REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. APPEAL NO. 11 OF 2016

CYPRIAN NGARI MACHAKI SAMBURU.....APPELLANT

VERSUS

NGARI MWERECA.....1ST RESPONDENT

ALEX KYALO MUTEMI.....2ND RESPONDENT

(Being an appeal from the Judgement and decree of Hon. A.N. Makau (SRM)

dated 8.3.2016 in Siakago RMCC No. 24 of 2012)

JUDGEMENT

1. This appeal arises from the judgement and decree of the Hon. A.N. Makau (SRM) dated 8th March 2016 in *Siakago RMCC No. 24 of 2012.* By the said judgement, the trial court dismissed the Appellant's suit against the Respondents with costs.

2. By his plaint dated 4th May 2012 the Appellant had sued the Respondents for trespass to his *Title No. Nthawa/Gitiburi/1788* (hereafter *parcel 1788*). The Appellant had sought damages and an order for the 2nd Respondent to remove himself, his servants and belongings from parcel 1788. It was contended that it was the 1st Respondent who had unlawfully leased out a portion of parcel 1788 to the 2nd Respondent who had allegedly taken possession thereof, cut down trees thereon and caused damage to the land.

3. By a joint statement of defence dated 16th May 2012 the Respondents denied the Appellant's claim in its entirety and put him to strict proof thereof.

4. The record shows that upon a full hearing of the suit, the trial court delivered its judgement on 8th March 2016 dismissing the Appellant's suit with costs to the Respondents. The trial court held that the Appellant had failed to demonstrate that the Respondents had trespassed into his land. The trial court believed the evidence of the District Land Registrar who had visited parcel No. 1788 and an adjacent parcel No. 1789 that the Respondents' activities were confined to the latter parcel.

5. Being aggrieved by the said judgement, the Appellant filed a memorandum of appeal dated 29th August 2016 raising the following grounds of appeal:

> *a) The learned Senior Resident Magistrate erred in law in arriving at the finding that the Plaintiff had failed to prove his cause on a balance of probabilities for trespass.*
>
> *b) The learned trial Magistrate erred in law in ignoring the strict provisions of section 19(1) of the Land Registration Act 2012, which were not adhered to by the Land Registrar in her own admission.*
>
> *The Land Registrar's report being disputed by one of the parties, the learned trial Magistrate erred in law by basing her judgement on the same.*
>
> *c) The learned trial Magistrate further erred in law when she tendered contradictory statements and observations in her judgement. In this case, she found that the Plaintiff has not proved his case for trespass and then later on advised the parties to pursue correction of the boundary, with the Ministry of Lands – Mbeere Land's Office.*

d) The learned trial Magistrate erred in law and fact when she failed to appreciate that determination of suit was only possible if a determination of the boundaries was properly and conclusively made, a fact and requirement in law which she ignored.

e) The judgement was against the weight of the evidence tendered.

6. When the appeal was listed for directions on 20th May 2019 the advocates for the parties agreed to canvass it though written submissions. Consequently, the Appellant was given 30 days within which to file his submissions whereas the Respondents were given 30 days upon the lapse of the period granted to the Appellant to file theirs. The record shows that the Respondents filed their submissions on 2nd July 2019 whereas the Appellant filed his on 10th September 2019.

7. The court is aware of its duty as a first appellate court. It has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court in a first appeal were summarized in the case of **Selle & Another Vs Associated Motor Boat Co. Ltd & Others [1968] EA. 123** at page 126 as follows;

> **"…Briefly put they are that this court must 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. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally."**

8. Similarly, in the case of **Peters Vs Sunday Post Ltd [1958] EA 424 Sir Kenneth O' Connor, P.** rendered the applicable principles as follows;

> **"…It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion…"**

9. In the same case, **Sir Kenneth O'Connor** quoted **Viscount Simon, L.C in Watt Vs Thomas [1947] A.C 424** at page 429-430 as follows;

> **"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."**

10. The court has considered and re-evaluated the entire evidence on record in this matter. The court has also considered the judgement of the trial court as well as the grounds of appeal raised by the Appellant.

11. The court shall consider the grounds of appeal as they appear in the memorandum of appeal. However, the 1st and the 5th grounds shall be considered together since they essentially raise the same point, that is, whether or not the Appellant had proved his case to the required standard before the trial court.

