IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME JJ.A)

CIVIL APPEAL NO. 63 OF 2017

BETWEEN

KARIM AMIRALI ABBANY...........................APPELLANT

VERSUS

IVANA R..1ST RESPONDENT

FRANCIS KADENGE KENGA.............2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the Environmental and Land Court at Malindi, (Olola, J.) dated 27th July, 2017

in

E&L.C.No. 64 of 2013)

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JUDGMENT OF THE COURT

[1] This appeal arises from a matter where Karim Amirali Abbany, (appellant) unsuccessfully sued the Ivana R. and Francis Kadenge Kenga 1st and 2nd respondents respectively for trespass on land described as Malindi Plot No. 9831*(the suit land).* In the claim, the appellant claimed that he was the lawful owner of the suit premises, having purchased the same in 2010; while the respondents were the registered proprietors of a neighbouring parcel described as Plot No. 9833 *(the adjacent parcel).* The appellant further asserted that sometime in the year 2011, prompted by a desire to demarcate his property using beacons, he contracted the services of a surveyor and it was then that to his surprise he discovered that the respondents had unlawfully encroached onto a portion of his land by putting up developments and fences thereon. All of his demands to the respondents to cease and desist in their conduct fell on deaf ears, prompting the appellant to institute suit seeking vacant possession of the suit premises, general damages for trespass, and declaratory as well as injunctive orders against the respondents.

[2] In a statement of defence dated 8th September, 2014, the respondents denied the allegations of trespass. Though they conceded that the appellant had purchased the suit land, they contended that they acquired the adjacent parcel way back in 2002 from a company known as Hotel Buildings Limited; through its director, one Marco Vancini and had enjoyed quiet and uninterrupted possession thereof. More critically, they added that at the time of acquisition of the adjacent parcel, the house and developments thereon were at least 10 years old and consequently, the appellant's claim that they had trespassed on the suit parcel by putting up the developments was factually untrue. Further, the portion that the appellant was claiming they had trespassed on, measuring 14.49m x 38m *(the disputed portion)*, was never part of the appellant's land. To the contrary they said, the disputed portion had always been a part of the respondents' parcel ever since the time of subdivision of the respective parcels.

[3] In a judgment delivered on 27th July, 2017, the learned trial judge **Olola J.,** found the claim unmerited and dismissed it with costs. Dissatisfied with that decision, the appellant lodged the present appeal, on grounds that the learned Judge erred by; finding the appellants' case unmerited and dismissing it; finding the appellant's land to have been incorrectly sized; finding that the respondents' had bought their land 10 years prior, yet their indenture showed that the 1st respondent's proprietorship began in 2008; failing to find that the respondents had encroached on the appellant's land; failing to find that the appellant, was the *bona fide* proprietor to the suit parcel, had indefeasible title thereto under section 23 of the Registration of Titles Act; unlawfully allocating the encroached portion of the appellant's land to the respondents contrary to Article 40 of the Constitution; failing to find that respondents' claim that they purchased the land in 2002 was fraudulent; giving preference to unreliable oral evidence whilst disregarding documentary evidence placed before him; ignoring the appellant's evidence and generally basing his decision on the wrong principles and acting injudiciously in the circumstances.

[4] With leave of the Court, the parties ventilated the appeal through written submissions. Learned counsel for the appellant **Ms. Chepkwony** adopted a three pronged approach in her written arguments of the appeal. Firstly, counsel submitted that there were errors of fact committed by the learned Judge by ignoring crucial evidence to wit; the certificate of official search and the deed plan. Had the Judge considered those documents he would have appreciated that the appellant's land measured 0.4104 Ha and thus he could not have concluded that it was incorrectly sized; that the deed plan and indenture produced proved that the respondents' registration came in 2008 yet the Judge erroneously held that they had been in occupation 10 years prior; that though the surveyor's report dated 25th November, 2013 proved that there was encroachment upon the appellant's land, instead of acting judiciously and remedying the apparent injustice, the learned Judge attributed the encroachment to distortions of the original boundaries.

[5] Counsel went on to submit that on errors of law, the Judge misapprehended the applicable law and failed to appreciate that under section 23(1) of the Registration of Titles Act *(repealed),* the appellant had an indefeasible title and that unless the same was proven to have been procured through fraud and/ or misrepresentation, neither the learned Judge nor any other body had the mandate to interfere with the appellant's title. Counsel contended that it was common ground that both parties had failed to exercise due diligence at the time of purchase, as a result of which they obtained parcels with erroneous boundaries and that in such circumstances, the court had a duty to correct the apparent injustice by allowing each party to only keep what is truly due to them. Closely related to the foregoing arguments, counsel also added that in fact, the respondents' parcel was purchased fraudulently and illegally, as the vendor Marco Vancini lacked the authority to transact. As a result, the Judge ought to have found that the respondents were trespassers in law from 2002 to 2008 when the indenture was registered.

