



REPEBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA A

AT NAKURU

ELC APPEAL NO. 7 OF 2019

CECILIA NJOKI MAINA.....APPELLANT

VERSUS

JANE WAMBUI WAHOME.....RESPONDENT

(Arising from the judgment of Hon.Teresia Matheka (PM) in Nyahururu SPMCC No.151 of 2006 delivered on 27th October 2011).

J U D G M E N T

1. This is an appeal arising from the judgment of the Hon Principal Magistrate Teresia Matheka delivered on 27th October 2011 in Nyahururu SPMCC No.151 of 2006. By the judgment the learned trial magistrate restrained the defendant/appellant from undertaking any construction or in any manner dealing with the portion of land abutting the plaintiff/Respondent's land Parcel **Nyahururu Municipality /Block 6/435** and the road of access. The Respondent's complaint was that the appellant had unlawfully started constructing structures on the road reserve thereby impeding access to the respondent's plot and blocking the Respondent's frontage to the road.

2. The appellant being dissatisfied and aggrieved by the judgment of the learned trial magistrate has appealed to this Court and by a Memorandum of Appeal dated 14th November 2011 filed in Court on 14th November 2011 has listed 13 grounds of appeal. In the main, the grounds of appeal are challenging the magistrate findings of fact on the evidence placed before the Court. The memorandum of appeal sets out the following grounds of appeal:-

1. That the learned trial magistrate erred in Law and fact by finding that the plaintiff had proved her case on a balance of probability while in fact he had not.

2. That the learned trial magistrate erred in law and fact by failing to find that the board of council met and accepted my application letter and they have not met again to chase me out.

3. That the learned trial magistrate erred in law and fact by failing to find that the plaintiff changed the suit from trespass to blockage while the case still in court.

4. That the learned trial magistrate erred in law and fact by failing to find the plaintiff cheated that the town clerk did not know about the construction and yet I produced the letter of allotment in the court that is from the town clerk.

5. That the learned trial magistrate erred in law and fact by failing to find that when the court came to the ground the plaintiff said I have entered her plot but she told the court I have built on road reserve.

6. That the learned trial magistrate erred in Law and fact by failing to find that the plaintiff said she did not have building plan for her plot and it was there it could have shown whether am blocking her frontage.

7. That the learned trial magistrate erred in law and fact by failing to find that the building was done in 1959 and none of those who were allotas accused me of blocking since the building plan did not allow the doors at that road reserve.

8. That the trial magistrate erred in law and fact by failing to find the Nyandarua Deputy District Surveyor who prepared a report in court was not from the Municipal Council of Nyahururu but from Nyandarua County council and the subject plots are not County Council plots.

9. That the learned trial magistrate erred in law and fact by failing to find the plaintiff said she did not know whether the

Municipal Council had allocated and she could have sued the Municipal not me, even after producing the allotment letter she still continued to persecute me.

10. That the learned trial magistrate erred in law and fact by failing to find that a technical inspector with Nyahururu Council said that my kiosk was not by council standard but it was not true since the town clerk ordered all kiosks to be constructed permanently within the town.

11. That the learned trial magistrate erred in law and fact by failing to find that the plaintiff has constructed a permanent wall without doors since she has no intension of using it.

12. That the learned trial magistrate erred in law and fact by failing to find that the plaintiff counsel rejected my witness and said that he was satisfied with my witness.

13. That the learned trial magistrate erred in law and fact by failing to find that the plaintiff said she would not call any witness from public works and municipal council but later she called them unlawfully.

3. As is the norm this being a first appeal, this court as an appellate court has a duty indeed an obligation to evaluate the evidence adduced before the trial court and form its own conclusions. See the cases of **Selle -vs- Associated Motor Boat Company Ltd (1968) EA 123 and Williamson Diamonds Ltd -vs- Brown (IGTO) EA I** where the Court outlined the principles that guide an appellate Court in considering and evaluating the record of evidence by the trial Court.

