



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC APPEAL NO. 2 OF 2014

ERASTUS MBUBA ZAKARIA.....APPELLANT

VERSUS

KINYUA NYAGA GATUMU.....RESPONDENT

***(BEING AN APPEAL FROM THE JUDGMENT OF THE PRINCIPAL MAGISTRATE'S COURT
AT RUNYENJES (HON. M.O. OBIERO) IN CIVIL CASE NO. 33 OF 2013 DELIVERED ON 5TH
DECEMBER 2013)***

JUDGMENT

The Appellant **ERASTUS MBUBA ZAKARIA** is the registered proprietor of land parcel No. KYENI/MUFU/3372 which neighbours the land parcel No. KYENI/MUFU/3373 registered in the names of **KINYUA NYAGA GATUMU** the Respondent.

On 25th October 2012, the Appellant moved to the High Court and filed this suit against the Respondent seeking judgment in the following terms:

- (a) A declaration that the Respondent is unlawfully in occupation of the Appellant's parcel of land No. KYENI/MUFU/3372.***
- (b) An order that the Respondent vacates the said parcel of land forthwith.***
- (c) The Respondent be ordered to pay to the Appellant mesne profits for the period that Respondent has been in occupation of the Appellant's land.***
- (d) Damages for the loss that the Appellant has suffered and has been denied the use of his parcel of land.***
- (e) Costs of the suit.***
- (f) Interest on (e) above.***
- (g) Any other further relief that the Honourable Court may deem fit and just to award.***

The suit was grounded on the pleadings that the Respondent had not only trespassed onto the Appellant's land and built a house thereon but also that the Respondent had defaced the boundary between the two parcels of land which was duly established pursuant to a Court order in **CIVIL CASE No. 29 of 2005**. The Respondent therefore continues to cultivate the Appellant's land and has ignored notices to vacate.

Pursuant to the **Chief Justice's Practice Directions dated 9th November 2012** which directed, inter alia, that Magistrate's Courts would continue to hear and determine all cases relating to land and the Environment and the use and occupation of land, in which such Courts have the pecuniary jurisdiction, this suit was on 14th March 2013 transferred to the Principal Magistrate's Court at Runyenjes where the land is situated. It was subsequently placed before **M.O. OBIERO** (Ag. Principal Magistrate Runyenjes Court) on 15th October 2013 and after hearing both parties and their witnesses, the trial Magistrate in a judgment delivered on 5th December 2013 dismissed the Appellant's case with costs.

That gave rise to this appeal in which the Appellant has raised the following grounds in seeking to have that judgment reversed:

1. That the learned Magistrate erred in law in allowing the Respondent who had earlier defended himself through a firm of advocates to act in person without giving the notice required by the Rules of Procedure to be given in the changed circumstances.

2. The learned Magistrate erred in law and in fact in failing to find that the Respondent was a trespasser on the Appellant's parcel of land in the light of the evidence before the Magistrate tendered by at least two witnesses who had first had knowledge of the situation on the ground.

3. That learned Magistrate erred in law and in fact in believing and attaching undue weight to the allegation that the Appellant did not know where his parcel of land was situated yet the Appellant had stated he carried out searches at the Lands office to confirm its existence, he produced an original title, a copy of green card and the Land Control Board consent to the transfer to him of the suit land.

4. The learned Magistrate erred in law and in fact in failing to believe and take into account the evidence given by well known local personalities in the relative area in support of the Appellant's case that the Respondent had built his house on the Appellant's land and had repeatedly destroyed boundary marks.

5. That the learned Magistrate erred in law and in fact in believing and finding that the Respondent did not up-root the boundary marks between the Appellant's and the Respondent's parcels of land despite the evidence of the two eminent witnesses aforesaid to the contrary.

6. That the learned Magistrate erred in law and in fact in believing the Respondent's inconsistent evidence where he alleges and/or asserts, on cross-examination, that his house stood on an access road and not on the Appellant's parcel of land yet he had earlier stated in his main evidence that he was satisfied with his position of land where he had allegedly lived since 1982 and he knew the boundaries very well.

