REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

ENVIRONMENT AND LAND COURT

ELC CA NO. 11 OF 2016

DESTERIO NYONGESA WANYAMA.....APPELLANT

VERSUS

GILBERT WESONGA MUGENI.....1ST RESPONDENT

AHMED MAHAMED.....2ND RESPONDENT

(Being an appeal from the Judgment and decree of Hon. R. WASHIKA WACHIRA (Mrs)

Resident Magistrate in BUSIA CMCC No. 31 of 2011

delivered on 7/4/2016)

J U D G E M E N T

1. This appeal arises from the judgement of the lower court (Hon. R. Washika Washira (Mrs)) delivered on 7/4/2016 in SPMCC No. 31/2011 Busia, which was a suit between the Appellant **– DESTERIO NYONGESA WANYAMA –** as Plaintiff and two Respondents **– GILBERT MUGENI** and **AHMED MAHAMED –** as first and second defendants respectively. Initially the suit in the lower court was between the Appellant and 1st Respondent only, with the 2nd Respondent joining much later vide an amended plaint dated 19/8/2015. The bone of contention then, as now, related to two plots here in Busia town - **PLOT No. 318** owned by the Appellant and **PLOT No. 286** owned by 1st Respondent.

2. The Appellant put up a commercial building on his plot and the 1st Respondent moved to occupy one ground – floor shop for the alleged reason that it was built on his plot. The Appellant felt aggrieved and filed the suit in the lower court praying at first for orders of eviction, permanent injunction and mesne profits from the 1st Respondent. Later on, it appears that the 1st Respondent left the shop and rented it out to 2nd respondent. That is why the 2nd Respondent was later enjoined as a party.

3. In the lower court, the 1st Respondent filed a defence and counter-claimed. The defence was essentially a denial of the Appellant's claim and the 1st Respondent made it clear that part of the Appellant's building was on his plot. He then counter-claimed asking for demolition of the Appellant's structure allegedly on his land and praying also for mesne profits and damages for trespass.

4. The 2nd Respondent entered appearance in the lower court but never filed defence. Due to this state of affairs, the Appellant's side asked for interlocutory judgment against him and got it. From the 2nd Respondent, the Appellant wanted an order directing him to pay rent to him instead of 2nd Respondent or vacate the premises as an alternative.

5. The matter was heard and in the ensuing judgment, the lower court dismissed the Appellant's suit, found for the 1st Respondent in the counter-claim, and made no findings at all for or against the 2nd Respondent. This appeal is essentially a contestation of that outcome by the Appellant.

6. The grounds of appeal faulted the trial magistrate for anchoring her judgment on a plaint that had been superceded by an amended plaint; failing to find and hold that the Appellant had proved his case on a balance of probabilities; raising and determining issues that were not pleaded or canvassed during trial; allowing the 1st Respondent's counter-claim in absence of sufficient evidence; awarding the 1st Respondent mesne profits when the same was not sufficiently pleaded or proved and while knowing that the 1st Respondent was the one

actually in occupation; failing to pronounce herself on the Appellant's claim against the 2nd Respondent; and generally failing to properly evaluate evidence and basing her decision on theories or hypotheses that were contrary to adduced evidence.

7. The Appellant wants a complete reversal of the outcome of the lower court's judgement. More specifically, he wants judgement in his favour and a dismissal of the 1st Respondents counter-claim. The Appellant also wants the Respondents to pay the costs of this appeal. This, in sum, is what comprises prayers (a) (b) and (c) in the appeal.

8. The appeal was canvased by way of written submissions. The Appellant's submissions were filed on 1/2/2019. The Appellant adopted a stratagem that focussed on specific grounds of appeal while subsuming others in the supporting arguments that followed. In this regard, the trial magistrate was faulted for basing her judgement on the initial plaint as if the amended plaint didn't exist. The court was said to have fallen into error, with the requirement of law being that the amended plaint supercedes the original plaint. The decided case of **PHOEBE WANGUI Vs JAMES KAMORE: HCC No. 367 of 2010, NAIROBI,** was cited and availed to reinforce this point.

