



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC APPEAL NO. 19 OF 2017

JULIUS KIMANI.....APPELLANT

VERSUS

KAMAU KINJA.....RESPONDENT

JUDGMENT

1. The Appellant being aggrieved by the judgment /decree of Mrs. A. Too acting Senior Resident Magistrate in Kangema SRM Court in civil case No. 48 of 2011 delivered on 25/9/2013 appealed to this Court against the entire judgment on the following grounds;

- a. The Learned Magistrate erred in law and in fact in making an order for the Appellant to fell down ten (10) gravelia trees that were not in the Appellant's land.
- b. The Learned Magistrate erred in law and in fact in condemning the Appellant to cut down trees that are on a parcel of land whose owner died way back in 2004 and nobody had taken letters of administration to his estate.
- c. The Learned Magistrate ignored the Appellant's evidence that showed that his land does not have a common boundary with the Respondents.
- d. The Learned Magistrate erred in law and in fact in finding that the trees were planted by the Appellant while it was alleged they were planted in 1980 long before the owner of the land died.
- e. The Learned Magistrate erred in law and in fact in ignoring the evidence adduced by the defence witnesses of a long standing boundary dispute between the owner of the land parcel no. LOC.19/NYAKIANGA/1897 and the Respondent.
- f. The Learned Magistrate failed to pay good attention to the issue of the position of the trees in relation to the boundaries.
- g. The Learned Magistrate erred in law and in fact by condemning the Appellant to pay costs yet the issues at hand had not been determined.
- h. The Learned Magistrate misdirected herself in framing the issues because the main issues were the ownership of the land where the trees were located and who planted them.

2. The Appellant prays for the following reliefs;

- a. An order to set aside the entire judgment of the Learned Magistrate delivered on 25/9/2013.
- b. An order rewarding costs of the suit in the lower Court and in this Court to the Appellant.

3. The appeal was opposed and the Respondents filed a notice of appointment on 29.03.2017. Parties choose to canvas the petition by way of submissions.

The Appellant's case

4. The Appellant in his submissions affirmed his position before the trial Court that he never planted the trees in 1980 or at all. He also denied that he and the Plaintiff share a boundary since LOC.19/NYAKIANGA/1897 which borders the Respondent's parcel of land does not belong to him. He claims that he can therefore not be compelled to cut trees that he did not plant nor are on his land. He even wonders why the Respondent did not proceed to cut down all the trees if at all he had permission to cut down the two trees. He claims to have been

dragged into Court unnecessarily by the Respondent.

5. He maintains there is a long standing unresolved boundary dispute between the owner of parcel no. LOC.19/NYAKIANGA/1897 and the Respondent.

6. He faults the trial Magistrate's decision that it only addressed one issue being that of compelling the Appellant to fell down the trees and left out other core issues for determination among them, firstly the ownership of parcel no. LOC.19/NYAKIANGA/1897, secondly which parcels of land had a common boundary and thirdly if there existed a boundary dispute.

7. He claims that parcel no. LOC.19/NYAKIANGA/1897 on which the trees are planted belong to his late father and if he were to comply with the Court order issued and proceed to fell trees in his late father's piece of land it would amount to intermeddling in his father's estate as he is not the administrator of the estate.

8. He avers that he owns parcel of land no. LOC.19/NYAKIANGA/1898 which does not border the Respondent's land. He faults the trial Magistrate for failing to pay attention to the Registry Index Map on record that shows the location of each of the parcels of land.

9. He also claims that he should not have been condemned to pay costs as he was wrongly sued and prays for costs both at the trial Court and this Court.

The Respondent's case

10. The Respondent submitted that the ten (10) trees which were a nuisance on his parcel of land were planted on parcel no. LOC.19/NYAKIANGA/1897 which is adjacent to his land. He claims that the Appellant is in actual possession of the parcel no. LOC.19/NYAKIANGA/1897 even though it is not registered in his name. He claims that the Appellant admitted to have planted the two (2) trees that were cut by the Respondent and that after Respondent split the trees the Appellant instituted a criminal case against him for theft.

11. He avers that when the Court made a scene visit it noted that the trees were on the same line as the two (2) that were cut by the Respondent and that indeed they were a nuisance and posed a danger to the Respondent's house.

12. He avers that the trial Magistrate was right in ignoring the issue of a boundary dispute and was properly guided by the evidence of District Forest Officer who informed the Court that the regulations require trees to be planted six (6) meters from the boundary line whilst he claims the trees in dispute are planted on his boundary line. He avers that the Appellant did not produce the map to show the border lines between the two plots.

13. He avers that costs were properly awarded to him and is of the view that the issues raised by the Appellant in his grounds of appeal amount to technicalities which are curable under Article 159(2)(d) of the Constitution of Kenya.

14. He urged the Court to dismiss the appeal and award him costs.

Brief history of the case

15. The Plaintiff/Respondent filed a plaint dated 13/05/2011 in which he averred that he was the registered owner of land parcel no. LOC.19/NYAKIANGA/1694 and the Defendant/Appellant was the registered owner of land parcel no. LOC.19/NYAKIANGA/1897. It was the Plaintiff's claim that the two parcels of land share a common boundary. And that along that common boundary the Defendant in 1980 planted 12 gravelia trees which have overgrown and encroached onto his house. That the Defendant has refused to cut them down. That the District office Mathiyoa authorized him to cut down 2 trees leaving 10 of them standing.

