REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC APPEAL NO. 24 OF 2018

MONICA ANYONA DONGI...............................APPELLANT

VERSUS

RICHARD OTIENO OKUMU.........................RESPONDENT

JUDGMENT

This is an appeal from the judgment and orders of the Principal Magistrate's Court at Bondo (Hon. Obiero) in ELC No. 3 of 2018 dated 19th October 2018. The Appellant has lodged the appeal on the grounds that the Learned Magistrate erred in law and fact by holding that the parcel of land known as South Sakwa/Barkowino/3249 (the suit property) is distinct from the parcel of land on which the Defendant had developed, failing to consider the submission of both the Plaintiff and Defendant in the case; Failing to examine the documents that were produced in evidence before him and failing to give directions on the fate of the parcel of land belonging to the Appellant on which the Respondent has constructed buildings.

Summary of Facts

The Appellant (as the administrator of her father's estate) sued the Respondent for eviction of the Respondent from the suit property, a permanent injunction against the Respondent from interfering with the Appellant's occupation and use of the suit property, mesne profits and costs of the suit. The Appellant claimed that the suit property was registered to her deceased father. She claimed that the Respondent had trespassed onto the suit property and constructed several structures which he had leased to several people carrying on business therein. The Respondent, on the other hand, denied the Appellant's ownership of the suit parcel and claimed that he was the owner of the suit property. At hearing, the Appellant produced the certificate of official search indicating her father as the registered owner of South Sakwa/Barkowino/3249, while the Respondent produced a letter of allotment indicating that he had been allotted a parcel marked "C" by the Town Council of Bondo.

The Magistrate held that both South Sakwa/Barkowino/3249 (freehold) and Parcel "C" (leasehold) were in existence and distinct from one another but shared a common boundary.

That Plot "C" was validly allotted to the Respondent. That a report filed by the Siaya County Surveyor dated 23rd July 2018 was pivotal in determining whether the Respondent had encroached onto land parcel South Sakwa/Barkowino/3249.

The Magistrate held that the Surveryor's report does not specifically point out where there was encroachment by the Respondent onto South Sakwa/Barkowino/3249, and disagreed with the Appellant's counsel's submission that the area marked as "Developed by the Defendant" showed such an encroachment. That the real issue was establishing the boundary between the two land parcel and not ownership, a matter that should be settled by a proper surveyor. That the Appellant had failed to prove his case and thereby dismissed the suit.

Appellant's Submissions

Counsel for the Appellant submitted that while South Sakwa/Barkowino/3249 and Parcel "C" were distinct from each other, the Surveyor's report indicated that the portion developed by the Respondent comprised of both Parcel "C" and a greater portion of South Sakwa/Barkowino/3249. That the Magistrate ignored this fact even when it was further highlighted in their submissions and even after it was conceded by the Respondent.

Counsel submitted that the Magistrate failed to scrutinize the Surveyor's Report and attached map which showed the portion of developed by the Defendant comprising both Parcel "C" and part of South Sakwa/Barkowino/3249. That as a result, the Magistrate failed to give appropriate orders remedying the Respondent's encroachment.

Respondent's Submissions

Counsel for the Respondent submitted that the Surveyor's report did not determine the exact location of the boundary between the two land parcels or the level of encroachment, if any. That the report's findings did not expressly state that the Respondent had encroached on the Appellant's land and thus such an assumption should not be made.

Counsel asserted that the trial took into consideration the submissions by both parties before arriving at its decision, after which it stated that the issue between the parties concerned their common boundary and not ownership as alleged by the Appellant. Counsel submitted that the trial court examined the documents presented before it, including the findings and conclusions of the Surveyor. Counsel submitted that the suit was statute barred as the action for trespass was brought 3 years after the Appellant started constructing on the said parcel of land.

Issues for Determination

Being a first appeal, the court relies on a number of principles as set out in ***Selle and another v Associated Motor Boat Company Ltd and others*** **[1968] 1 EA 123**:

> **"…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 this 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 ..."**

It was also held in ***Mwangi v Wambugu*** **[1984] KLR 453** that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence.