9. Further, the trial magistrate was again faulted for only isolating one issue for determination and for not taking into account that the 2nd Respondent had not filed a defence and therefore had interlocutory judgement against him, which required a pronouncement in the final judgement.

10. The Appellant was said to have bought his plot for valuable consideration, had the beacons shown to him, had his plans for developing the plot duly approved, and had construction started and completed thereafter. Everything, it seems, was regularly done. Yet the 1st Respondent went into forcible occupation of one of the ground-floor shops after alleging that his adjacent plot had been encroached upon. The ensuing imbroglio required official ascertainment from the relevant office. Both sides consented that a surveyor should visit the site. That was duly done. PW2 visited the site and compiled a report which, among other things, talked of a re-adjustment of the area map to correct an overlap that had existed. It is clear that PW2 used the re-adjusted map. It is clear too that that was the map to apply as use of any other would affect parties who were not part of the suit.

11. The Appellant found fault with the issue taken regarding readjustment of the map. According to the Appellant, the consent entered into between the parties allowing the surveyor to visit the site was made on the basis that there was indeed such readjustment. There was therefore no need for the surveyor to avail to court records or documentation justifying or allowing readjustment.

12. Issue was also taken with the judgement that was delivered. The judgement is said to have made reference to surveyor's report which allegedly had pointed out the inadequacy of relying on the two versions of the area plans. The surveyor's report had no such information or content, the Appellant submitted.

13. Further, the 1st Respondent was said not to have availed the allotment letter for his plot and did not also disclose its size. And going by the allotment letter that the Appellant himself had, it was clear that there can be re-adjustment on survey. I think the implication here is that there was nothing unusual about the re-adjusted area plan that was used. The Appellant stressed and/or emphasized that his building was within his plot; that he had obtained the requisite approvals for construction; that the 1st Respondent forcibly occupies one of the shops; and that the rent payable for that shop was Kshs.25,000 per month.

14. On mesne profits, the Appellant submitted that these are damages awarded against a tenant in wrongful possession of another's land or property. To succeed in such a claim, a claimant must demonstrate that someone is in possession of his land or property unlawfully. In the case at hand however, the 1st Respondent was ordered to be paid mesne profits yet he was the one in wrongful possession of the Appellant's property. Put differently, the Appellant has to pay mesne profits to someone in wrongful possession of his property. And even assuming that the mesne profits ordered to be paid were for the 1st Respondent's plot, that plot was said to be undeveloped and the Appellant was not in its possession.

15. The 1st Respondent' submissions were filed on 18/2/2019. According to the 1st Respondent, the issue is essentially a boundary dispute. It was pointed out that the Appellant's evidence was on the basis of the original plaint, the amended plaint having come long after the Appellant and his witness had given evidence. The trial magistrate was therefore said to be correct to base her judgement on the original plaint.

16. The Appellant was said to have encroached onto the 1st Respondent's parcel of land by an area measuring 7.39 metres by 37.6 metres. And in this same area, the Appellant has put up a building.

17. The re-adjusted map said to be the one in use was said to be wanting for reasons, *interalia*, that it is not shown who applied for re-adjustment; that no notice to parties was given so that they could lodge objection if need be; that no minutes were shown recommending re-adjustment; that the Appellant and his witnesses refused to produce original survey maps and even successfully opposed production of such maps by 1st Respondent; and that the re-adjusted map shown has no plot numbers and is therefore of doubtful authenticity.

18. The court was urged to find that the trial magistrate was right. The mesne profits were said to be rent payable – calculated at 25,000/= per month – from the year 2004 to 2011. The 1st Respondent was also said to be entitled to 300,000/= he had been earlier made to pay as rent.

19. I have considered the appeal as filed, rival submissions by learned counsel on both sides, and the case law availed. The lower court matter as initially filed was between the Appellant, as the plaintiff, and the 1st Respondent, as defendant, at the time. But the plaint that initiated the case was later amended and the second Respondent was added as the second defendant. On the basis of that amended plaint, interlocutory judgement was entered against the 2nd Respondent. Yet at the time of judgment, the trial magistrate reverted to the original plaint, delivered judgement on that basis, left the interlocutory judgement against the 2nd Respondent hanging, and said nothing of the

prayers sought by the Appellant against the 2nd Respondent.