12. The court has considered the evidence on record as well as the parties respective written submissions. The Appellant contended that the trial court decided the suit against the weight of evidence in holding that the Appellant had failed to prove his case on a balance of probabilities. The Respondents, on the other hand, contended that it was the duty of the Appellant to prove the alleged trespass and damage to his property. It was submitted that the Appellant had failed to tender any credible evidence to prove his allegation. They, therefore, supported the judgement of the trial court.

13. The burden of proof in civil cases generally lies upon the party who instituted the suit. **Section 107 of the Evidence Act (Cap. 80)** stipulates as follows:

> **"(1) Whoever desires the court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies upon that person."

14. Similarly, **Section 108** of the said **Act** provides for the incidence of the burden of proof in the following terms:

"The burden of proof in a suit or proceeding lies upon that person who would fail if no evidence at all were given on either side".

15. It is evident from the material on record that it is the Appellant who had filed suit before the Resident Magistrate's court at Siakago. It is the Appellant who had made allegations of trespass and damage to his parcel No. 1788 against the Respondents. It would, therefore, follow that the Appellant had the burden of proving all the essential facts which constituted his cause of action.

16. The court has considered the evidence on record as tendered by all the concerned parties. Whereas the Appellant had claimed that the 2nd Respondent had encroached into his parcel of land, the Respondents contended that their activities were confirmed to a separate but adjacent parcel of land known as 1789. The District Land Registrar who testified on behalf of the Respondents supported the Respondents' case. The Registrar and the District Surveyor had earlier on visited the two parcels in the presence of the concerned parties and filed a written report in court. The report indicated that the 2nd Respondent's activities were confined within parcel 1789 and that they were not even close to the common boundary between parcel Nos. 1788 and 1789.

17. The material on record indicates that upon analysis of the evidence on record, the trial court believed the evidence of the Respondents and that of the District Land Registrar that there was no encroachment upon the Appellant's parcel No. 1788. As a result, the trial court held that the Appellant had failed to prove his claim of trespass on a balance of probabilities and proceeded to dismiss his suit with costs to the Respondents.

18. An Appellate court should be cautious in overturning findings of the trial court which tried the suit in the first instance. The trial court had the benefit and advantage of hearing the witnesses and observing their demeanor. It cannot be said that on the basis of the evidence of record, no reasonable tribunal properly directing itself to the facts and the law could have reached a similar verdict. This court's own evaluation of the evidence on record leads to the inevitable conclusion that the Appellant woefully failed to prove his allegations against the Respondents.

19. As indicated before, the Respondents were not bound to call a surveyor or the Land Registrar, or even to produce the report on the establishment of the boundaries between parcel Nos. 1788 and 1789. The burden of proof did not lie upon them. The burden of proof lay with the Appellant to prove the alleged encroachment. The Appellant did not tender any report from a land surveyor or other expert to support his claims. All the witnesses he called were merely laymen with no expertise in determination of boundaries to land. The court therefore, finds no fault with the finding and holding of the trial court. The court finds no merit in the 1st and 5th grounds of appeal and the same are accordingly dismissed.

20. The 2nd ground of appeal faulted the trial court for failing to hold that the Land Registrar had failed to observe the provisions of **Section 19(1)** of the **Land Registration Act, 2012.** The trial court was also faulted in basing her judgement on the Land Registrar's report whereas it was disputed by the Appellant.

21. It must be remembered that it was never the Appellant's case before the trial court that he had a boundary dispute with the owner of neighboring parcel No. 1789. There was no prayer in his plaint seeking determination of any boundary dispute. It is also evident from the material on record that the owner of parcel 1789 was not joined as a party to the proceedings. The Appellant's case before the trial court was a straightforward claim for trespass to land. It was pleaded that the 1st Respondent had unlawfully leased out the Appellant's parcel No. 1788 to the 2nd Respondent who had taken occupation thereof.

22. There mere fact that the parties to the suit consented to have the Land Registrar and the District Surveyor establish the boundaries of parcel No. 1788 and 1789 did not alter the nature and character of the Appellant's suit. The Appellant did not at any time amend his plaint. As it later turned out, the Appellant ultimately disowned the Land Registrar's report. The Appellant thereafter sought a second visit incorporating the private surveyors for the parties but he later on abandoned that mission.

