Adeti v Alexander Oyiolo Odongo T/A Alema Service Station (Civil Appeal 44 of 2018) [2022] KECA 1037 (KLR) (23 September 2022) (Judgment)

Neutral citation: [2022] KECA 1037 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 44 OF 2018

PO KIAGE, S OLE KANTAI & M NGUGI, JJA

SEPTEMBER 23, 2022

BETWEEN

COLOMBUS OPIO ADETI ..... APPELLANT

AND

ALEXANDER OYIOLO ODONGO T/A ALEMA SERVICE STATION ..... RESPONDENT

((An appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Busia (A. K. Kaniaru, J.) dated 21st February, 2018 in ELC NO. 180 OF 2014)

JUDGMENT

JUDGMENT OF KIAGE, JA

1 Colombus Opio Adeti, the appellant is the registered owner of a parcel of land known as L.R. No. Samia/Luchululo-Bukhulungu/995 (suit property). He claimed that on or about August 1, 2004, the respondent, Alexander Oyiolo Odongo, who owned a parcel of land known as LR. No. Samia/Luchululo-Bukhulungu/1050 (adjacent property) entered the suit property without consent or licence from the appellant and illegally constructed a concrete wall and a service station known as Alema Service Station (petrol station). Aggrieved, the appellant lodged a boundary dispute with the Busia District Land Registrar.

2 When the Registrar failed to settle the dispute, the appellant filed a Judicial Review Application in Busia vide High Court Miscellaneous Civil Application No. 14 of 2008 and obtained an order of mandamus compelling the Registrar to ascertain, fix and determine the said boundary in dispute. According to the appellant, the Registrar ascertained the boundaries and made a finding that the respondent had indeed trespassed on the suit property. However, the respondent declined to vacate and continued to conduct business to the detriment of the appellant.

3 Given that the suit property was a commercial plot situated within Funyula Township, the appellant had plans to construct commercial buildings. To that end, he had even submitted development plans for approval by the relevant authorities. However, these intentions were interrupted by the illegal occupation of the suit property by the respondent. As a result, he claimed to have lost expected income from the rent of his would be commercial buildings at Kshs. 400,000/= per month. In the end, he prayed for the following orders in the main;

a. An order of eviction.

b. A permanent injunction restraining the defendant, his agents, servants, employees or anyone claiming from him from trespassing into, taking possession or occupying or construction of any structures or in way interfering with his use, occupation and possession of the property.

c. Mesne profits from 1st August 2014 until full possession is conferred.

4 The respondent filed a defence and denied trespassing onto the suit property. He affirmed ownership of the adjacent property and claimed that the petrol station has been constructed on it and not on the suit property as claimed. In any case, he argued, the appellant did not legally acquire ownership of the suit property. In support of this assertion, he pointed out that one Aloyce Adongo Oluoch had sued the appellant at the High Court in Busia vide HCCC No. 78 of 2013 on allegations that he had fraudulently acquired the suit property. The respondent averred that the appellant was thus not entitled to the prayers sought in the plaint.

5 Kaniaru, J considered the pleadings, testimonies and evidence tabled before the court and delivered a judgment on 21st February 2018. He dismissed the suit with costs, having found that the appellant failed to make a satisfactory case of trespass, encroachment and occupation.

6 Dissatisfied with the judgment, the appellant filed the instant appeal containing 7 grounds, which, condensed, are that the learned judge erred in law and in fact by;

a. Premising his judgment on issues that were not before him.

b. Failing to find that the respondent had trespassed and encroached onto the suit property.

c. Finding that the appellant's case was not properly pleaded and that the evidence thereof was unsatisfactory.

d. Finding that the appellant failed to prove his case on a balance of probabilities.

7 During the hearing of the appeal, learned Counsel Mr. Omondi appeared for the appellant, while learned Counsel Mr. Ipapu held brief for Mr. Okutta who is on record for the respondent. Both parties had filed written submissions.