20. This was obviously a grave procedural error and the submission by the Respondent's counsel that **"the trial magistrate was very correct in basing her findings on the original plaint as filed by the Appellant"** sounds not only hollow but laughable. Even a very rudimentary knowledge of procedural law would readily show that the original plaint is never reverted to where an amended plaint is regularly filed and accepted by the court. The trial court goofed. Nay, it goofed big and unacceptably. I am in agreement with the Appellant's counsel on this issue.

21. The Respondents counsel submitted that the matter at hand is a boundary dispute between the parties. Not very much so, I would respond. It is clear that there is an area measuring about 7.39 metres by 37.6 metres that the 1st respondent claims to own. There is also an obvious issue of forcible detainer or occupation by the 1st Respondent.

22. In handling the other grounds of appeal, I would need to look at the evidence availed, re-evaluate it myself, and make my own findings. As I do so, I bear in mind that I didn't hear the case and therefore didn't see the witnesses testify. In that regard therefore I will make due regard of the fact that the findings of fact by the trial court were made from a point of vantage, which I obviously lack at this stage.

23. It was the Appellant's case that he bought his plot sometimes in the year 2003. He had the beacons duly fixed and a beacon certificate issued to him. He then decided to develop his plot and actualised his desire by putting up a four-storey commercial building on the plot. All the requisite documentation and approval processes were adhered to and construction seems to have gone on without a hitch. Then the 1st defendant appeared, foisted himself into one of the ground-floor shops, and started operating a hardware business. His claim? That the shop was his own, having been put up on a portion of his land.

24. The Appellant felt aggrieved and had recourse to court via this suit, asking for orders of eviction, injunction, mesne profits, and costs. The 1st Respondent denied the Appellant's claim and averred, *interalia*, that part of the Appellant's building was on his plot. He also counter-claimed and asked for orders of demolition, mesne profits plus general damages, and costs. It appears clear that the 1st Respondent left the shop at some point and rented it out to 2nd Respondent. That is why the 2nd Respondent was made party to the suit.

25. It is against this background that the lower courts hearing was conducted. And as the bone of contention related both to boundary and ownership of some portion, it became necessary to call expert evidence. PW2 came to satisfy this requirement. He testified, *interalia*, that according to the area re-adjusted map, the Appellants building was within his land. The re-adjustment referred to was said to have become necessary because of an existing overlap that needed to be corrected. That map applied even to the neighbouring plots.

26. The decision of the lower court was largely hinged on its evaluation of the evidence of PW2. It rejected the re-adjusted map on the grounds, *interalia*, that it lacked crucial details and that it could not even be demonstrated to be the map of the area. Having rejected the map, the finding was inevitable that the Appellant had encroached onto the 1st Respondent's land. It was inevitable too that the 1st Respondent would get the orders he got.

27. This appeal is essentially a challenge to the finding made and the orders given. The 1st Respondent was happy with the finding. He pointed out it is not shown who had asked for re-adjustment and why it had become necessary. He pointed out that no notice was given to the parties to voice their views and that no minutes were availed to show approval of the re-adjustment by the relevant authority. The map itself was said to lack crucial details thus raising doubts as to its authenticity.

28. The Appellant obviously has different views. It was pointed out that the existence of the re-adjusted map was well within the knowledge of the disputing parties. It was therefore not necessary to produce records of approvals, or documents authorising re-adjustment. Besides, the plots in issue were said to be leases from the government and the report of this witness showed clearly that the readjusted map reflected the ground situation as captured in earlier plans. It appeared clear that the re-adjusted map did not apply only to the disputed plots; it is the one applicable also to the immediate neighbourhood.

29. Further, the Appellant pointed out that it was the government's right to make the re-adjustment. The Respondent was faulted for not even disclosing the size of his plot and it was pointed out that even the area maps he purported to rely on were only marked but never produced as exhibits. The trial court itself was faulted for taking the position that some documents were not availed yet the consent order that required the re-adjusted map to be availed never required that such other documents also be made available.

