

**IN THE COURT OF APPEAL**  
**AT KISUMU**  
**(CORAM: ASIKE-MAKHANDIA, OMONDI & KIMARU,**  
**JJ.A) CIVIL APPEAL NO. 227 OF 2019**

**GILBERT WESONGA MUGENI.....APPELLANT**  
**AND**  
**DESTERIO NYONGESA WANYAMA.....RESPONDENT**

*(Being an appeal from the judgment of the Environment and Land Court of Kenya at Busia (Kaniaru, J.) dated 30<sup>th</sup> July, 2019*

***in***

***ELC Appeal No. 11 of 2016***

\*\*\*\*\*

**JUDGMENT OF THE**  
**COURT**

1. The respondent is the registered owner of plot No. 318 located in Busia, where he has put up a commercial building hosting several shops, while the appellant owns plot No. 286, which is adjacent to the respondent's plot. In an amended plaint dated 19<sup>th</sup> August, 2015, the respondent lodged a suit against the appellant, before the Chief Magistrate's Court at Busia, alleging that the appellant had trespassed into his property. It was the respondent's case that on or about 28<sup>th</sup> December, 2011, the appellant, without any colour of right, forcefully alienated one of the shops located on the respondent's property, alleging that it was constructed on his plot, and used the said shop to run a

hardware business. The respondent averred that the appellant

vacated the said shop on 14<sup>th</sup> June, 2015, and leased the same to one **Ahmed Mohamed**, who was the 2<sup>nd</sup> defendant in the suit before the trial court, without the appellant's authority. The respondent pleaded that plot Nos. 318 and 286 were distinct properties with clear boundaries, and that the development undertaken by the respondent on his property did not encroach onto the appellant's property. The respondent prayed for eviction orders against the appellant; injunctive orders restraining the appellant from interfering in any way with the respondent's shop; *mesne* profits for loss of use of the said shop; and an order directing the 2<sup>nd</sup> defendant to pay the respondent rent for use of the said shop for the period he has been in occupation; and costs of the suit.

2. The appellant, in his statement of defence and counterclaim, denied the averments made by the respondent. He averred that the development undertaken by the respondent on plot No. 318 encroached onto his property being plot No. 286. He prayed for orders directing demolition of the structure illegally erected on his said property by the respondent; *mesne* profits and general damages for trespass by the respondent; and costs of the suit.

3. By consent of the parties, the trial court, on 30<sup>th</sup> March, 2011, made an order directing the District Surveyor and Municipal

Council of Busia to verify the respective acreages of both properties, avail survey plans and duly approved plans, and report on the re-arrangement of the survey plans. The surveyor, **Jared Ouma Okoth**, who testified as PW2 told the court that there existed two survey plans, one made in 1993 and another in year 2000, after a re-arrangement of the two properties, to cure a section of overlap. He stated that a section of the respondent's plot measuring 7.39 metres by 37.6 metres overlapped onto the appellant's property, and that the revised survey plan was drawn to cure that anomaly. It was his evidence that the respondent's development did not encroach onto the appellant's plot according to the revised plan. He urged the court to adopt the revised plan, as not doing so would affect other allottees on the ground. He stated that plots were government plots leased to the respective parties.

4. At the end of the trial, the learned trial magistrate found in favour of the appellant. The trial magistrate rejected the revised plan of year 2000 for reasons that the surveyor's (PW2) report did not include authorization documents for the changes made to the original map of 1993, and that the revised plan did not contain plot numbers. Consequently, the trial court found that part of respondent's development (two

shops) had encroached

onto the appellant's plot by 37.5 meters, pursuant to the original map drawn in year 1993. The trial court allowed the appellant's counterclaim as prayed, and directed that part of the respondent's building encroaching onto the appellant's plot be demolished; and ordered that the appellant be awarded *mense* profits plus general damages to be calculated at the sum Kshs.25,000 per month, from year 2011 to date of judgment, totaling to Kshs.2,950,000; that Kshs.300,000 recovered from the appellant be refunded to him by the respondent as the respondent failed to substantiate his claim; and that any further rent received by the respondent from the two shops be paid to the appellant until the date of demolition.