7. That the learned Magistrate erred in law and in fact in finding that the Appellant failed in his duty to establish the actual boundary between the Appellant's parcel and the Respondent's parcel while it is on record that the Appellant's advocate sought the services of the District Surveyor only to be refused on the grounds that such services would only be extended to the Appellant if the Court so ordered. The learned Magistrate could at that juncture have issued witness summons ordering the District Surveyor to do the needful but he blamed the Appellant who had no powers similar to the Magistrates.

8. The learned Magistrate erred in law and in fact in finding that the Court could not order the relevant authorities i.e. the Land Registrar and/or District Surveyor to establish the actual boundary between the Appellant and the Respondent's respective parcels as suggested in the last but one paragraph of the Appellant's written submissions dated 1st November 2013 yet he had earlier referred to a judgment of the same Court produced as exhibit 5 (he erroneously refers to it as exhibit 4) where, in his own words "..... the Court made an order that the parties were to seek the assistance of the Land Registrar to have the boundary between the parcel of land number KYENI/MUFU/3373 and KYENI/MUFU/3372 clearly marked"

9. The learned Magistrate erred in law and in fact in failing to take cognizance of the sensitivity of the land issue herein.

10. The learned Magistrate further erred in law and in fact in failing to at least direct, in exercise of the Court's unlimited and inherent discretion and power, that a solution to the obvious problem be found in any endeavour to meet the ends of justice or to prevent abuse of the process of the Court.

11. That the learned Magistrate erred in law and in fact in dismissing the Appellant's suit.

12. The learned Magistrate also erred in law and in fact in ordering the Appellant to pay costs of the suit.

As the Respondent was acting in person, the appeal was heard by way of oral submissions although counsel for the Appellant **MR. KAMUNYORI** had filed and served written submissions which he orally summarized.

This being a first appeal, the role of this Court is to re-evaluate the evidence on record and reach its own conclusions while appreciating that it did not have the benefit of seeing or hearing the witnesses. Ordinarily, an appellate Court will not interfere with the findings of fact by the trial Court unless they were based on no evidence at all or on a misapprehension of the same or the trial Court is shown to have acted in wrong principles – MWANASOKONI VS KENYA BUS SERVICES LTD 1982-88 I K.A.R 278 and KIRUGA VS KIRUGA & ANOTHER 1988 K.L.R 348. See also SELLE VS ASSOCIATED MOTOR BOAT COMPANY 1968 E.A 123 and JABANE VS OLENJA 1986 K.L.R 661. I am guided by the above precedents and have also taken into account the submissions herein.

I shall first consider the first ground of appeal in isolation. It is that the Magistrate erred in law and in fact in allowing the Respondent who had earlier defended himself through a firm of advocates to act in person without giving notice as required by the Rules of Procedure. Counsel has in his submissions referred this Court to the provisions of Order 9 Rule 8 (1) of the Civil Procedure Rules which provide as follows:

“Where a party, after having sued or defended by an advocate intends to act in person in the cause or matter, he shall give a notice stating his intention to act in person and giving an address for service within the jurisdiction of the Court in which the cause or matter is proceeding, and the provisions of this order relating to a notice of change of advocate shall apply to a notice of intention to act in person with necessary modifications”