8 Mr. Omondi contended that the learned Judge erred by dismissing the appellant's suit in spite of the overwhelming evidence presented. The evidence of the Land Registrar, PW5, was conclusive as he confirmed that the respondent's petrol station, which was reinforced by an electric fence, was situated on the suit property. The learned judge therefore ought to have come to the proper conclusion that the respondent trespassed on the suit property and granted the appellant the prayers sought. Counsel urged the Court to allow the appeal with costs.

9 Mr. Ipapu pointed out that since parties are bound by their pleadings; the appellant erred by filing his suit against LR. No. Samia/Luchululo-Bukhulungu/1050 which did not exist at the time as it had already been subdivided into Samia/Luchilulu/1594 and 1595, a fact the appellant was well aware of. The learned Judge correctly dealt with this issue in the judgment and also held that since another entity

had purchased one of the subdivided parcels, it ought to have been joined in the proceedings since any orders against its portion would adversely affect it.

10 In conclusion, Counsel submitted that the appellant failed to prove his claim on mesne profits and was therefore not entitled to it. He urged the Court to dismiss the appeal.

11 In response, Mr. Omondi concurred that parties are bound by their pleadings but also pointed out that the respondent did not plead the issue of the subdivision in his defence hence that issue was not open for determination. In any case, the question in issue was whether the respondent's petrol station was situated on the suit property. Whether or not subdivision had taken place, this would not have precluded the judge from making a finding of trespass. He concluded that there was sufficient evidence on this and therefore the appeal ought to be allowed.

12 I have considered the record of this appeal and distilled the main issues for consideration as whether the appellant proved his claim of trespass and whether he was entitled to the reliefs sought. I shall consider these issues whilst keeping in mind our mandate on a first appeal which is to reconsider the evidence, re-evaluate it and come to an independent conclusion. See *Selle -vs- Associated Motor Boat Company* [1968] EA 123.

13 The appellant contended that he had overwhelming evidence to prove that the respondent had trespassed on the suit property. In a nutshell, his learned Counsel argued that the learned judge could not properly have come to a conclusion other than that the respondent had trespassed on the suit property and therefore ought to have granted the appellant the prayers sought. Regardless of the appellant's assertion, however, we are tasked to establish whether the appellant proved its case on a balance of probabilities. The threshold of a balance of probabilities was well elucidated by this Court in *Palace Investments Limited -vs- Geoffrey Kariuki Mwenda & Another* [2015] eKLR as follows;

> " [T]he burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in Miller -vs- Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-
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> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."" (Emphasis added)

14 This Court has over the years pronounced itself on what constitutes trespass, as was well captured in the oft-cited case of *M'mukanya -vs- M'mbijiwe* (1984) KLR 761;

> " [t]respass 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."

15 This was echoed in William Kamunge Gakui -vs- Eustace Gitonga Gakui[2016] eKLR as follows;

> " Trespass to land is a tort against possession and there must be an entry on the suit property by the tortfeasor."

16 It is worth mentioning that a claim in trespass can be instituted by anyone who has an interest in a property; he does not necessarily have to be the legitimate owner. In Samuel Mwangi -vs- Jeremiah M'itobu [2012] eKLR this Court pronounced;

> " [T]he learned Judge of the High Court erred in his conclusion that only an "owner" of land had the right to sue in trespass. That is clearly not so. As Winfield and Jolowicz state in their book "Tort" (12th Edition @ p. 361):
>
> "Possession in fact confers no actual right of property, but a possessor may nevertheless maintain trespass against anyone who interferes who cannot himself show that he has the right to recover possession immediately. A stranger cannot rely in his defence upon another person's right to possess (the "justertii") unless he can prove that he acted with that person's authority. Even wrongful possession, such as that acquired by a squatter, will, in principle, be protected except against the owner of the land or someone acting lawfully on his behalf.""