4. In the suit before the Lower Court, it was the respondent's case that she was the lessee from the Government of land parcel **Nyahururu Municipality/Block 6/435** measuring 0.2675 Hectares (approximately). The respondent claimed the appellant had put up structures on the part of her plot (respondent's) which also extended onto the road reserve. The respondent sought an order of injunction restraining the appellant from effecting further construction at the site.

5. The Respondent testified as PW1 and her evidence was to the effect that she owned land parcel **Nyahururu Municipality /Block 6/435** and was the registered owner. She stated her plot was a corner plot and was serviced by three access roads. The respondent testified that the appellant had commenced construction of a structure that encroached onto her plot and the access road. The respondent stated the appellant's said structure though on the road reserve, was blocking the respondent's plot from fronting the road and therefore was interfering with the use and/or development the respondent could reasonably effect on the plot. The respondent averred she could not develop the portion of her plot abutting the road as she could not have a road frontage because of the structure the appellant had constructed on the road reserve adjacent to her plot.

6. PW2 Chege, Muturi Tharima a government Surveyor at the direction of the Court carried out a site inspection and filed a survey map and his report. He affirmed that indeed the appellant had constructed some structures on the road reserve and that the respondent could not by reason of the said structures utilize the front of her plot appropriately.

7. PW3 Washington Muhia Kanyau, a technical Inspector with Nyahururu Municipal council testified that the structures erected by the appellant on the road reserve were not approved prompting the Town Clerk to give the appellant notice to remove the structures. He testified that the Council could issue Temporary Occupation Licences (TOL) for temporary structures. He stated usually it was the owner of the nearby plot who was allowed to use the road reserve. He stated the structures erected by the appellant on the road reserve did not conform to the standard plans for kiosks approved by the Council.

8. The appellant testified in the lower Court as DW1 and her evidence was that she had been cultivating on the road reserve from 1990 and that in 2002 she was allowed to construct a store and a kiosk. She stated the space was identified to her by the Town Engineer. She stated she constructed on the road reserve and not on the respondent's plot. The appellant averred she was occupying government land and not the respondent's land and she had not been ordered to vacate from there by the council. The appellant admitted in cross examination that the letter issued to her authorizing her to construct a kiosk did not state where the kiosk was to be constructed. The appellant further stated she did not have any plan for the kiosk but was given a plan by PW2 which she did not know if it had been approved. The appellant admitted she had been issued a Notice to move from the place but blamed that on what she stated was "politics". The appellant said her structures are erected on top of the sewerage line. The appellant took the position that since her structures were not on the respondent's plot, the respondent had no reason to ask her to move away.

9. The fore going was briefly the evidence before the learned trial magistrate and the issue for determination in this appeal is whether on the basis of the evidence, the learned trial magistrate was justified to reach the decision that she did. As I observed earlier in this judgment all the appellant's grounds of appeal as per the memorandum of appeal challenge the learned trial magistrate's findings of fact and law on the evidence. I will therefore consider all the grounds collectively in determining whether the learned trial Magistrate in her assessment and evaluation of the evidence arrived at the correct findings and decision.

10. There was no dispute at all that the respondent was the registered owner of land parcel **Nyahururu Municipality / Block 6/435** and/or that the plot was served by three roads of access. Equally, it was not disputed that the appellant had constructed some structures on one of the road reserves fronting the respondent's plot. The evidence of the respondent (PW1), PW2 and PW3 clearly detailed the nature of the structures. There was no evidence however that the appellants structures had encroached onto the respondents plot as the respondent had claimed. The issue that fell upon the learned trial magistrate to decide was whether the appellant's structures were an impediment to the respondent's use of her property and/or whether the respondent's right to have unrestricted frontage to the road was interfered with by the appellant's structures. The learned trial magistrate further had to determine whether the structures erected by the appellant on the road reserve were lawful.

