Maangi v Ndemwa & another (Environment and Land Appeal E009 of 2021) [2024] KEELC 4027 (KLR) (30 April 2024) (Judgment)

Neutral citation: [2024] KEELC 4027 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITUI

ENVIRONMENT AND LAND APPEAL E009 OF 2021

LG KIMANI, J

APRIL 30, 2024

BETWEEN

ITAVWA MULI MAANGI ..... APPELLANT

AND

JOHN MUTEMI NDEMWA ..... 1ST RESPONDENT

NDUU KITHONGO ..... 2ND RESPONDENT

(Being an Appeal against the Judgment of Senior Principal Magistrate Hon. J. Aringo, in Kyuso PMELC No.6 of 2020 delivered on 27th October 2021)

JUDGMENT

1. This appeal is against the judgment of the Senior Principal Magistrate Hon. J. Aringo, in Kyuso PMELC No. 6 of 2020 delivered on 27th October 2021. The Memorandum of Appeal dated 24th November 2021 sets forth the following grounds of appeal:

    1. The learned trial senior Resident Magistrate erred in law and fact by failing to find that the Respondents had illegally trespassed into the Appellant's parcel of land.

    2. The learned trial senior Resident Magistrate erred in law and fact by refusing to grant general damages for illegal trespass to land.

    3. The learned trial senior Resident Magistrate erred in law and in fact by holding that the 1st Respondent has been in occupation of the suit land since 1992, without any proof of the same being produced in court, and at the same time disregarding the Appellant's evidence that the Respondents encroached into the suit land in July 2020.

    4. The learned trial senior Resident Magistrate erred in law and fact in failing to grant the costs of the suit to the Appellant.

5. The learned trial senior Resident Magistrate erred in law and in fact by showing bias towards the Appellant by deciding the case against the weight of evidence on illegal trespass to the suit land, award of general damages and award of costs of the suit.

2. The Appellant prays that the appeal be allowed and part of the judgment of the trial court dated 27th October 2021 be set aside and orders be issued declaring the Respondents as illegal trespassers in the suit land, awarding general damages for unlawful trespass and award costs of the suit to the Appellant.

3. The suit in the trial court was instituted vide the plaint dated 13th August 2020, where the Plaintiff in the suit is the Appellant herein. The plaintiff averred that he is the registered proprietor of land parcel number Kyuso/Ngomeni'A'1096 measuring 0.09 Ha. He stated that the defendants without his permission or any right trespassed onto his aforementioned land and started making bricks which at the time of filing the suit totaled approximately 8,000 and the brick-making was still ongoing. The plaintiff further averred that the defendants had trespassed on land parcel Kyuso/Ngomeni'A'1095 and constructed a Kiln which they were using to burn bricks. He claimed that they dug up the soil, cleared vegetation and cut down trees. He averred that the defendant's action of moulding bricks and operating a kiln on the suit land was causing waste on the soil, vegetation and trees.

4. The plaintiff prayed for a permanent injunction against the defendants, general damages for illegal trespass and costs of the suit.

5. The defendants filed a defence in person dated 9th September 2020 and denied the alleged trespass. They stated that the suit Land Parcel Kyuso/Ngomeni 'A' 1096 is registered to the 2nd Defendant, Nduu Kithongo who is the grandfather of the 1st Defendant. The 1st Defendant stated that he uses the suit land with authority from the 2nd Defendant. They denied that any demand notice was issued to them and denied the jurisdiction of the court as there are several cases in court over the same subject matter namely CC3 of 2013, CC 2 OF 2019, CC44 of 2015 and a criminal matter.

6. The Counsel for the Appellant applied for and was granted leave to amend the Memorandum of Appeal on 31st January 2023 but the amended Memorandum was not filed.

7. Further, the appeal against the 2nd Respondent was on 25th January 2024 marked as withdrawn on the Appellant's application.