5. The appellant, aggrieved by the said decision, appealed to the Environment and Land Court at Busia. In summary, the appellant faulted the learned trial magistrate for: relying on the original plaint as opposed to the amended plaint; failing to find that the respondent had sufficiently established his case; determining issues not pleaded or canvassed during trial; allowing the appellant's counterclaim in the absence of sufficient evidence; awarding the appellant *mesne* profits when the same was not sufficiently pleaded or proved,

despite the fact the appellant was in occupation of the respondent's shop; and

for failing to properly evaluate the evidence on record, thereby arriving at the wrong decision.

6. Kaniaru J., in a judgment dated 30<sup>th</sup> July, 2019, allowed the respondent's appeal. The learned Judge faulted the trial court for rejecting expert evidence by PW2, and by basing its decision on an old area map availed by the appellant, which was marked for identification, but never produced in evidence as an exhibit. The learned Judge found that the appellant was not entitled to *mesne* profits as he had forcefully taken over the respondent's shop, on allegation of encroachment of his land, where he ran a hardware business. The learned Judge noted that the appellant did not take any legal action against the respondent when he was constructing the building, but rather allowed the development to be finished, then forcibly took over one of the shops and claimed ownership. The learned Judge also found that the revised plan of year 2000 produced by PW2, the surveyor, was applicable, and that the appellant purchased the property in 2003, after the readjustment of the area map. He could not therefore rely on the previous plan which was no longer applicable. In the end, the respondent's appeal was allowed.

7. The appellant has lodged a second appeal before this Court, having been dissatisfied by the decision of the first appellate court. He has proffered three (3) grounds of appeal as reproduced below:

***(1) THAT the learned Judge erred in law in adjudicating on a matter without a decree appealed against;***

***(2) THAT the learned Judge erred in law in arriving at a decision which was contrary to the Registration of Titles Act and or the erstwhile Registered Land Act Cap 300 of the Laws of Kenya/ The Land Registration Act, 2012;***

***(3) THAT the learned Judge was plainly wrong in arriving at a decision which exemplifies and compounds anarchy contrary to established statutory order.***

8. The appeal was heard by way of written submissions. **Mr. Ipapu** was on record for the appellant. The appellant abandoned the first ground of appeal, and confined his submission on the remaining two grounds. It was his submission that the respondent encroached and constructed a permanent structure on part of the appellant's land, a fact admitted by the respondent, and that the respondent justified the encroachment by stating that there was a re-adjustment of the boundaries. Counsel contended that there was no approved

sub-division plan tendered in evidence; no written instructions

from the Registrar directing the rectification; that the new plan did not bear any plot numbers; and that the appellant was never notified of the alleged re-adjustment. He maintained that the re-adjustment was not done in strict compliance of the applicable law.

9. The respondent did not participate in this appeal.

**10.** We are alive to our mandate as a second appellate Court which is circumscribed. We are required to resist the temptation of delving into matters of facts, and confine ourselves to matters of law, unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See the decisions of this Court in **Kenya Breweries Ltd v Godfrey Odoyo [2010] eKLR**; and **Stanley N Muriithi & another v Bernard Munene Ithiga [2016] eKLR**).

11. Having evaluated the record of appeal, as well as submissions by the appellant, the principal issue that falls for determination by this Court is whether the respondent's development encroaches upon the appellant's parcel of land. The two properties are adjacent to each other. The

dispute arises from the existence of an earlier cadastral map  
which, upon

subsequent re-adjustment by the relevant survey authorities to cure an identified overlap between the adjoining parcels of land, altered the boundary alignment. Following this correction, the respondent's building as presently situated appears, according to the appellant, appears to protrude into the appellant's land.

12. We note that the trial court called for expert evidence by Busia District Surveyor (PW2), who explained to the court that there existed an old area map (FR 327/7/1993) which was drawn in 1993, but that after an overlap between the appellant's and the respondent's plots was discovered, a revised map (FR 374/162/2000) was drawn in the year 2000 to cure this overlap. According to PW2, the revised map drawn in the year 2000 represents the correct position of the two properties on the ground, and that pursuant to the said revised map, the respondent's development was on his parcel of land and does not encroach into the appellant's land.

