



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

CIVIL APPEAL NO. 249 OF 2013

MWIRIGI M'KIRERA.....APPELLANT

VERSUS

MOSES KITHINJI M'IKIARA.....RESPONDENT

(An appeal from the Judgment and Decree of the Chief Magistrate's Court at Meru delivered by Honourable D.W. Mburu, Ag. Principal Magistrate and dated 12th April, 2013)

J U D G M E N T

1. The Appellant was the Plaintiff in Meru CMCC No. 877 of 2003, while the Respondent was the Defendant.
2. In the Plaint (initially filed on 21.10.03 but amended on 13.8.10), appellant was claiming that he owns an undeveloped Commercial Plot No. 167 at Nkubu Market which Plot had been encroached upon by the Respondent. He further stated that on 20.10.03, Defendant had started to construct a concrete foundation in readiness to construct a permanent building.
3. Plaintiff had then sought orders for:-
 - 1) **A Permanent Injunction to restrain the Defendant from trespassing and encroaching into the Plaintiffs Plot No.167 Nkubu Market.**
 - 2) **Exemplary damages against the Defendant for wantonly and knowingly trespassing on Plaintiff's Plot Number 167 Nkubu Market.**
 - 3) **Costs of the suit.**
 - 4) **Any other or better relief that the Honourable Court may deem fit and just to grant.**
4. Defendant had filed a statement of defence on 17.11:03 which was not amended. The contents thereof are a general denial save to state that Defendant owns Plot No. 98B at Nkubu Market and that this is the plot he is developing.
5. As the case was proceeding before the lower court, a consent by all parties was made on 3:11:03, whereby the Provincial Physical Planning officer (Meru Central) and the District Surveyor were ordered to visit the suit premises to wit 98A, 98B and 167 at Nkubu Market and to file a joint report **"ON THE EXISTENCE OR OTHERWISE OF THESE PLOTS"**.

6. The Report was availed. It is dated 13:1:03 and was prepared and signed by H.G. Tharamba, the County Surveyor and D.K. Kiara, the Provincial Physical Planning Officer.
7. The Appellant had testified that he had bought the plot from one Isabela Gatwiri on 18:07:1996. He produced an agreement to that effect as P Ex 1.
8. Appellant had further testified that he applied for transfer of the plot into his names on 19:07:96 and this was allowed. He also produced a bundle of receipts (P Exhibit 2) to show that he had been paying rates to the Council.
9. Appellant had also stated that his immediate neighbor is the Respondent who is on Plot No. 98B, which plot is developed. Appellant contended that Respondent had encroached on Plot 167 and had started to develop the same. However the Respondent had stopped the construction when the case was going on.
10. PW2 one Stanley Mutahi Mugambi testified that he was the legal officer of the council and that Nkubu Market falls within his jurisdiction. He availed P Exhibit 3, the minutes from the Council approving the transfer of Plot 167 for Isabella Gatwiri to the Appellant.
11. PW 3, Henry Gichuru Tharamba is the Surveyor who had visited the scene and filed a report. He stated that he found all the three plots on the ground that is 167, 98A and 98B. He averred that for Plot No. 167 it was smaller than what was on record. For Plot No. 98 A and 98B there were some slight differences upon comparing what was on the ground and what was on record. **The plots were small because of the road which borders them** as the road had been widened from 3 metres.
12. PW4 Elizabeth Wanjiru Mburu stated that she was the Deputy Physical Planning Officer Imenti North and Imenti Central Buuri District. Her evidence is that Plot No. 167 existence in the development Plan of Nkubu Market. The Plan was produced as P Exhibit 6.
13. For the Respondent, he had testified as DW1 stating that there is Plot No. 98A and 98B. His is 98B whereas 98A belongs to one Samuel M'Rukaria. Respondent had stated that he acquired his Plot in 1970's from Samuel M'Rukaria and Augustino Mbui through the Meru County Council. He also stated that he had not encroached on plot 167 as **"it is not there next to me"**. He averred that when the road was built in 2000, 10 feet was taken from his plot, so he was added 10 feet in 2003.
14. In the Judgment, the trial Court stated that the issue for determination was **whether Respondent's construction was on plot No. 167 belonging to Appellant or on plot No. 98B belonging to Respondent.**
15. The trial Court found that **"All the witnesses for the Plaintiff only managed to prove that Plaintiff is the owner of Plot No. 167 Nkubu Market"**. The trial Court went ahead to state that the "Plaintiff was not able to show that the Defendant had done construction on his (Plaintiff's) plot. The Plaintiff's case was dismissed hence this appeal.
- 16.8 grounds have been filed in the memorandum of appeal. I will deal with grounds, 1, 2, 3, 4, 5, 6 and 8 together as they are more or less related. Ground 7 will be dealt with separately.
17. This appeal was heard by way of Submissions, pursuant to directions given by the court on 8:9:2016. Such Submissions have duly been filed.
18. This Court is conscious of its role as the first appellate court as stated in **SELLE vs. ASSOCIATED MOTOR BOAT CO. LTD. [1965] E.A. 123**, and has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter. This court must, however bear in mind the fact that it neither saw nor heard the witnesses and to make due allowance for that.
19. For the Appellant, it is averred that the trial court did not write the Judgment in compliance with the

law that issues were not framed and the Court's decision was manifestly at variance with the candid evidence of the appellant.