17 From the foregoing, it is clear that for one to successfully prosecute a claim on trespass, he must prove that one, he is in possession of the suit property hence has the right to immediate and excusive possession and two, that there is an entry onto the suit property by the tortfeasor and such unlawful entry denied the claimant his right to exclusive possession.

18 On the first limb, the argument of whether or not the appellant was a legal owner of the suit property was not necessary as we have established that an occupier of the suit property, even if a squatter, can institute a claim of trespass as long as it not against the lawful owner of the suit property. All that needed to be established was that the appellant was in occupation of the suit property. From the record, the appellant produced title to the suit property which, on the face of it, proved that he was the proprietor. His occupation of the suit property was also proved and the respondent did not rebut that aspect. The question on the authenticity of the appellant's title cannot defeat his claim of trespass and as such I need not delve into it.

19 On the second limb, the appellant needed to establish that the respondent's petrol station was constructed on the suit property. The appellant had to prove that the respondent's petrol station and fence were not within the boundaries of the respondent's parcel but rather were on or within the suit property's boundaries. The appellant is of the belief that DW5's (Land Registrar) report confirmed the trespass by the respondent. He held that view at the court below and continues to propand it before us. The said report dated 27th September 2013, at the conclusion read as follows;

> " The existing boundaries have therefore been confirmed by the surveyor to be correctly placed. Beacons have been marked within the existing wall and on the area after the main Funyala-Port Victoria road and next to the Air-strip. Access road between Samia/Luchululo Bukhulungu/995 & 1050 have been marked on the ground."

20 I respectfully share the learned judge's dissatisfaction with the report as it failed to deal with the pertinent issue which was the boundaries. The report only alludes to existing boundaries as confirmed by the surveyor. Yet the said surveyor did not testify. Nor was his report on the said boundaries produced in evidence. In absence of the surveyor's report and/or testimony, as the expert in the field, the learned judge was hamstrung and unable to establish the exact location and the boundaries between the suit property and the adjacent property. As such he could not ascertain where the petrol station was situated.

21 The appellant's case was hinged on; his own testimony, that of PW2 who testified that the appellant bought land from his father, and on DW5's report which the appellant claimed was proof that the

respondent had trespassed on the suit property. After reading the report, I share the bewilderment of the learned judge as to how the appellant interpreted that report to mean that the respondent had trespassed on the suit property when it clearly stated that the existing boundaries were correctly placed. In the circumstances, I must find that the learned judge correctly held that the appellant made an unsatisfactory case of trespass. The best he achieved, to use Lord Deming's phraseology in The Minister Of Pensions (Supra) is a draw, which was not good enough, and his claim had to fail as it did.

22 I find that the appellant failed to discharge his burden of proof as provided for in section 107 and 109 of the *Evidence Act*. The onus was on him to table evidence before the court to aid his claim. He failed to prove that the property on which the petrol station was situated was the suit property. And it follows that since he failed to prove his claim of trespass, he cannot be entitled to mesne profits.

23 I see no reason for departing from the learned Judge's findings and conclusions. In the result, my respectful view is that this appeal should fail in entirety, and I would dismiss it with costs.

As Kantai and Mumbi-Ngugi, JJA agree, it is so ordered.

JUDGMENT OF KANTAI, JA

24. I have had the advantage of reading in draft the Judgment of my brother Kiage, JA and I am in full agreement with the reasoning and conclusion arrived at by the learned Judge.

25. The appellant had a legal duty to prove his case on a balance of probabilities and having failed to do so the learned Judge of the Environment and Land Court was right to find no merit in the case.

26. The appeal is dismissed with costs to the respondent as ordered by Kiage, JA.

JUDGMENNT OF MUMBI NGUGI, JA

27. I have had the advantage of reading in draft the judgment of Kiage, JA., with which I am in agreement and have nothing useful to add.

DATED and delivered at Kisumu this 23rd day of September, 2022.

P.O. KIAGE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

Signed

DEPUTY REGISTRAR