Summary of the proceedings before the trial court

8. PW 1, Itavwa Muli Maangi, the Plaintiff, gave evidence before the trial court where he stated that the suit land was given to him by his grandfather Maangi Kirao. He stated that he acquired the suit land through adjudication, and produced the proceedings in Minister's appeal case 90 of 2013 as exhibit 1. He stated that the previous title was revoked and he was given the land and produced the title deed to the suit land parcel Kyuso/Ngomeni/'A'1096. He accused the defendant of making bricks on his land and cutting trees and stated that he had lost a lot of property in the invasion of his land and produced photos showing the trespass. He prayed for damages and costs.

9. On cross-examination, the Plaintiff confirmed that he sued 27 defendants in a separate land case in Machakos but he did not file the documents in that case.

10. PW 2 Patrick Muthui Keya stated that the Plaintiff is his relative from his clan and his neighbour and adopted his witness statement as evidence in chief in which he had stated that the Plaintiff is the duly registered owner of Land parcel Kyuso/Ngomeni/'A'1096 the suit property and that the defendant illegally entered the suit land and fenced it without the authority of the plaintiff and has refused to

stop the activities despite demand notice being issued to him. He stated that in July 2020, some brick-making works were started by the defendants, making the value of the land depreciate.

11. On cross-examination, PW 2 stated that he had been present during the scene visit and it was evident how they had crossed their boundary. He also stated that he was aware of a case in Kitui law courts where a decree was issued. That 1096 was initially surveyed to Nduu Kithoongo and the matter was referred back to the lands office from Machakos High Court.

12. DW 1 John Mutemi Ndemwa stated that the 2nd defendant is his grandfather and testified on his behalf. He adopted his witness statement in court where he had stated that suit parcel Kyuso/Ngomeni/'A'1096 belongs to his grandfather, the 2nd defendant while the plaintiff is the owner of 1097 and that he uses Land Parcel 1096, his grandfather's land.

13. In his statement, he referred to the suit the Plaintiff instituted in Machakos High Court case number 44 of 2013 and later also filed Kyuso 13 of 2013 and 2 of 2019 while the other matters were not finalized. He stated that the plaintiff intended to grab his grandfather's land who has health-related challenges. He stated to the court that he had been using his grandfather's parcel since 1991 with no complaints from anyone.

14. On cross-examination, he denied that Machakos High Court case number 44 of 2013 returned the matter back to adjudication and stated that in Kyuso 13 of 2013 there was a site visit by the court and the surveyor showed them the boundaries between 1096 and 1097.

15. Judgment was delivered on 27th October 2021 where the trial court entered judgment in favour of the plaintiff in terms of prayer (a) of the plant. The trial court found that the plaintiff had established by the best evidence that he was the registered proprietor of the suit land parcel Kyuso/Ngomeni'A'1096. Consequently, by dint of Section 24 of the *Land Registration Act*, he has absolute ownership of the parcel of land. On prayer (C) of the plaint seeking an award of general damages, the court found that the suit parcel of land was through adjudication initially surveyed and registered to the 2nd defendant and the registration was only overturned on appeal to the Minister. The court noted that the suit was filed just about a month after the decision of the Minister and it was not clear that the defendant had been notified of the decision, which overturned their ownership of the suit land. The court was unable to establish the illegal trespass claimed by the plaintiff and thus declined to award damages. The court further did not make an award of costs.

16. The court gave directions on the filing of written submissions by the parties and further noted that because the Respondent was acting in person, the parties would appear on 22nd February 2024 for highlighting of submissions and/or oral hearing of the appeal. Counsel for the Appellant filed written submissions and highlighted the same on the said date. The court was satisfied that the remaining Respondent John Mutemi Ndemwa was served with a hearing notice indicating that the appeal was scheduled for hearing on the said date as per the affidavit of service of Walter Jatiaga Aderi sworn on 14th February 2024.

The Appellant's submissions and hearing of the appeal

17. Counsel submitted that having established that the appellant was the registered proprietor of the suit land Kyuso/Ngomeni/'A'1096, the trial court's failure to award general damages was an error. Counsel further stated that the respondents did not deny that there was trespass and that the 1st respondent did not call any evidence to show that he was on the suit land with the consent of his grandfather Nduu Kithongo.

