REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

CIVIL APPEAL NO. 34 OF 2010

JULIUS NJUGUNA NDUATI……………………...APPELLANT

VERSUS

LUCY NYOKABI MWANGI…………………….. RESPONDENT

[An appeal from the judgement of T.A Odera (Miss) Senior Resident Magistrate dated 21/9/2010 in Kitale Chief Magistrate's Court Civil Case No. 490 of 2004]

J U D G E M E N T

INTRODUCTION

1. The respondent is one of the administrators of the estate of the late **Zakaria Mwangi** who was one of **33 partners** who came together and bought **LR. No. 838/3** situate at **Moi's Bridge.** The appellant was also one of the partners. The purchased property was commonly referred to as **Gitiha Farm** and measured about **20 acres.**

2. The farm was later subdivided and portions of various sizes given to the partners. Prior to the subdivision, there were disputes among the partners which culminated in filing of civil suits. One such suit was ***Eldoret HCC. No. 93 of 1977*** which ended in a consent whereby the appellant was given **Plot No. 3A** measuring **0.07 of an acre** and **Plot No. 49** measuring **0.35 of an acre** making a total of **0.42 acres** in full settlement of his claims. The other case was ***Eldoret HC Misc. Civil Application No. 3 of 1984*** which also ended in a consent whereby the appellant who was one of the respondents was given one share and one plot where he was residing.

3. When the survey process was completed, one of the appellant's plots was **No. 13638/1** and was adjacent to the one owned by the respondent's husband which was **No. 13638/2**. Upon the demise of the respondent's husband, the appellant started the process of putting up a permanent structure on her husband's land. The appellant then moved to the lower court and filed ***Kitale Senior Principal Magistrate Civil case No. 490 of 2004*** in which he sought an order that he was the owner of **Plot No. 3A** forming part of **Plot No. 838/3** measuring **100 x 100ft** and that the respondent had no proprietary interest on the same. He also sought an injunction seeking to restrain the respondent or her agents from interfering with the plot.

4. In a judgement delivered on **21/9/2010**, the learned magistrate dismissed the appellant's suit with costs triggering this appeal.

The appeal and submissions by counsel for the appellant

5. The appellant raised 12 grounds of appeal which can be summarized as follows:-

(i) That the learned magistrate misunderstood the appellant's case against the respondent.

(ii) That the learned magistrate failed to appreciate the binding nature of the judgement in Eldoret HCCC. No. 93 of 1977 and as a result her judgement amounted to an appeal against the said judgement.

(iii) That the learned magistrate erred in shifting the dispute between the appellant and the respondent from the suit property to other properties.

(iv) That the learned magistrate erred in failing to appreciate that the respondent was sued in her individual capacity as a trespasser and that the suit property did not form part of the estate of her late husband.

6. On the first ground hereinabove, the appellant's counsel submitted that the trial magistrate did not understand the appellant's case; that she merely wrote a judgement which failed to analyze the issues for determination and that she arrived at a wrong finding that she had no jurisdiction to determine the issue of ownership.

7. On ground two set out hereinabove, the appellant's counsel contended what trial magistrate did in dismissing the appellant's case amounted to an appeal against the judgement in ***Eldoret HCC No. 93 of 1997*** which was binding upon her.

RESPONDENT'S SUBMISSIONS

8. The respondent's counsel submitted that the appellant was wrongly accusing the magistrate of touching on the issue of ownership of the suit property when the appellant's claim was clear that he sought a declaration that he was the owner of **Plot 3A** measuring **100 x 100ft**. He further submitted that there was no way the trial magistrate would have addressed the prayers in the plaint without touching on ownership.

9. The respondent further submitted that the trial magistrate arrived at a correct finding that there was a dispute on the ground and that the appellant had failed to adduce evidence of any encroachment on to his land. The respondent further submitted that the trial magistrate never ignored the decision of the High Court in Eldoret. The trial magistrate's findings were based on the prayers in the plaint and that she found that there was no prove of the appellant's case as required.

ANALYSIS OF EVIDENCE, THE LAW AND FINDINGS

10. I have considered the pleadings, submissions of the parties as well as the law. The issues which emerge for determination are as follows:-

1. Is the appellant owner of Plot No. 3A?

2. Did the appellant prove that there was encroachment on to his plot?

11. This being a first appeal, I have to consider the evidence adduced before the trial court, evaluate it and reach my own conclusion but of course giving room to the fact that I did not observe the witnesses testifying. See ***Selle -vs- Associated Motor Boat Company [1963] EA 123***.

