



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

CIVIL APPEAL NO.84 OF 2015

KAUMA MUNYI.....APPELLANT

VERSUS

KITHUKA KITHURI.....RESPONDENT

JUDGMENT

The facts giving rise to this case were set out in my ruling on stay of execution application that was delivered on 22nd January, 2016. The respondent herein filed a suit against the appellant at the Resident Magistrate's Court at Kyuso in Kyuso RMCC No. 29 of 2011, Kithuka Kithuri vs. Kauma Munyi (hereinafter referred to only as "the lower court" where the context so admits). In his plaint dated 10th October, 2011, the respondent averred that at all material times, the respondent and members of his family occupied all that unregistered parcel of land situated at Kamayagi Village, Tharaka Location, Mumoni District, (hereinafter referred to as "the suit property"). The respondent averred that the suit property had no title but the same was identifiable in size and location. The respondent averred that they acquired the suit property through inheritance from their grandfather several years ago and that they have developed the suit property extensively.

The respondent averred that in the month of July 2010 or thereabouts, the appellant unlawfully entered the suit property and fenced off a portion thereof. The respondent averred that the appellant cut down trees on the said portion of the suit property and started cultivating the same. The respondent averred that the appellant's acts aforesaid amounted to trespass on the suit property since the appellant's entry on the suit property was without permission or consent of the respondent. The respondent averred that after entering the suit property, the appellant started asserting ownership rights over the same.

The respondent sought judgment against the appellant for a declaration that the suit property belongs to the respondent and a permanent injunction restraining the appellant from entering or in any other manner remaining on the suit property. The appellant filed a statement of defence on 18th November, 2011 in which he denied the respondent's claim in its entirety.

The lower court case was heard by B. M. Mararo P.M. who in a judgment dated 26th September, 2015 and delivered on his behalf by B. M. Kimtai S.R.M. on 21st October, 2015 entered judgment for the respondent against the appellant as prayed in the plaint. The appellant was aggrieved by the said judgment and lodged the present appeal against the same on 2nd November, 2015. The appellant has challenged the lower court's decision on several grounds which are set out in his memorandum of appeal dated 2nd November, 2015.

The appellant has contended that the lower court misdirected itself in fact and law and erred in its finding that the respondent had proved his case to the required standard. The appellant has contended further that the lower court erred in law and in fact in failing to record all the proceedings before it particularly the evidence that was tendered by the appellant and his witnesses. The appellant has also contended that the lower court erred by failing to deliver its judgment in time. The appellant has contended that the lower court delivered the judgment the subject of the appeal when the magistrate concerned was on suspension and as such under stress. The appellant has contended further that the decision of the lower court was wholly against the weight of evidence on record. The appellant has asked the court to allow the appeal, set aside the judgment and decree of the lower court and substitute the same with a decree dismissing the lower court suit with costs.

The appeal was argued orally before me on 13th September, 2017. Both parties appeared in person in this appeal. The appellant told the court in his submission that his official name is Thomas Mutegi Munyi. He submitted that the lower court did not record the evidence of his witnesses. He submitted that instead of recording the evidence from his witnesses the learned magistrate in the lower court was just staring at the said witnesses. The appellant submitted that the learned magistrate in the lower court however recorded all the evidence that was tendered by the respondent and his witnesses. The appellant submitted further that the judgment of the lower court was delivered after unreasonable delay and after the learned magistrate who heard the case in the lower court had been sacked. The appellant submitted that the learned magistrate wrote the said judgment after he had been dismissed and that he was asked for a bribe to secure a favourable verdict. The appellant reiterated that the judgment of the lower court was against the weight of evidence that was before the court.

In his submissions in reply, the respondent supported the judgment of the lower court. The respondent relied entirely on the record of the lower court and urged the court to dismiss the appeal. I have perused the proceedings of the lower court and the judgement of that court which is the subject of this appeal. I have also considered the appellant's grounds of appeal and the submissions that were made before me by the parties. This being a first appeal, the court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions although it has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified in the lower court. See, the case of Verani t/a Kisumu Beach Resort -vs- Phoenix of East Africa Assurance Co. Ltd [2004] 2 KLR 269 and Selle vs. Associated Motor Boat Co. Ltd. [1968] E.A 123 on the duty of the first appellate court. In the cases of Peter vs. Sunday Post Ltd. [1958] E.A 424 and Makube vs. Nyamuro [1983] KLR 403, it was held that an appellate court will not ordinarily interfere with the findings of fact by the trial court unless they were not based on evidence, or were based on misapprehension of the evidence or where it is demonstrated that the court acted on wrong principles in reaching its conclusion.

