs.50,000/= as general damages for trespass to land in the circumstances of this case cannot reasonably be said to be in excessive to warrant inteferece by this court.

28. The upshot of the foregoing is that the appeal is found to be without merit and is dismissed with costs to the respondent.

29. Orders accordingly.

Dated, signed and delivered in open court at Nyeri this 7th day of March, 2019.

L N WAITHAKA

JUDGE

Coram:

Ms Muchai h/b for Mr. Karweru for the appellatnt

Mr. Njuguna for the respondent

Court assistant - Esther