That provision does not really apply in the circumstances of this case. The record shows that when the case came up for hearing on 10th September 2013, the Respondent's counsel **MR. EDDY NJIRU** was absent but his brief was held by **MR. ITHIGA** who applied for an adjournment on grounds that **MR. EDDY NJIRU** was un-well. Counsel for the Appellant **MR. KAMUNYORI** objected and referred the Court to previous applications for adjournment by the Respondent who was not even present in Court. The trial Magistrate granted the **“VERY LAST ADJOURNMENT”** adding that the trial would proceed for hearing on 15th October 2013 **“with or without the defendant and his counsel”**. Come 15th October 2013, the Respondent was in Court but yet again his counsel was absent. The Respondent informed the Court that he had not seen his counsel and was given upto 9.45 a.m. to do so. At 9.45 a.m. the Respondent informed the trial Magistrate that he had been unable to communicate with his counsel and the Court directed that the trial proceeds. The Appellant thereafter testified and was cross-examined by the Respondent. Clearly therefore, it cannot be said that the Respondent intended to **“act in person”** having previously been represented by counsel as provided under Order 9 Rule 8 (1) of the Civil Procedure Rules. The Respondent was all along represented by a counsel who let him down by not attending the Court even when the Magistrate had granted the very last adjournment. Indeed on the morning of the trial, the Respondent tried to reach his counsel but in vain and at 9.45 a.m. the Court directed that the trial proceeds. There was nothing else that the Respondent would have done in the circumstances other than to conduct his own case. There was therefore never any intention by the Respondent to act in person in his case and so a notice to that effect was not necessary. That ground of

appeal fails.

The other grounds of appeal can easily be considered together. They relate to whether the Respondent was indeed a trespasser, the veracity of the evidence by witnesses including well known personalities in the area, the finding that the Appellant had failed in his duty to establish the boundary, the failure to order the Land Registrar and Surveyor to establish the boundary and the failure by the trial Court to exercise its **“unlimited and inherent discretion”**. There is also the issue of costs.

It must be remembered that it was the Appellant who moved to Court alleging trespass on his land by the Respondent and his eviction therefrom, mesne profits and damages. That must presuppose that the Appellant knew the boundary to his land. It was therefore his duty to prove the trespass because **Section 109 of the Evidence Act** placed that burden on him. It reads:

“The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

The record shows that on 30th October 2013, the Appellant’s counsel addressed the trial Magistrate in the following terms:

“I had indicated that I wished to call a surveyor. Unfortunately, the surveyor has indicated that he can only come when summoned by this Court and in the company of Land Registrar. I do leave it to the Court to consider whether their evidence is necessary. As for now I do close the plaintiff’s case”

In the course of his judgment, the trial Magistrate stated as follows:

“I wish to point out that with due respect to the plaintiff’s counsel, the issue of establishing the boundary between the two parcels of land was their duty. They ought to have done this by calling the District Surveyor as a witness. The law is very clear that it is the duty of the party who alleges the existence of a fact to prove the same. It is never the duty of the Court to investigate and find out whether the alleged fact exists”.

The trial Magistrate no doubt had in mind the provisions of **Section 109 of the Evidence Act** referred to above. It is therefore not correct for the Appellant’s counsel to submit, as he had done, that:

“In any case, the Court has unlimited discretion when dealing with any issue before it, and there would have been nothing out of the ordinary for the learned magistrate to order an investigation, if this would have assisted him to dispense justice”

The Appellant was represented by counsel who was clearly aware that the evidence of the Land Registrar and Surveyor would be crucial. Indeed on 15th October 2013, counsel addressed the trial Magistrate in the following terms:

“I thought I would close my case today. However, I have found it necessary to call another witness. I do pray for another date. I wish to call a witness from the office of the District Surveyor. That will assist in determining this matter more accurately”

The Magistrate allowed that application while noting however that the said witness had not recorded statements. The Respondent too had no objection to that application. Therefore, when on the next hearing date of 30th October 2013, the counsel for the Appellant abandoned his earlier request to call the Land Registrar and Surveyor and proceeded to close the Appellant’s case even without seeking Court summons, it would not have been open to the trial Magistrate to descend into the arena of litigation and prosecute the Appellant’s case. The trial Magistrate was therefore correct to decline the invitation to investigate the case and obviously he did not enjoy any **“unlimited and inherent discretion”** to do so as suggested by counsel for the Appellant. His jurisdiction was limited by law.