It is on the foregoing principles that the appeal before me falls for consideration. The first ground of appeal is that the lower court erred in its finding that the respondent had proved his case on a balance of probability. The respondent's case as pleaded was that at all material times the respondent and members of his family were in occupation of the suit property which they acquired from their grandfather. At the trial, the plaintiff gave evidence and called one witness. When the hearing commenced in the lower court on 7th October, 2014, the respondent told the court that the appellant had trespassed on the suit property that belonged to his father. The respondent told the court that he believed that the suit property belonged to his father because, he had earlier filed a suit against one, Mutua Mutegi over the suit property whom he succeeded in evicting from the suit property. He stated that after the death of his father in 2009, the appellant with the encouragement of his father claimed that the suit property belonged to him. He stated that the appellant entered the suit property on 13th July, 2010 and started cutting down trees. He stated that he reported the incident to the area chief, one Mutua who tried unsuccessfully to resolve the dispute. He stated that after the chief failed to resolve the dispute, the defendant and his brothers erected a boundary fence on the suit property on 11th March, 2011. He stated that he decided to go to court after a report to the area District Officer regarding the said acts of trespass yielded no solution. On cross examination, the respondent told the court that the suit that he had filed against Mutua Mutegi involved the suit property and that the property belonged to his father. In the course of cross-examination, the learned magistrate stood down the respondent and fixed the matter for further hearing on 4th November,

2014 on the ground that the witness had become so emotional.

When the hearing resumed on 31st March, 2015, for reasons which are not clear from the record, the hearing of the suit started afresh before the same magistrate instead of the same continuing from where it had reached on 7th October, 2014. The lower court took the respondent's evidence in chief afresh after which he was cross-examined. The respondent reiterated that the suit property belonged to his father. He told the court that he had sued the appellant because the appellant had entered his father's land. He stated that when someone else entered the suit property earlier, he filed a suit against him and had him evicted. He stated that the appellant did not lay a claim over the suit property at that particular time.

On cross-examination, the respondent told the court that the case that he had filed earlier in respect of the suit property did not concern the appellant. He stated that his grandparents died and were buried on the suit property and that the appellant's brothers had vacated the suit property because the same did not belong to them.

The appellant's witness was one, NJERU MBABU (PW2). PW2 told the court that the parties were both known to him. He told the court that in 1956, he used to graze cattle with his grandparents on the suit property. He stated that they used to water the animals on the suit property which belonged to the respondent's father. He stated that the appellant's grandfather's parcel of land was a cross the stream where they used to water the animals. PW2 explained in detail the location of the suit property *vis-a-vis* the neighbouring parcels of land which belonged to among others PW2's grandparents and the appellant's grandparents. He told the court that the respondent's father had allowed members of the appellant's family to graze their cattle on the suit property temporarily. He stated that the suit property reverted to the respondent's family after the appellant's family stopped grazing their cattle thereon. PW2 told the court that the appellant entered the suit property after the death of the respondent's father.

On cross-examination, PW2 stated that he was staying one (1) Kilometers away from the suit property. He stated that the appellant's grandparents were known to him and that the appellant had entered the suit property forcefully.

In his defence, the appellant also gave evidence and called 2 witnesses. The appellant told the court that the suit property belonged to him. He stated that he inherited the suit property from his father, one, Julius Munyi Isaka. He stated that he acquired the suit property from his father in the year 2000. He told the court that he was residing on the suit property and was also using the same for cattle grazing. The appellant stated that it was not until 9th May, 2010 that the respondent started grazing his goats on the suit property and laying a claim over the same. He stated that attempts to resolve the matter through the area chief failed because the respondent claimed that the dispute was pending before the court at Mwingi. On cross-examination, the appellant stated that he had occupied the suit property since the year 2009.

