



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC APPEAL NO 52 OF 2016**

**MARGARET NGUHI MBUGUA.....APPELLANT**

**VERSUS**

**RUTH KARI KAGWE.....1ST RESPONDENT**

**MARY NJOKI GICHURU.....2ND RESPONDENT**

**GEOFFREY MAGE KINYANJUI.....3RD RESPONDENT**

**(Being an appeal from the ruling and decree of the Honourable D N Musyoka**

**Principal Magistrate Kikuyu delivered on 27th April, 2016**

**in Kikuyu PMCC No 354 of 2010)**

**JUDGMENT**

1. This appeal arises from the Judgment of the Principal Magistrate Court at Kikuyu (Hon D. N. Musyoka, PM) rendered on 27/4/2015 in **Kikuyu SPMC Civil Case Number 354 of 2010; Ruth Karii Kagwee & 2 others v Margaret Nguhi Mbugua**. Through the impugned judgment, the trial court issued a permanent injunction against the appellant, restraining her together with her tenants, agents and employees, against interfering with the respondents' quiet enjoyment of their parcels of land namely Dagoretti/Thogoto/2294, 2295, 2296 and 2297. The said parcels were subdivisions out of Parcel Number 536.

2. What triggered the suit was a boundary dispute which ended up in the defunct Land Disputes Tribunal between the appellant (as claimant) and the respondents' predecessors in title (as respondent). The award of the Tribunal directed the District Surveyor to visit Dagoretti/Thogoto/536 and confirm that the boundaries of the said land were as per the judgment of the High Court which was rendered by Koome J on 8/4/2005. The respondents as the new registered proprietors of the affected parcels were served with a notice requiring them to attend the boundary determination. Aggrieved by the notice requiring them to attend the session, the respondents instituted a suit against the appellant seeking a permanent injunction

3. After hearing the parties, the trial court rendered a judgment in which it held as follows:

***“In her evidence the defendant dwelt at length on the family property which does not concern the plaintiffs and in fact testified that she did not understand why the 1st and 2nd plaintiffs sued her. She even admitted that she would be offended if anyone interfered with her piece of land or if anyone interfered with her quiet enjoyment of her property. In her defence she stated that the plaintiffs ought to have sued Benjamin Wangendo, Duncan Kinyanjui and Mathew Wangai for not informing them of a family land dispute. In fact in the defence the defendant stated that she never interfered with the plaintiffs parcels of land.***

***That admission alone entitles the plaintiffs to the reliefs sought. That if anyone interferes with the quiet enjoyment of the plaintiff's parcels of land, then they should be restrained from doing so. A permanent injunction is therefore issued restraining the defendant, either by herself or her tenants, agents or employees from interfering with the quiet enjoyment of the plaintiff's parcels of land if that is currently happening. The costs of the suit is awarded to the plaintiffs.”***

**Appeal**

4. Aggrieved by the judgment, the appellant brought this appeal citing the following seven (7) grounds:

1. **The Learned Trial Magistrate erred in law and in fact when he failed to appreciate the nature of the dispute before him and accordingly arrived at a wrong decision.**
2. **The Learned Trial Magistrate erred in failing to properly apply his mind to the need to render substantive justice to the parties before him and accordingly arrived at wrong decision.**
3. **The Learned Trial Magistrate misdirected himself on both law and fact when he failed to appreciate that the boundaries to the dispute properties had been aligned pursuant to an order of a competent Court/Tribunal and had accordingly been altered from the position existing at the time of sub-division and issuance of Titles.**
4. **The Learned Trial Magistrate erred in law and in fact when he failed to appreciate that granting orders sought by the plaintiff would have the effect of reversing the substance of another Decree issued by the same Court pursuant to another matter before the then Land Disputes Tribunal**
5. **The Learned Trial Magistrate erred in effectively quashing an earlier decree issued by the same court directing that the boundaries of the subject properties be aligned**
6. **The Learned Trial Magistrate erred in law and in fact in granting injunctive orders without due regard to the law governing issuance of injunctive remedies.**
7. **The Learned Trial Magistrate erred in awarding costs to the plaintiffs**