13. The appellant's case is that the alleged re-adjustment was not undertaken in accordance with the law. It was the appellant's submission that the original map was unilaterally and unlawfully altered without his knowledge or consent, resulting in the purported subsequent survey map for the

same area, mapping out new boundaries and adjusting the position and

acreage for the two parcels of land on the ground, contrary to the procedure set under repealed **Registered Land Act (Cap 300)**. The appellant argued that the respondent did not avail any documentary evidence to establish that the tendered sub-division plan produced in evidence was approved, or any written instructions from Land Registrar authorizing the said rectification to be done. The appellant maintained that the new map produced in evidence by PW2 was not authentic and did not indicate plot numbers; and that the appellant was never informed of the said re-adjustment before it was implemented.

14. A perusal of the record shows that the respondent purchased his plot No. 318 sometime in April 2003. According to the report by the surveyor (PW2), the re-adjustment of the area map was done in year 2000, way before the respondent purchased his plot No. 318. The Respondent, having acquired the land on the strength of the lawfully updated registry map, is entitled to rely on that map as the accurate representation of the parcel of land that he purchased.
15. We agree with the observation made by the learned Judge that if the appellant is aggrieved by the boundary as

reflected in the amended map, the proper procedure, pursuant to **sections 18 to 20** of the **Land Registration Act**, is to pursue a boundary

determination or rectification by the Land Registrar or the Director of Surveys, who are the statutory custodians of approved maps and survey plans. The appellant is barking up the wrong tree in imputing liability on the respondent for any alleged encroachment that arises purely from a boundary realignment carried out by the relevant land administration authorities prior to their purchase of the said parcel of land. PW2 noted that the readjusted map affected other neighbouring plots, other than the appellant's and respondent's parcels of land. The only course of action that was available to the appellant was to pursue recourse with the relevant statutory custodians of cadastral records. This Court cannot penalize a purchaser who relied upon an official map unless fraud or illegality is established.

16. As regards the appellant's claim for *mesne* profits, the circumstances when claims for *mesne* profits can arise were considered by this Court in the case of **Attorney General v. Halal Meat Products Limited [2016] KECA 306 (KLR)** as

follows:

***“... where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period***

***of occupation of his/her***

***property by another. See McGregor on Damages, 18th Ed. para 34-42.”***

17. From the adduced evidence, it was established that the respondent began construction on the plot in 2004, and the alleged encroachment, if any, was visible and continuous. The appellant took no legal action for six years, only to resurface in 2010 and forcibly take over a shop he claimed was constructed on his land. Even assuming, for argument's sake, that an encroachment existed, the appellant's conduct of forcibly taking possession of one of the respondent's shop to run his own business disentitles him from the award of damages sought. *Mesne* profits are, in law, a compensatory remedy awarded to a party who has been unlawfully kept out of possession of their land and thereby deprived of the income that the property would reasonably have produced. It is a remedy grounded in equity and cannot be invoked by a party who has, through unlawful self-help, taken possession of property that had not been legally adjudged to be his.

18. The evidence on record shows that after taking over the shop, the appellant derived income from the premises where he ran a hardware business, and that after he vacated the said shop, he leased the shop to a third party and

collected rental income

therefrom. Having benefited financially during the entire period

of his unlawful occupation, the appellant cannot claim to have suffered any loss capable of attracting an award of *mesne* profits. In addition, we have scrutinized the record and we cannot find any evidence on basis upon which the trial court arrived at the figure of Kshs. 25,000 per month as damages. It was speculative to put it mildly.

19. In the circumstances, we are satisfied that the first appellate court addressed itself correctly on the law, and properly carried out its duty of review and re-evaluation of evidence tendered before the trial court. The appeal before us has no merit. It is hereby dismissed with no orders as to costs.

20. Orders accordingly.

**Dated and delivered at Kisumu this 19<sup>th</sup> day of December, 2025.**

**ASIKE-MAKHANDIA**

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**... JUDGE OF APPEAL**

**H.A. OMONDI**

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**. JUDGE OF APPEAL**

**L. KIMARU**

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**.... JUDGE OF APPEAL**

**I certify that this is a true copy of original.**

***Signed***

**DEPUTY REGISTRAR.**