16. The Plaintiff Respondent prayed for judgment in his favor for the following orders;

a. The Defendant be ordered to cut down the 10 gravelia trees at the boarder of LOC.19/NYAKIANGA/1694 and LOC.19/NYAKIANGA/1897

b. Costs of the suit

c. The sum of Kshs. 5,200/-

17. During the hearing of the case by the trial Court the Plaintiff called 5 witnesses who testified that the parties in that suit were relatives and had knowledge that the contested trees were planted by the Defendant therein. They also confirmed that the trees were actually a nuisance on the Plaintiff's land because they were shedding a lot of leaves on his compound and were dangerously overhanging his house. PW5 the District Forest officer produced a report indicating the dangers the trees posed to the Plaintiff's home and advised the parties to seek assistance from the Ministry of Lands on the boundary issue as the regulations require trees to be planted 6 meters from the boundary. There is also reference to the report made by National Environmental Management Authority (NEMA) officer on 12.1.2010 addressing the same issue. The Plaintiff claimed that the Defendant has refused to cut down the trees despite being asked to do so by the Plaintiff. He also informed the Court of his efforts to have the matter resolved by the local authorities but every time they were summoned the Defendant failed to attend.

18. The Defendant in his defence claimed that he was not the owner of the LOC.19/NYAKIANGA/1897 in which the trees are planted but is the registered owner of LOC.19/NYAKIANGA/1898 which does not border the Plaintiff's parcel of land and produced certificates of title to

that effect. He informed the Court that LOC.19/NYAKIANGA/1897 belonged to his late father one Mwangi Wagana who died in 2004 and produced his death certificate and that he was not the administrator of the estate. He claimed that the 2 trees that were cut by the Plaintiff were adjacent to his parcel of land which would explain why he instituted criminal proceedings against the Plaintiff when he split the trees. However, that position was clarified by the Court when it made a scene visit as the Court observed that all the 12 trees were actually planted on the same line. He brought up the issue of a boundary dispute between parcels no. LOC.19/NYAKIANGA/1897 and LOC.19/NYAKIANGA/1694. He denied being in possession of his father's land. He claimed that the trees were planted by his late father and that they do not belong to him.

19. The trial Court found that the issues herein were not merely a boundary dispute and noted that although the Defendant was not the registered owner of LOC.19/NYAKIANGA/1897, all the 12 trees were all in the same line and the Defendant had instituted criminal proceedings against the Plaintiff for cutting down and splitting the 2 trees. The Learned Magistrate therefore concluded that the Plaintiff had proved his case against the Defendant, entered judgment in his favour compelling the Defendant to fell down the remaining ten trees and awarded costs to the Plaintiff.

Determination

20. Having carefully evaluated the evidence before the trial Court, the grounds of appeal and rival submissions before this Court, and guided by the Court of Appeal case of **Selle v Associated Motor Boat Co. [1968] EA 123**, which stated thus:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. 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 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 or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (**Abdul Hameed Saif vs. Ali Mohamed Sholan(1955), 22 E. A. C. A. 270**) the Court are set out the issues for determination as thus;

On which parcel of land are the trees planted?

21. It was the Plaintiff's averment in his plaint that the trees were planted on a common boundary between LOC.19/NYAKIANGA/1694 and LOC.19/NYAKIANGA/1897. Evidence was adduced and confirmed by the trial Court that the trees were planted on LOC.19/NYAKIANGA/1897.

Who owns the parcel of land on which the trees are planted?

22. It was the Plaintiff's claim that parcel no. LOC.19/NYAKIANGA/1897 belongs to the Defendant/ Appellant. Documentary evidence of actual certificates of title produced before the trial Court to show that LOC.19/NYAKIANGA/1897 did not belong to the Defendant Appellant but to his deceased father one Mwangi Wagana. The Court was also informed that there was no administrator appointed to the estate of Mwangi Wagana.

23. The Respondent claimed that the Appellant was in actual occupation of LOC.19/NYAKIANGA/1897. He also claims that the Defendant planted the 12 trees on that parcel of land. That position was firmly denied by the Defendant and he contend that land belongs to his late father and that his late father is the one who planted the trees.

24. Section 26 of the Land Registration Act, No 6 of 2012 provides as follows;

“1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

A certificate of title is a conclusive proof of ownership it then follows that the legal owner of the land parcel no. 1 LOC.19/NYAKIANGA/1897 is the deceased whose succession of the estate is yet to be undertaken.

25. The trial Court judgment compelled the Defendant to fell the trees that are planted on parcel no. LOC.19/NYAKIANGA/1897 which we have demonstrated that it does not belong to the Defendant/ Appellant. It would be legally impractical to say that the trees planted on a parcel of land that belong to one person belong to a different person (save with other arrangement) and thus a stranger cannot be compelled to cut trees on someone else's land. I find that the trial Court erred in not addressing the issue of ownership of the parcel of land based on evidence in form of certificate of titles presented before Court on which the trees are planted before proceeding to make her determination. The correct route that the Plaintiff should have followed to ventilate his grievance in this matter was to nominate the Defendant or other siblings as a representative of his late father's estate, take out letters of grant of administration ad litem and sue him as a representative of the estate. In the circumstances the judgment of the trial Magistrate is set aside in its entirety.

26. The Court has not considered the issue of a boundary dispute as the same was not pleaded and tried in the lower Court.

27. On the issue of costs considering that the parties in this matter are relatives and the evidence adduced of the long period of continued dispute over the subject matter herein each party will bear their own costs both at the trial Court and in the present case.

28. The upshot is that the appeal is allowed.

DELIVERED, DATED AND SIGNED AT MURANG'A, THIS 8TH MARCH 2018.

J. G. KEMEI

JUDGE