5. The appellant sought the following orders in this appeal.

- a) **The orders issued by the Honourable D M Musyoka Principal Magistrate Limuru be vacated/discharged.**
- b) **This appeal be allowed.**
- c) **Costs of both the lower court and the appeal be borne by the appellant.**

#### **Submissions**

6. The appeal was canvassed through written submissions. Counsel for the appellant first took issue with the trial court for rendering a very short judgment in which it said nothing concerning the counterclaim made by the appellant. Secondly, counsel submitted that the respondents' case was that the appellant was encroaching on their land while the appellant's case was that the land she occupied belonged to her, based on the survey exercise carried out pursuant to the decree in Land Case Number 3 of 2010. Counsel argued that the court was duty bound to determine whether indeed the appellant was occupying the respondents' land but neglected to make that determination. Thirdly, counsel faulted the trial court for failing to frame issues for determination. Fourthly, counsel faulted the trial court for making a decision that ran counter to a decree issued by the same court pursuant to a determination of the Land Disputes Tribunal, and contended that the decision was *res judicata*. Fifthly, counsel submitted that the trial court failed to appreciate and apply the overriding objective of the court as spelt out under Section 1(A) of the Civil Procedure Act. Sixthly, counsel argued that the trial court failed to appreciate or apply the principle upon which jurisdiction to grant permanent injunctions is exercised. Lastly, counsel faulted the court for condemning the appellant to pay costs of the suit.

7. The 1st and 2nd respondents submitted that they did not want strangers to resurvey their parcels of land in a dispute which did not concern them and for this reason, they properly moved to court to seek a permanent injunction to stop the appellant from interfering with their quiet enjoyment of their parcels of land. Secondly, they submitted that even if the judgment of the court was set aside and the matter remanded back to the trial court, the outcome would be the same because the dispute at the Tribunal commenced one and a half years after the suit properties had changed hands and they were not parties to the case in the Land Disputes Tribunal. They further argued that the doctrine of *res judicata* would not apply because the Land Disputes Tribunal case was initiated against Benjamin Wangendo long after he had ceased to be proprietor of the suit properties and the respondents were not parties to the dispute in the Tribunal and to the consequential decree. They added that the trial court properly granted a permanent injunction because they had satisfied the requisite criteria.

8. The 3rd respondent submitted that the respondents asserted through pleadings that the appellant had overstepped her boundaries and was interfering with their possession of their parcels of land while the appellant claimed that there was an order calling for the resurvey of the boundaries. He argued that the trial court properly rendered itself on the issue at hand. Secondly, the 3rd respondent submitted that although the trial court did not frame the issues at hand, it nonetheless rendered itself on the dispute. On the contention that the suit was *res judicata*, the 3rd respondent submitted that the parties in the Land Disputes Tribunal case and the consequential enforcement proceedings were not the same hence the doctrine of *res judicata* would not apply.

9. The 3rd respondent further submitted that the trial court properly upheld the principle of overriding objective in the administration of justice. He added that the threshold for grant of injunctive orders was met because the respondents were registered proprietors who were entitled to protection against encroachment. On the issue of costs, the 3rd respondent submitted that it is a rule of thumb that costs follow the event. Lastly, he submitted that the suit was triggered by the appellant hence she was properly condemned to pay costs.

#### **Determination**

10. I have considered the entire record of the trial court, the grounds set out in the memorandum of appeal, and the parties' respective submissions. I have also considered the nature of the dispute giving rise to the impugned judgment. I have similarly considered the law

applicable to the dispute giving rise to this appeal, and the relevant jurisprudence. The following issues fall for determination in this appeal: (i) whether the trial court appreciated the nature of the dispute before it and properly pronounced itself on the dispute; (ii) whether the trial court's failure to frame issues led to a miscarriage of justice; (iii) whether the suit giving rise to the impugned judgment was *res judicata*; (iv) whether the trial court failed to properly apply the principle of overriding objective as spelt out in Section 1A of the Civil Procedure Act; (v) whether the trial court failed to appreciate and apply the principles upon which jurisdiction to grant a permanent injunctive order are granted; and (vi) whether the trial court erred in condemning the appellant to pay costs of the suit in the trial court.