18. They stated that whether or not the respondents were aware of the conclusion of the appeal to the Minister was not an issue and the trial court erred in basing its decision on that question.

19. Counsel submitted that the evidence before the trial court was sufficient on a balance of probabilities for granting prayer on general damages the suit should not have been dismissed and the dismissal was against the weight of evidence. She submitted that the Appellant's title was conclusive evidence of ownership and that the defendants had testified to having occupied the suit land.

20. Quoting section 3(1) and (2) of the *Trespass Act*, it was submitted that the Respondents did not discharge the burden of proof to show an excusable reason for entry nor the owner's consent. They therefore submit that that the Plaintiff was entitled to general damages for trespass. They relied on the authorities of Rhoda S. Kiilu V Jiangxi Water & Hydropower Construction Kenya Ltd (2019) eKLR, Jogoo Kimakio Bus services v Electrocom Int. Ltd 1992 cited in the case of Ezekiel Morara Nyatogo vs Mini Bakeries Ltd Kiambu HCCA No. E38/2021(2023)eKLR among others and urged the court to set aside the judgment in terms of prayer (c).

Analysis and Determination

21. As a first appellate court, this court must approach the whole of the evidence on record from a fresh perspective and with an open mind and to evaluate and re-examine the evidence adduced in the trial court, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified. This was espoused in the Court of Appeal case of Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:

> " .....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 into account of particular circumstances or probabilities materially to estimate the evidence."

22. It is also the legal position that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

23. The Court of Appeal in Kiruga vs Kiruga & Another [1988] KLR 348, observed that:-

> " An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand."

24. The court has considered the grounds of appeal, the record of appeal, submissions by Counsel and the authorities cited and formed the opinion that the grounds of appeal may be summarized and consolidated with grounds 1, 2, 3 and 4 being heard together as raising the question of " Whether the trial court erred in law and fact in finding that illegal trespass on the Appellant's land had not been proved and in failing to award general damages for trespass"

25. The claim by the appellant was that sometime in July 2020, the Respondents trespassed on the suit parcel of land parcel Kyuso/Ngomeni'A'1096 and that the trespass continued until the time of filing

the suit on 14th August 2020. On the other hand, the Respondents claimed that they were on the suit parcel of land because it belonged to the 2nd Respondent Nduu Kithongo who is the 1st respondent's grandfather who had given him consent to use the land. The Respondents attached documents to show that the appellant had filed several suits against them concerning the suit land.

26. From the documents produced by the appellant, it is clear that the suit parcel of land is a product of the land adjudication process. The appellant adduced before the trial court a copy of the title deed to the suit land issued on 8th July 2020. He also adduced the findings and decision in the appeal to the Minister case number 90 of 2013, the decree in L17 of 1991, and letters dated 14th May 2020 and 22nd June 2020 on implementation of the decision in the appeal to the Minister. The appellant also adduced a demand letter issued to the Respondents by the Appellants Advocate dated 7th August 2020 and photographs said to have been taken of the suit parcel of land.

27. The respondents on the other hand adduced before the trial court the plaint filed in Machakos case number 44 of 2013 where the appellant sued 27 persons including the 2nd respondent challenging demarcation of the land which included the suit land situated in the Ngomeni location. He accused the defendants in that case of interfering and destroying the land. In Kyuso case number 3 of 2013 the appellant claimed that he was awarded land parcel parcel Kyuso/Ngomeni'A'1097 while the deceased Nduu Kithongo was awarded Kyuso/Ngomeni'A'1096. He sued for trespass to parcel 1097 and confirmed that he had appealed to the minister against the decision in land parcel 1096.

28. In case no. Kyuso PMCC 2 of 2019 the appellant claimed ownership of land parcel 1097 and sued for damages for trespass to the said land by the two respondents herein together with two others.

29. From an assessment of all the evidence adduced before the trial court, certain issues are noted. The decision in the appeal to the Minister does not show whether the parties to the appeal were present during the hearing and at the time when the decision was read. It is also not clear if the proceedings produced consist of the entire proceedings in the appeal to the Minister since the same do not show the participation of the parties to the appeal.