30. The Appellant then turned to the Respondents counter-claim, which is essentially the focus of attention in grounds 4, 5, and 6 in the memorandum of appeal. It was pointed out that the Appellant is not a trespasser, having put up his plot in accordance with approved plans and the plot shown to him. The re-adjustment took place in year 2000, while he put up his building in year 2004. The surveyor himself, it was submitted, had recommended that there should be no interference with the revised plan as it was the one applicable in the area.

31. On mesne profits, the Appellant pointed out that these are damages awarded against a tenant in wrongful possession of another's land. Proof of mesne profits consists in demonstration by the land owner that someone is in unlawful possession and/or use of his land. In the case at hand, it is the 1st Respondent who is in possession and/or use of the Appellant's property. The Appellant wondered how he could be made to pay mesne profits to somebody who is already in possession and profitable use of the same property over which he claims mesne profits. The Appellant, it was pointed out, is not in possession, having been dispossessed by the 1st Respondent. Yet the requirement of law **– see Rajan Shah Vs Bipin Shah: HCCA No. 200 of 2011 –** is that a person who is to pay mesne profits has to be shown to be in actual possession.

32. Besides, the 1st Respondent's plot was undeveloped. He was therefore deriving no benefit or profit from it. The Appellant submitted that even if mesne profits were to be assessed, it would not be 25,000/= adopted by the court, that figure having arisen as a result of

development done by the Appellant himself and not the 1st Respondent. The trial court was said to be wrong on all these scores.

33. The 1st Respondent's position on this is that the trial court was right as the mesne profit awarded covered the period running from 2004 to 2011 when the Appellant was allegedly collecting rent amounting to Kshs.25,000, which the 1st Respondent ought to have been collecting.

34. Ultimately it was submitted that the Appellant put up his building in accordance with plans duly approved by the relevant authority. And a person from that authority - PW2 - testified that the construction undertaken was right and in the right place. Then the 1st Respondent took the law into his own hands by forcing himself into a portion of the constructed building on allegations that the portion was his own. The trial court was faulted for approving this state of affairs. By so doing, it was said to be promoting impunity and/or undermining the rule of law.

35. The court was told that the Appellant had proved his case while the 1st Respondent's counter-claim was never proved and was only fit for dismissal. The desire of the Appellant is that this appeal be allowed, the lower court's judgement be set aside and be substituted with a judgement in his favour in terms of the amended plaint. The Appellant also wants the respondents to be condemned to pay the cost of this appeal.

36. I have had a look at the lower court matter and have considered the proceedings and the judgment that resulted from trial. I have already expressed my agreement with the Appellant elsewhere in this judgement concerning the pleading on which the lower court's judgement was based. There was an amended plaint on which the judgement should have been based. Indeed, there was already an interlocutory judgement entered against the 2nd Respondent based on that amended plaint.

37. But in a manner that seems akin to procedural aberration, the trial court reverted to the original plaint, ignored and made no mention of the interlocutory judgement on record, and proceeded as if the 2nd Respondent never existed in the suit. The result of all these grave errors was a fundamentally flawed judgement that does not meet the tenents of a wholesome judgement.

38. The manner in which the trial court judgement appreciated the evidence on record was also wanting in my view. It was common ground that the Appellant's and 1st Respondent's plots abutted on each other. The problem between them was really a small portion on the ground which the 1st Respondent claimed to be his on the basis of earlier records but which the Appellant claimed to be his own on the basis of later revised and/or adjusted records. PW2's evidence was meant to shed light on and/or resolve the issue. This witness came with a map which he said was the one applicable not only to the parties plots but to that general area as well. He urged acceptance of the map, saying that its rejection would likely affect other neighbours who are not parties to this suit.

39. Even then, the trial court proceeded to reject the map on the ground, *interalia*, that it lacked some details. That rejection heralded implied acceptance of old records which PW2's office no longer regarded applicable to that general area. One such record is the old area map or plan that the 1st Respondent availed. It was marked for identification but was never subsequently accepted as an exhibit. This acceptance by the lower court was wrong for a court of law only uses documents normally availed before it as exhibits. It was wrong too because as an old document, its use, reliance, and acceptance of it by the court required availability of expert evidence, much like the evidence of PW2, vouching for its validity and usefulness. Such evidence was not available. It was therefore not open to the trial court in my view to disregard the expert evidence of PW2 and embrace or accept a record that was not an exhibit before it and had no backing of expert evidence.