11. Before I make pronouncements on the above issues, I will briefly outline the principles upon which the appellate jurisdiction of this court is exercised in an appeal of this nature.

12. This being a first appeal, the court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions, although it has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified in the lower court. See, the case of **Verani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd [2004] 2 KLR 269** on the duty of the first appellate court.

13. It is also settled that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they were not based on evidence at all, or were based on a misapprehension of the evidence or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, **Peter v. Sunday Post Ltd. [1958] E.A 424** and **Makube v. Nyamuro [1983] KLR 403**.

14. The first issue is whether the trial court appreciated the nature of the dispute before it and properly pronounced itself on the dispute. A perusal of the amended plaint reveals that the suit was triggered by a notice by the District Surveyor inviting the respondents to attend a boundary dispute resolution session. The respondents were vehemently opposed to that exercise. The permanent injunctive order which they therefore sought and obtained was intended to frustrate any adverse outcome of the intended boundary dispute resolution exercise.

15. Similarly, a perusal of the appellant's amended defence and counterclaim reveals that the appellant contended that the respondents had encroached on her land. She therefore sought a determination of the boundaries by the Government Surveyor. It was therefore crystal clear from the pleadings before the trial court that the dispute before it was a boundary dispute. The trial court commenced hearing of the suit on 25/11/2014 and rendered a judgment on 27/4/2015. At the time hearing of the suit commenced, previous land laws, including the Land Disputes Tribunals Act, had been repealed. The current land laws were therefore in force. Significantly relevant to the dispute before the trial court was the current legal framework in Section 18 of the Land Registration Act which bars courts from entertaining any action or other proceedings relating to a dispute as to the boundaries of a registered parcel of land unless the boundaries have been determined in accordance with the legal framework in that section. The section provides thus:

**18. Boundaries.**

**1) Except where, in accordance with Section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.**

**2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.**

**3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:**

**Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act, Cap. 299.**

16. From the trial court's record, the respondents did not present any evidence of a prior boundary determination by the Land Registrar within the above framework. Similarly, the appellant, though contending that the District Surveyor had visited the suit properties pursuant to an award of the defunct Land Disputes Tribunal, did not present a determination signed by the Land Registrar within the above framework. In my view, in the absence of a prior determination signed by the Land Registrar, the trial court had no jurisdiction to entertain the dispute and grant the injunctive order it granted. It ought to have downed its tools on account of lack of the Land Registrar's prior determination. It ought to have referred the dispute to the Land Registrar. Having failed to take cognizance of the fact that the dispute before it was a boundary dispute, the trial court erroneously proceeded to hear and determine the dispute contrary to the framework in Section 18 of the Land Registration Act. My finding on the first issue therefore is that the trial court failed to appreciate that the dispute before it was a boundary dispute and that it lacked jurisdiction to entertain it in the absence of a preceding boundary determination by the Land Registrar. This appeal therefore will succeed on that ground alone.

17. The second issue is whether the trial court's failure to frame issues led to a miscarriage of justice. My answer is in the affirmative. Issues are points which fall for determination in a defended suit. Under Order 21 rules 4 and 5 of the Civil Procedure Rules, it is a mandatory requirement that issues be concisely framed by the court and the court's decision on each issue be pronounced. Order 21 rules 4 and 5 provide thus:

**4. Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.**

**5. In suits in which issues have been framed, the court shall state its finding or decision, with the reasons therefor, upon each separate decision on each issue**

18. It is instructive that following its failure to frame issues, the trial court consequently failed to appreciate the nature of the dispute before it and proceeded to hear and grant a permanent injunction in a dispute where it did not have jurisdiction. Had the court framed issues, one of the key issues would have been whether or not the respondents had encroached on the appellant's land. That would have informed the court that the dispute before it was a boundary dispute and it did not have jurisdiction to entertain the boundary dispute in the absence of a prior determination signed by the Land Registrar.