11. I have reviewed the evidence and the judgment by the learned trial magistrate and I find no fault in the findings of fact and the decision reached by the learned trial magistrate. The evidence before the trial magistrate was clear that the respondent's plot was fronted by three

roads, it was a corner plot and that is what made it peculiar. The respondent had a right and indeed a legitimate expectation that she would have unrestricted frontage and access to these roads. When the appellant set out to construct structures on the frontage of the respondent's land the respondent had a right to complain as her right to have unrestricted access and frontage to the road was infringed. See the case of **Niaz Mohamed Jan Mohamed -vs- Commissioner of Lands & 4 others (1996)eKLR** and **The Commissioner of Lands -vs- Kunste Ltd CACA No.234 of 1995 (Nakuru)**. In the Niaz Mohamed case (*supra*) the High Court sitting at Mombasa held that where a person was allocated a plot with a road frontage he was entitled to assume that:-

***“the unutilized portion would remain a road reserve and he would continue to enjoy all the rights and privileges of frontage to the road and enjoy the resultant easement of direct access to the road. I find on a prima facie basis that the plaintiff had such right and ought to be protected*”**

12. In the commissioner of **Lands -vs- Kunste Ltd** case (*supra*) the Court of Appeal held that the Commissioner of lands could not alienate a plot that was in the frontage of the hotel that Kunste Ltd had developed which would have resulted in the hotel being obstructed from being freely viewed from the main Nakuru- Nairobi Highway. The Court in its judgment inter alia stated:-

The basis of Kunste's Motion was basically that the appellant had earlier assured its predecessor in title that the plot would not be alienated and that the appellant in allotting it to the interested party was, in effect, backtracking from that assurance; that it was neither consulted nor notified of the appellant's intention of alienating the plot prior to the allotment not withstanding that the appellant was well aware that the allotment would adversely affect it, notwithstanding that the appellant was aware that the hotel had planted trees on the plot and had been mowing the grass on it.”

13. The Court of Appeal in the Kunste case further held that Kunste Hotel Ltd had demonstrated it had sufficient interest in the plot allocated to the interested party and was in the circumstances entitled to be consulted before the decision to allocate the plot to the interested party was made by the commissioner of Lands. The learned trial magistrate in the lower Court appropriately referred to the two Court decisions I have cited above in determining the Respondent in the instant appeal had sufficient interest and right to question the basis of the appellant's construction of structures on the road reserve fronting her plot **Nyahururu Municipality Block 6/435**. The respondent therefore had the *locus standi* to institute the suit against the appellant in the lower Court. The actions of the appellant adversely affected the respondent and the respondent was entitled to approach the Court for redress.

14. The appellant for her part did not prove to the standard required that she was lawfully allocated the site as a TOL and/or that the structures she erected had the approval of the Municipal Council. The evidence of PW2 and PW3 was clear that the structures that the appellant had erected did not confirm to the standard plans for kiosks approved by the Council. The plan the appellant tendered in evidence had no approval endorsement. PW3 was emphatic that the structure constructed by the appellant was not the standard kiosk plan approved by the council. He stated kiosks were supposed to be constructed with temporary materials but the appellant had constructed a permanent building. It was evident therefore the structures the appellant had constructed had not been approved and were therefore unlawful and illegal and for that reason the Municipal Council had served a notice upon the appellant to remove the unlawful and illegal structures. Section 38 of the Physical Planning Act, Cap 286 Laws of Kenya empowered the council to serve such a notice where the provisions of Section 30 of the Act relating to development permission had not been complied with.

15. On the evidence presented before the lower Court I am satisfied the learned trial magistrate properly evaluated the evidence and was entitled to arrive at the findings that she did. I find no basis upon which I could interfere with the learned Magistrate's findings on the facts and the law. The appeal is without any merit and I order the same dismissed with costs to the respondent.

JUDGMENT DATED SIGNED AND DELIVERED AT NAKURU THIS 28th DAY OF NOVEMBER 2019.

J M MUTUNGI

JUDGE