40. The truth of the matter as I see it is that what PW2 availed was the applicable record of the area and if the trial court had turned its mind to the broader consequences of its rejection, it would have realised that its position unwittingly threw into a spin ownership arrangements of other plots in the area involving people who are not parties to the case. It is in this sense that the lower court judgement can also be seen as having a narrow focus that ignore the wider relevant concerns already brought to its attention by PW2.

41. The issue of mesne profits awarded also aggrieved the Appellant. In my view, the Appellant is also correct on this issue. The 1st Respondent entered the Appellant's shop. He ran a hardware business and the Appellant was deriving no benefit at all from it. The 1st Respondent later rented out the shop and was the one receiving the rent paid. The Appellant had been dispossessed and was evidently deriving no benefit from the shop. One would wonder then how the Appellant can be condemned to pay mesne profit relating to premises in possession, occupation and profitable use by the very person who is claiming such mesne profits. And even assuming that there was a period in which the 1st respondent was unlawfully deprived of use by the Appellant, the 1st Respondent would need to demonstrate, which he did not do, that the ensuing loss would amount to 25,000/= per month. And he would also need to show that he would be earning that amount from his own business and not from a room constructed by the Appellant.

42. I think also that a broader objective look at the entire scenario in this matter is necessary. It is common ground that the Appellant and the 1st Respondent are neighbours. The Appellant has put up a four-storey building on the plot allocated to him. It takes time to put up such a building. A watchful neighbour would obviously know that such a project is being undertaken and, if such a project encroaches his space, he would be expected to take the necessary legal action to obviate the encroachment.

43. But the 1st Respondent in this matter seems to have allowed or at least tolerated the development going on. He did not take action. He waited until the construction was over and even then, he did not take any legal action. He instead forcefully took one of the shops and claimed ownership. The 1st Respondent was obviously wrong. A more reasonable approach would have been to take legal action against the Appellant. His action of forcible entry and occupation has no backing of the law. The Appellant comes across as the more reasonable person. When his shop was occupied, he never took the law into his own hands. He instead filed the suit in the lower court and let the law take its course. The 1st Respondent has created an incongruous situation in which he purportedly owns the ground floor shop while the rooms immediately above that shop are still owned by the Appellant.

44. It seems apparent from records and proceedings that the re-adjustment opposed by the 1st Respondent was not even initiated by the Appellant. It took place much earlier, possibly in or around year 2000. The Appellant seems to have bought the plot in the year 2003 and

started construction in the year that followed (2004). Though he is the one now suffering for that re-adjustment, it cannot be blamed on him. The 1st Respondent is misdirecting his anger. The office that seems involved, alone or possibly with other actors, is the one represented by PW2. He should have had recourse to that office, or even sued it, for rectification of boundary if the re-adjustment was illegal or for indemnity if the boundary could not be rectified. The Appellant seems to me to be the wrong target.

45. When all is considered therefore, the appeal herein obviously has merits. I do not agree with the Appellant on each and every argument presented, but the cumulative import and thrust of his submissions make a compelling case for allowing the appeal. The Respondents submissions seem to me patchy and unfocused. While the Appellant gave a serious attention to his grounds of appeal, the response of the 1st Respondent was rather jumbled.

46. I would not therefore equivocate in holding, as I hereby do, that the lower court was wrong in its finding and decision. I therefore set aside the lower court judgement and decree and make a substitution thereof with a judgement in favour of the Appellant. In this regard, the Appellants gets what he claims against both the 1st and 2nd Respondent on the basis of the amended plaint in the lower court. I am referring specifically to prayers (a) (b) (bb) and (c) in the amended plaint. I also dismiss the 1st Respondents counter claim in the lower court. The Appellant is awarded also costs of this appeal and costs of the suit in the lower court.

Dated, signed and delivered at Busia this 30th day of July, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Appellant: Absent

1st Respondent: Absent

2nd Respondent: Absent

Counsel for the Appellant: Absent

Counsel for the Respondents: Present

Court Assistant: Nelson Odame