19. The third issue is whether the suit giving rise to the impugned judgment was *res judicata*. The doctrine of *res judicata* is enshrined in Section 7 of the Civil Procedure Act which provides as follows:

**7. *Res judicata***

***No court shall try an suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.***

**1) *The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.***

**2) *For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of the court.***

**3) *The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.***

**4) *Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.***

**5) *Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.***

**6) *Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.***

20. There was no evidence that the parties to the suit before the trial court had previously litigated over the same dispute. The respondents were registered as proprietors of their respective parcels in 2008. They were not parties to the dispute in the Land Disputes Tribunal. They were similarly not parties to the award enforcement proceedings initiated by the appellant in 2010. Consequently, my finding is that the respondents were not barred by the doctrine of adverse possession. Had they obtained a prior determination by the Land Registrar, they would have been properly entitled to seek redress in a court of law.

21. The fourth issue is whether the trial court failed to properly apply the principle of overriding objective as spelt out in Section 1A of the Civil Procedure Act. Under the principle of overriding objective, the court, in the exercise of its mandate is required to facilitate the just, expeditious proportionate and affordable resolution of disputes. The dispute before the court was a boundary dispute. The respondents contended that the appellant was encroaching on their respective parcels. The appellant similarly contended through her counterclaim that the respondents had encroached on her land and urged the court to order a survey exercise to determine the boundaries. The court rendered itself on the issue thus:

***"In her evidence the defendant dwelt at length on the family property which does not concern the plaintiffs and in fact testified that she did not understand why the 1st and 2nd plaintiffs sued her, she even admitted that she would be offended if anyone interfered with her piece of land or if anyone interfered with her quiet enjoyment of her property. In her defence she stated that the plaintiffs ought to have sued Benjamin Wangendo, Duncan Kinyanjui and Mathew Wangai for not informing them of a family land dispute. In fact in the defence the defendant stated that she never interfered with the plaintiffs parcels of land.***

***That admission alone entitles the plaintiffs to the reliefs sought. That if anyone interferes with the quiet enjoyment of the plaintiff's parcels of land, then they should be restrained from doing so. A permanent injunction is therefore issued restraining the defendant, either by herself or her tenants, agents or employees from interfering with the quiet enjoyment of the plaintiff's parcels of land if that is currently happening. The costs of the suit is awarded to the plaintiffs."***

22. Looking at the above pronouncement in the contest of the dispute which was before the trial court, I entirely agree with the appellant that the court did not adhere to the requirements of the principle of overriding objective because it did not do what the law required of it. My finding on this issue is therefore in the affirmative.

23. The fifth issue is whether the trial court failed to appreciate and apply the principles upon which jurisdiction to grant a permanent injunction is granted. The principles upon which a permanent injunction is granted are well settled. To be granted a permanent injunction, a plaintiff must establish the existence of a right and violation of that right by the defendant. In the dispute before the trial court, there was no boundary determination by the Land Registrar and there was similarly no evidence of violation of the respondents' right by the appellant. In my view, it was not possible to logically conclude that the respondents had satisfied the above criteria in the context of the boundary dispute without a boundary determination within the framework of Section 18 of the Land Registration Act. The trial court, in my view, proceeded to grant a permanent injunction without a proper basis.

24. Similarly, in light of the nature of the dispute before the court, there was no proper basis for condemning a party to the dispute to bear costs yet the boundary dispute remained unresolved and violation of the respondents' right by the appellant had not been conclusively established.

25. The net result therefore is that this appeal succeeds.

#### **Disposal Orders**

26. Consequently, the appeal herein is allowed in the following terms:

*a) The judgment of the trial court in Kikuyu SPMCC 354 of 2010 is wholly set aside and is replaced with an order staying further proceedings therein and referring the boundary dispute in the suit to the Land Registrar, Kiambu, to determine the boundaries of the affected parcels of land within the framework of Section 18 of the Land Registration Act.*

*b) A different magistrate shall thereafter hear and determine the suit and counterclaim afresh after receipt of the Land Registrar's determination under Section 18 of the Land Registration Act.*

*c) The parties to the suit shall equally bear the Land Registrar's costs, if any.*

*d) In view of the fact that the trial court's omissions and misdirections largely contributed to the lodging of this appeal, parties shall bear their respective costs of the appeal.*

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF MARCH 2019.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Njuguna for the Appellant

Ms Kitonga for the 1st & 2nd Respondents and holding brief for Mr. Wamae for the 3rd respondent.

June Nafula - Court Clerk