30. The said appeal was between the appellant herein Itavya Muli versus Ngui Makuthu, Joel Syengo, Rachel Mwasi, Dickson N. Musili and Nduu Kithongo (2nd respondent herein) and the subject matters of the appeal included the suit land parcel 1096 among others. The decision in the appeal was that the appeal was allowed and the land parcel subject matter of the appeal was to be recorded in the name of the appellant Itavya Muli Maingi.

31. The totality of the evidence detailed above leads the court to the conclusion that indeed the suit parcel of land was initially demarcated and recorded in the name of the 2nd respondent Nduu Kithongo. The court also concludes that the initial occupation of the land was as of right as an owner. The court notes that there was no serious contest to the 1st respondent's claim that he was using the suit land with the consent of the 2nd respondent.

32. The court agrees with the trial court that the evidence adduced before him does not show that the respondents were at any point made aware of the decision in the appeal to the Minister that changed the ownership of the suit land from the 2nd respondent to the appellant. It was not shown that the letter of demand by the appellant's advocate was delivered to the respondents and they refused and/or failed to give up occupation of the land.

33. In the court's view and contrary to the appellant's claim that the respondents entered the land in early July 2020 and started making bricks, the court is of the view that the claim is not supported by the evidence adduced. It appears to the court more likely that the said activities commenced earlier. This

finding is arrived at taking into account the appellant's averments in the Machakos case No. 44 of 2013 where he claimed that there was interference and destruction of the suit parcels of land by the defendants in that case. In the court's further view, the appellant sued for trespass to land parcel 1097 in Kyuso case nos. 3 of 2013 and Kyuso PMCC 2 of 2019 because there was no contest to his title to that land. He did not sue on land parcel number 1096 because its ownership was contested and had been awarded to the 2nd respondent.

34. It further appears to the court that the appellant waited until he obtained the title deed to the suit parcel of land on 8th July 2020 and soon thereafter issued a letter of demand on 7th August 2020. As was observed by the trial court it is not clear that the said letter was delivered to the respondents. The suit herein was filed soon after on 14th August 2020.

35. From the foregoing, the court is inclined to agree with the trial court's finding that the respondents were in occupation of the suit land as owner for the 2nd respondent and the 1st respondent, was in occupation with the consent of the 2nd respondent. The trial court found that the appellant did not establish anything to the contrary. This court agrees with this finding and further states that the appellant did not point to this court anything to show that the respondents entered onto and remained on the suit land without reasonable excuse.

36. The *Evidence Act* is clear upon whom the burden of proof lies. Section 107 provides as follows:

    1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

    2. When a person is bound to prove the existence of any facts, it is said that the burden of proof lies on that person.

37. Section 109 of the same Act further provides that:

> " 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 law that the proof of that fact lies on any particular person."

38. Section 3 (1) of the *Trespass Act*, defines trespass as follows;

> " Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."

39. The Court in the case of M'Mukanya v M'Mbijiwe (1984) KLR 761 stated that: trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership (See Thomson v Ward, (1953) 2QB 153."

40. The court above further quoted Winfield & Jolowicz on Tort, Sweet & Maxwell, 19th Edition page 428 as follows:

> " Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence

to the contrary, the owner of land with the paper title is deemed to be in possession of the land." [Emphasis supplied].

41. The court finds that the trial court did not err in finding that there was no illegal trespass proved. Having found that trespass had not been proved, the court finds that the question of an award of general damages for trespass as submitted by the Counsel for the appellant does not arise.

42. The upshot of the above is that the appeal herein is found to have no merit and the same is hereby dismissed with no order as to costs since the respondents did not participate in the appeal.

DELIVERED, DATED AND SIGNED AT KITUI THIS 30TH DAY OF APRIL, 2024.

HON. L. G. KIMANI, JUDGE

ENVIRONMENT AND LAND COURT, KITUI

Judgement read in open court and virtually in the presence of:

C/A Musyoki – Court Assistant

M/S Njambili for the Appellant

N/A for the Respondents