12. The appellant's claim in the lower court is captured in paragraph 6 of the plaint where he averred as follows:-

6"On the 20/8/2004, the defendant without any colour of right trespassed into the plaintiff's plot and demolished a section of the permanent building and started to dig a foundation for purposes of erecting a permanent structure on a section of the plot".

13. It was incumbent upon the appellant to adduce evidence to show that he was the owner of **Plot No.**

3A and that the respondent had encroached into a section of it as alleged in his claim. In the case of ***Wareham t/a A.F. Wareham & 2 Others -vs- Kenya Post Office Savings Bank [2004] 2 KLR***, it was held as follows:-

> **"The burden of proof is on the plaintiff and the degree of proof is on a balance of probabilities. In discharging the burden of proof, the only evidence to be adduced is evidence of the existence or non existence of the facts in issue or facts relevant to the issue. It follows that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded the party with the burden of proof should fail".**

14. In the instance case, the appellant neither adduced any evidence to show that **Plot No. 3A** existed and that he owned it nor that there was encroachment by the respondent. From the pleadings, there is no doubt that the plaintiff was owner of **Plot No. 3A**. This is clear that he was entitled to **Plot No.3A** and that is what the consent in ***Eldoret HCC No. 93 of 1977*** stated. It is clear from that consent that the process of subdivision was to be undertaken and the appellant was to get **Plot No. 3A**.

15. Following subdivision, the initial plot numbers changed. It is not clear whether **Plot No. 3A** is what became **Plot No. 13638/1** which was adjacent to **Plot No. 13638/2** owned by the husband of the respondent. This is because there is evidence that the appellant had other plots.

16. The appellant's claim was that the respondent had encroached on to his **Plot No. 3A** and interfered with part of it. There was absolutely no evidence adduced to show that there was any encroachment. The respondent on the other hand adduced evidence that there was a dispute between her and the appellant. She went and brought a surveyor who marked the boundary. He marked the boundary between **Plot No. 13639/1** and **13638/2**. The surveyor testified as DW3.

17. The burden of proof was on the appellant to prove that there was encroachment. He did not discharge this burden. There was therefore no way the magistrate would have granted the appellant's claim in absence of evidence to support the appellant's allegations. The appellant in his evidence in chief insisted that his plot no was 3A and that he did not know of any other number.

18. Though the appellant's claim in the plaint was that the respondent had encroached on to his land, his evidence was that the respondent's husband did not own any plot. He even went ahead to point at the certificate of confirmation of grant given to the respondent to argue that **Plot No. 13628/2** was not among the properties of the respondent's husband. While under cross-examination, the appellant stated that it was his fence which was removed and corridor damaged.

19. It is the appellant who ought to have brought in a surveyor to show that there was encroachment on to his land and adduce credible evidence that his fence had been removed and his corridor damaged.

20. I find that all the grounds in the memorandum of appeal are misconceived. The trial magistrate stated in passing that the respondent is the administrator of the estate of her husband. This is a fact. There was no issue to be determined on the capacity of the respondent. The statement of claim by the appellant was clear that he sued the respondent as a trespasser. Nowhere in the judgement did the magistrate say that she ought to have been sued as administrator of the estate of her late husband.

21. There was also an argument that the trial magistrate shifted the appellant case from **Plot No. 3A** to other plots. As I have pointed out hereinabove, the appellant based his pleadings on **Plot No. 3A**. He did not adduce any evidence that **Plot No. 3A** existed. If he was contented by producing an extracted order from **Eldoret HCC No. 93 of 1977**, he was mistaken because this order was made before subdivision and processing of titles. The appellant cannot be heard to complain that the trial magistrate shifted from **Plot No. 3A** to other plots. There was an attempt by a witness of the respondent to produce a map showing the position of **Plot No. 13638/1** and **13638/2** but an objection was raised by the appellant's counsel. The appellant did not want the truth to come out. This is why he even pretended that he did not have any other plot number other than **Plot No. 3A**.

DECISION

22. The trial magistrate never made any decision which was contrary to the decision of the ***Eldoret HCCC No. 93 of 1977***. The trial magistrate was perfectly in order in reaching a conclusion that the appellant had failed to prove his case. I do not therefore find any merit in this appeal. The same is hereby dismissed with costs to the respondent.

Dated, signed and delivered at Kitale on this **20th** day of **January, 2017.**

E. OBAGA

JUDGE

In the presence of M/S Mufutu for Mr Nyambegera for appellant.

Court assistant – Isabellah.

E. OBAGA

JUDGE

20/1/17