Counsel for the Appellant has also referred to a previous case being **RUNYENJES COURT CIVIL CASE No. 29 of 2005 KINYUA GATUMU VS MARTHA NJUE** in which an order had been made by another Magistrate (**D.O ONYANGO**) referring the parties to seek the assistance of the Land Registrar to survey the boundary between the two parcels of land. Counsel for the Appellant then refers to his earlier submissions made in the trial Court when he stated in the last but one paragraph that:

“The plaintiff therefore prays that Court orders that the Land Registrar and/or the District Surveyor’s office undertake the exercise of re-establishing the legitimate boundary between the two parcels. This is the only way that the Court will be conclusively informed that the defendant has trespassed on the plaintiff’s parcel”.

Surely counsel could not be seeking through submissions, what the Appellant had not sought in his plaint filed in the subordinate Court. Having pleaded the unlawful occupation of his land (trespass) an order for eviction, damages and mesne profits, those are the remedies the Court was obliged to investigate and make a finding. If the Appellant was not sure about the boundary to his land or if he wanted the same to be fixed, he had the option under **Section 19 of the Land Registration Act** to move the Registrar to fix the boundary. That is not what the Appellant sought from the trial Court which was entitled to proceed on the assumption that the boundary had been fixed and that the Respondent had gone beyond that boundary and unlawfully occupied the Appellant’s land parcel No. KYENI/MUFU/3372. After all, that is what the Appellant had pleaded.

With regard to the complaint that the trial Magistrate erred in law and in fact in failing to believe the evidence of two well known personalities in the area, those two were **MICHAEL NJUE** (PW2) who sold the land parcel No. KYENI/MUFU/3372 to the Appellant, **SAVERIO NDWIGA** (PW3) the area Assistant Chief and **NJUE NJIRU** (PW4) a Village elder. PW2 and PW3’s evidence was basically that the Appellant’s land is KYENI/MUFU/3372 and the Respondent’s land is KYENI/MUFU/3373. PW3’s evidence was more helpful. He said the parties had a boundary dispute and that the Respondent admitted having destroyed the boundary. However, when he was cross-examined by the Respondent, he said:

“I am not a surveyor. I can read a map. I cannot tell the exact boundary between the two parcels of land. I have said the truth”.

The trial Magistrate was entitled to decide which of the witnesses to believe. He believed the Respondent’s evidence that he had not constructed his house on the Appellant’s land. I have no reason to fault the findings of the trial Magistrate who had the benefit of observing and hearing the witnesses. It has not been demonstrated that those findings were based on no evidence or were in misapprehension of the law. This Court must therefore give respect to those findings and having done so and having also considered the totality of the evidence placed before the trial Magistrate, I am not persuaded that the Magistrate erred either in law or in fact in dismissing the Appellant’s suit in the subordinate Court.

Finally, ground 12 takes issue with the trial Magistrate’s order that the Appellant pays costs of the suit. **Section 27 (1) of the Civil Procedure Act** says as follows on the issue of costs:

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, costs of and incidental to all suits shall be in the discretion of the Court or Judge, and the Court shall have full powers to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purpose aforesaid; and the fact that the Court or Judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the Court or Judge shall for “good reasons” order otherwise”. Emphasis added

As a general rule, the successful party is entitled to costs so as to recoup what he has spent in litigation. Such costs can only be denied for **“good reasons”**. Therefore, where the trial Court has exercised its discretion on costs, an appellate Court will not interfere unless such discretion has been exercised

unjudicially or on wrong principles. No reasons have been advanced by counsel for the Appellant as to why the Respondent should have been denied costs by the trial Magistrate. That ground of appeal similarly fails.

Ultimately therefore and having re-considered the evidence

that was placed before the trial Magistrate and also the law, I find no reason to reverse the judgment of the trial Magistrate. This appeal is therefore dismissed with costs to the Respondent.

B.N. OLAO

JUDGE

16TH JUNE, 2017

Judgment delivered, dated and signed in open Court this 16th day of June 2017

Mr. Kamunyori for Appellant - present

Respondent in person – absent.

B.N. OLAO

JUDGE

16TH JUNE, 2017