The appellant's first witness was FRANCIS KASORO MUSEE(DW2). He told the court that the parties herein were both known to him. He stated that the suit property belonged to the appellant. DW2 stated the appellant and his brothers and the respondent's brother used to occupy the suit property side by side. DW2 stated that there was no dispute between the parties then. He stated that when the dispute arose and the same was referred to the area chief, the respondent claimed that the suit property had been awarded to him by a court in Mwingi. On cross examination, DW2 stated that the parents of the parties herein did not have any dispute over the suit property when they were alive. The appellant's last witness was his father, JULIUS MUNYI (DW3). DW3 told the court that the suit property belonged to the appellant who started using the same in the year 2000. DW3 confirmed that the appellant resides on and also uses the suit property for other purposes. On cross-examination, DW3 stated that the parties herein did not have a dispute over the suit property during the lifetime of the respondent's father. He stated that the respondent encroached on the suit property after the death of his father. He stated that as at the time of the respondent's encroachment on the suit property, he had already given the suit property that was previously owned by him to the appellant. DW3 stated further that the village elders did not resolve the dispute because the respondent had claimed that the dispute had been resolved at a court in Mwingi although he did not furnish any evidence of the alleged resolution of the dispute.

I will consider grounds 1 and 5 of appeal together, grounds 3 and 4 of appeal together and ground 2 of appeal separately. From the evidence on record, I am in agreement with the appellant that the respondent did not prove his case on a balance of probabilities. As I have stated earlier in this judgment, the respondent had claimed in his plaint that the suit property belonged to his grandfather from whom his family inherited the property. In his evidence before the lower court, the respondent stated repeatedly that the suit property belonged to his deceased father. The respondent did not place any evidence before the court showing that he was the legal representative of his deceased father. There was also no evidence that the respondent had brought the suit on behalf of his father or members of his family. The respondent had sought a declaration that the suit property belonged to him. In his evidence however, he testified that the property belonged to his father. The respondent did not lead evidence how the suit property changed hands from his father to him. The respondent who had claimed that he had a previous case over the suit property with one, Mutua Mutegi at the Magistrate's Court at Mwingi and that the court had awarded him the suit property did not place any evidence of the proceedings that took place at Mwingi. A part from a copy of the plaint, no other material was placed before the court in relation to that case. In my view, the lower court fell into error in giving so much weight to the said case that the respondent alleged to have filed at Mwingi in the absence of proceedings and a judgment that was made in that case. In any event, it was common ground that the appellant was not a party to that case. The court should have noted that when the dispute between the parties was taken before the area chief and local elders for determination, the appellant insisted that the matter was pending before the court at Mwingi. He however failed to place any evidence before the chief of the said proceedings. In my view, since the suit property was not registered, the village elders would have been better placed to determine the dispute between the parties over the suit property.

I am also not in agreement with the lower court that since the appellant was the one who filed a suit against the respondent for trespass that was proof that he was the owner of the suit property. From the totality of the evidence on record, I am not satisfied that the respondent established his claim against the appellant. I am in agreement with the lower court that the appellant did not also put convincing evidence before the court in proof of his claim over the suit property. The court should have taken note however that the appellant did not file a counter-claim and that the burden of proof was on the respondent and not on the appellant.

With regard to the second ground of appeal, I have found no evidence that the lower court failed to record the evidence that was tendered by the appellant and his witnesses. The appellant did not explain to the court the nature and substance of the evidence that was tendered on his behalf and which the lower court failed to record. In the absence of such explanation, ground 2 of appeal is unsubstantiated and I find no merit in the same.

With regard to grounds 3 and 4 of appeal, I have noted that the hearing before the lower court was finalized on 14th April, 2015 after which the parties were directed to file written submissions. When the matter came up for mention on 30th April, 2015, the court confirmed that the parties had filed written submissions and fixed the matter for judgment on 3rd June, 2015. From the record, the trial magistrate, Hon. B.M. Mararo P.M prepared and signed the judgment on 26th September, 2015 and the same was delivered on his behalf on 21st October, 2015 by Hon. B.M. Kimtai S.R.M. The judgment was delivered 5 months after the completion of the hearing and filing of submissions by the parties. I am in agreement with the appellant that there was a delay in the delivery of the judgment in the lower court. There is no evidence however that the trial magistrate was to blame for the delay or that the said delay occasioned a miscarriage of justice to the appellant. The manner in which the judgment in question was delivered shows that the trial magistrate was no longer at Kyuso Resident Magistrate's Court when the judgment was delivered. Although the appellant has claimed that the learned magistrate wrote the said judgment when he was on suspension, there is no evidence in proof of that fact. Even if that was to be the case, there is no evidence that the alleged suspension affected the learned magistrate's judgment in any way. For the foregoing reasons, I find no merit in grounds 3 and 4 of appeal.

For the foregoing reasons, the appeal before me succeeds only on grounds 1 and 5 of appeal. It is my finding that the respondent's claim in the lower was not proved and as such the lower court erred in