20. Respondent submitted that the Appellant had not adduced any evidence to show that construction was going on in Plot No. 167 and that all that Plaintiff had managed to prove was that he owns a Plot No. 167 at Nkubu Market.

21. I find that the issue for determination; **whether Respondent's construction was on plot No. 167 belonging to Appellant or on plot No. 98B belonging to Respondent**, was properly framed by the trial magistrate. How it was determined is another issue altogether.

22. Firstly, I find that Appellant has given an account of how he acquired his plot. He had bought it from Isabella Gatwiri. The transfer was effected through minutes of the Council and this was confirmed by PW 2 (The legal officer). The acquisition of Appellants plot is similar to how Respondent had acquired his own from one Rukaria. The trial court should have recognized that both parties were at par in terms of acquisition of rights and interests in their respective portions of the land.

23. The second factor to consider is with regard to the evidence of the expert witnesses. The Report of 13:11:03 by the County Surveyor and the physical planner did indicate the existence of the plots 167, 98A and 98B. The report reads as follows:-

“At the site we established the locality, existence and boundaries of Plot 98A and 98B, which are fully developed.Between Plot No. 98B and the existing road, there exists space with measurements that do not comply with the County Council Records but as per the plans, the plot is No. 167.

24. The attached plan does show that Plot No. 167 is adjacent to plot No 98B. It is therefore clear that the trial Magistrate failed to consider this very crucial evidence of witnesses who had the expertise and information to interpret what is in the lands records and what is on the ground.

25. I note that in the ruling of 19:4:2004, with regard to the interlocutory application for injunction the court had relied on the independent evidence of the surveyor and physical planning officer. The court had found that there was a presumption that appellant owns the plot in dispute. The question is, did the Respondent challenge this evidence? Hardly.

26. Thirdly, it is evident that Appellant had been paying rates to the Council for Plot No. 167. The receipts confirm that much. It follows that the council had recognized the appellant as the owner of the plot that was the space between 98B and the road.

27. The fourth factor to consider is the widening of the road in the vicinity of the plots in question. I note that Respondent has given an explanation as to how he came to own the space at the front of his plot (the suit plot). He averred that a road was widened in 2000, a fact also admitted by PW 3. Respondent states that his plot was hived off at the back to the extent of 10 feet and so a certain physical planner gave him 10 feet at the front.

28. However, Respondent never substantiated this claim. He had no documents and or witnesses to support this claim. The question that begs an answer is, was the hiving off, of Respondent's plot at the back (in year 2000) to create the road a case of compulsory acquisition?

29. There was no clarification on this issue. It is however not fathomable that one can be compensated for land acquired by the council in the manner described by the Respondent. There has to be a trail of the events and documentation. This is something that the Magistrate did not question.

30. The fifth factor to consider is with regard to the developments already carried out. In his own evidence, Respondent had stated that he built a stone permanent shop on plot 98B in 1975. The report of Surveyor and physical Planner also confirm that plot No 98A and B are fully developed. It means that

Plot No. 98B was already fully developed. This is a case whereby Respondent acquired the Plot in 1970. He built it in 1975. So what was he constructing, where was he constructing? Going by the evidence of PW3, the plots are rather small. So this is not a case where the Respondent had left some of his land as idle land. I am inclined to believe that the plot where the Respondent had embarked on constructing was on 167 and not 98B.

31. My finding is that Appellant has been able to prove that the plot between 98B and the road belongs to him, the same being 167. This happens to be the plot which Defendant had embarked on developing.

32. The appeal succeeds so far, as the trial magistrate did not consider the weight of the evidence adduced by the appellant vis a vis that which was adduced by the Respondent and ultimately, he arrived at a wrong conclusion.

33. Ground 7

34. It is averred that the Magistrate erred in failing to assess the damages payable to the Appellant. I find that indeed this is an issue that had been pleaded for. However, it is trite law that what is pleaded has to be proved. No evidence was adduced in support of this claim. Perhaps the Trial Magistrate ought to have made note of that. Nevertheless, the claim for damages fails for lack of prove.

35. CONCLUSION

The appeal hereby succeeds and I proceed to give orders as follows:-

- 1. The judgment delivered on 12:4:2003 in Meru CMCC 877 /2003 is hereby set aside.**
- 2. It is hereby declared that plaintiff is the rightful owner of plot number 167 at Nkubu market.**
- 3. A permanent injunction is hereby issued restraining the defendant from trespassing and encroaching unto plaintiff's plot No. 167 at Nkubu market.**
- 4. Appellant is awarded costs of this appeal as well as costs in the subordinate court.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 22ND NOVEMBER, 2017 IN THE PRESENCE OF:-

Court Clerk: Janet

HON. L. N. MBUGUA

ELC JUDGE