The issues of whether South Sakwa/Barkowino/3249 and Parcel "C" were validly in existence and distinct from one another appears to have been resolved by the Trial Magistrate to the satisfaction of the parties. At the core of this appeal is the issue of whether the Respondent encroached on South Sakwa/Barkowino/3249, an issue that the Trial Magistrate determined based on the Surveyor's Report and attached map. Therefore, the issues for determination in this appeal are restricted to the following:

1. Whether the Trial Magistrate misapprehended the Surveyor's Report and attached map

The Trial Magistrate held:

> **"The report does not specifically point out where there is encroachment by the Defendant into the parcel of land number South Sakwa/Barkowino/3249. However, what is clear is that the two parcels are different but they share a common boundary. To that extent, I do respectfully disagree with the plaintiff's counsel that the area marked "Developed by the Defendant" shows that the Defendant has encroached into the plaintiff's land and developed the same."**

While the scope of the surveyor's report was limited to establishing the shape of the Respondent's plot and determining the exact location of the Respondent's plot vis-à-vis the Appellant's plot, the report went a step further and identified the extent of the area developed by the Respondent. In the attached map, the area developed by the Respondent was marked with a green line and clearly shown to have extended beyond Parcel "C" and included a significant portion of South Sakwa/Barkowino/3249 which was marked with a yellow line. Further, the key to the map identified the area marked with green as "Developed by the defendant".

The Black's Law Dictionary 9th Ed. defines "development" as a substantial human-created change to improved or unimproved real estate, including the construction of buildings or other structures. The word "developed" as used in the Surveyor's Report and attached map can only be construed to mean a substantial change in the state of the identified area created by the actions of the Respondent. The identified area was clearly shown to include part of the Appellant's portion of land.

It therefore follows that the Trial Magistrate misapprehended the Surveyor's Report and the import of the area marked as "Developed by the defendant" on the attached map.

2. Whether the Trial Magistrate erred in finding that the Respondent had not encroached on the Appellant's land

The Trial Magistrate held:

> **"I am of the further opinion that the real problem between the plaintiff and the Defendant is an issue regarding the boundary and not ownership…. What is ironical is that the parties…. did not find it necessary to request the surveyor to establish for them the exact boundary and also address the issue of encroachment.**
>
> **Based on the foregoing, I am of the finding that there is no evidence to clearly demonstrate that the Defendant encroached into the plaintiff's land and the extent of the encroachment if any."**

However, the Surveyor's Report included findings regarding the boundary between the parties' plots which was established after identifying the relevant beacons marking the boundary between the freehold and leasehold areas. The Surveyor also clearly marked the extent by which the area developed by the Respondent extended into the Appellant's land. Therefore, the Magistrate erred in finding no evidence to demonstrate encroachment by the Respondent. The Surveyor's Report was sufficient evidence to prove on a balance of probability that the

Respondent had indeed encroached the Appellant's land and had carried out some development activities thereon.

3. Appropriate Reliefs

Having established the Trial Magistrate's misapprehension of the evidence and subsequent erroneous findings, I am of the opinion that this appeal ought to be allowed and the judgment and orders of the lower court be set aside. Accordingly, the Appellant's prayers for eviction orders and permanent injunction should be granted.

Regarding the Appellant's prayers for mesne profits, the same must have been specifically pleaded and proved to be granted. The Court of Appeal in ***Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others*** **[2018] eKLR** stated:

> **"This Court in *Peter Mwangi Mbuthia & another vs. Samow Edin Osman* [2014] eKLR expressed that it is upon a party to place evidence before the court upon which an order of mesne profits could be made. It was stated:**
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> > **"As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded… That being so, it must be very hard on the applicant to be forced to pay an amount which had not even been pleaded in the first place, and on which the first respondent offered no evidence at all."**
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> > **"We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established."**

In ***Karanja Mbugua & another vs. Marybin Holding Co. Ltd*** **[2014] eKLR** it was correctly stated that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of Civil Procedure Act. In ***Dr. J K Bhakthavasala Rao –v - Industrial Engineers, Nellore*** **AIR 2005 AP 438** it was held that mesne profits by its very nature, involves adjudication of a pure question of fact. ***"The onus of proving what mesne profits might, with due diligence, have been received in any year lies upon the party claiming mesne profits."***

The Appellant did not tender any proof for her claim for mesne profits, which she implied at hearing could be assessed as Kshs. 150,000 per month. Therefore, I am of the opinion that the Appellant's prayer cannot be granted.

DATED AND DELIVERED THIS 20th TH DAY OF DECEMBER, 2019.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

In the presence of:

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