23. The court is the opinion that whether or not there as compliance with **Section 19 of the Land Registration Act, 2012** is totally irrelevant to the dismissal of the Appellant's suit for trespass to land. The owner of parcel 1789 was not a party to the suit. The burden of proof in the claim for trespass lay with the Appellant. The Appellant may as well have called his own licenced surveyor and relied on his evidence. There is no legal requirement that a claim for trespass to land cannot be resolved without reference to **Section 19(1) of the Land Registration Act 2012.**

24. The court finds no merit whatsoever in the complaint that the trial court erred in relying on the Land Registrar's report on the basis that it had been disputed by the Appellant. A report by a government official, prepared pursuant to a court order does not become inadmissible simply because one of the affected parties has disputed it. It does not become useless just because one of the concerned parties is dissatisfied with it. It does not lose its probative value simply because its contents are unfavourable to one of the affected parties. It was the duty of the Appellant to present a contrary report if he deemed the Land Registrar's report to be incompetent, inaccurate, or misleading.

25. The 3rd ground faulted the trial court for making some contradictory observations in her judgement. It was contended that having found that the Appellant had failed to prove his case for trespass, it was not open to the court to advise the parties to seek correction of the boundaries between parcel Nos. 1788 and 1789 at the Lands office. The court finds this ground to be merely a red herring. It has nothing to do with the trial court's evaluation of the evidence and its holding that the Appellant had failed to prove trespass to the required standard. The trial court's advice to the parties at the end of the judgement was merely gratuitous advice. It was not binding. As indicated earlier, there was no prayer by the Appellant for correction of any boundaries. There is no merit in the 3rd ground and the same is hereby dismissed.

26. The 4th ground faulted the trial court for failing to appreciate that a determination of the suit was only possible if the boundaries of parcel Nos. 1788 and 1789 were conclusively determined. The court is unable to find merit in this ground of appeal. As indicated before, it was never pleaded in the Appellant's plaint that he had a boundary dispute with the owner of parcel 1789. In fact, parcel 1789 was never mentioned in the plaint. The owner of that parcel was never made a party to the suit. This court wonders how a resolution of a boundary dispute which was never pleaded could have assisted the Appellant in proving his case of trespass against the Respondents.

27. The court is also unable to agree with the Appellant's contention because a case of trespass to land can be prosecuted and resolved without necessarily establishing the boundaries of adjacent parcels of land. A trespasser does not have to emerge from your neighbour's land. The Appellant's plaint merely stated that the 1st Respondent had wrongfully leased out the Appellant's parcel No. 1788 to the 2nd Respondent. It was not pleaded that the owner of parcel No. 1789 was involved in the transaction at all. As it turned out, the 2nd Respondent who was accused of trespass was merely a lessee of parcel No. 1789 who had not even encroached upon the Appellant's parcel No. 1788.

28. Before concluding the judgement, the court would like to comment on one prayer which the Appellant sneaked into his written submissions. The prayer was in the following terms:

> **"We pray that the court orders for a fresh determination of the boundaries between land parcel number Nthawa/Gitiburi/1788 and Nthawa/Gitiburi/1789 in adherence to the provisions of Section 19 of the Land Registration Act (2012)".**

29. It is evident from the material on record that the said prayer was neither included in the plaint before the trial court nor the memorandum of appeal filed herein. It is a prayer which is not predicated upon the pleadings on record both before the trial court and this court. Parties are bound by their pleadings. See **Odd Jobs V Mubia [1970] EA 476**. That prayer is not tenable in law and would not have been granted by this court even if the Appellant had succeeded on appeal.

30. The upshot of the foregoing is that the court finds no merit in the grounds of appeal raised by the Appellant. Accordingly, the Appeal is hereby dismissed with costs to the 1st and 2nd Respondents. The costs shall be on the higher scale.

31. It is so decided.

JUDGEMENT DATED, SIGNED and **DELIVERED** in open court at **EMBU** this **17TH DAY** of **OCTOBER, 2019**

In the presence of the Appellant and the 1st Respondent present in person and in the absence of the 2nd Respondent.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

17.10.19