[6] This appeal was opposed; Mr Lughanje learned counsel for the respondents filled written submissions which he wholly relied on. According to the respondents, both parties' parcels abutted each other and were purchased from a common vendor, Hotel Buildings Limited, to which Marco Vancini was a director; that at the time of purchase, each party was shown their respective portion and bought it on 'as is' basis. While the respondents' parcel already had developments thereon, the appellant's land was vacant and that upon purchase of their parcel in 2002, the respondents took possession and have been in occupation for about 11 years. On the other hand, the appellant had only been in occupation of his parcel for 3 years and that the portion he alleged to have been encroached on was part and parcel of the respondents' land all along.

[7] With regard to the contention that the respondents' purchase was fraudulent and that Marco Vancini was an unauthorized seller, counsel submitted that the said Marco Vancini not only signed the respondents' indenture, but that of the appellant as well, in his capacity as an authorized director of Hotel Building Limited, the parties' predecessor in title. Counsel pointed out that neither the appellant nor his predecessor in title were ever in possession of or owned the disputed portion and in any event, the sale agreement produced by the appellant does not disclose the measurement of the suit land.

[8] As a matter of fact, all the purchasers of the subdivided parcels had assumed that the demarcations thereto were proper and had the appellant not engaged the services of a surveyor after the fact, the parties would have stayed oblivious of any allegations of encroachment ever arising. In addition, that the respondents were never proven to have encroached upon the appellant's land; that the misinformation on the boundaries is something that was evidently perpetuated over the years by the parties' predecessors in title and the only way the appellant could have remedied the same was at the point of purchase, by having a survey conducted to ascertain the size and demarcations of the land prior to purchase. In conclusion, learned counsel submitted that the appellant's title over the disputed portion was extinguished by operation of the law by dint of sections 7, 13, and 17 of the Limitations of Actions Act and that the learned Judge's findings were legally sound.

[9] Before embarking on determination of the appeal, we must of necessity, remind ourselves of the duty as a first appellate court to re-analyze and re-evaluate the evidence tendered before the trial court and come up with our own independent conclusions (see. **Abok James Odera T/A A.J Odera & Associates v. Machira & Company Advocates [2013] eklr.** However, while so doing, the court must always be mindful of the fact that it neither saw nor heard the witnesses and make due allowance in that regard (see. **Kenya Ports Authorty v. Kuston (Kenya) Limited [2009] 2 EA 212.** From the grounds of appeal and the submissions of the parties, and the above summary of the salient features of the evidence before the court below, we have distilled three issues that fall for determination in this appeal;

a) Whether the appellant's suit was time barred and if not;

b) Whether the appellant's claim was merited and;

c) Whether the respondent's purchase was fraudulent

[10] On the first issue, the respondents have at the tail end of their submissions contended that the claim was filed out of time by dint of sections 7, 13 and 17 of the Limitations of Actions Act. However, this contestation was neither raised in the respondents' defence nor in their submissions before the trial court.

Under **Order 2 rule 4(1)** of the Civil Procedure Rules, it is stipulated that:

> ***'A party shall in any pleading subsequent to a plaint plead specifically in any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant <u>Statute of limitation</u> or any fact showing illegality-***
>
> ***(a) Which he alleges makes any claim or defence of the opposite party not maintainable;***
>
> ***(b) Which, if not specifically pleaded, might take the opposite party by surprise; or***
>
> ***(c) Which raises issues of fact not arising out of the preceding pleading.'*** (emphasis added)

The respondents never raised the issue of limitation of action in their defence. Raising that argument for the first time on appeal offends the provisions of Order 2 rule 4(1) aforesaid. Even if this court were inclined to extend its benevolence and deliberate on the unpleaded issue, as it may be, simply because it is an issue of law, that is only possible if the issue was at least canvassed by parties at trial and left to the court for determination (see. **Odd Jobs v. Mubia (1970) EA 476).** In this case limitation of time was neither pleaded nor argued at trial. The inescapable fate of that argument therefore is that it must be rejected (see. **Town Council of Awendo v. Nelson Oduor Onyango & 13 others (2013) eKLR**).

[11] This leads us to the question of whether the appellant's claim was merited. From the pleadings filed by the parties, it is common ground that the appellant and the respondents purchased the suit land and the adjacent portion respectively. What is in dispute is the rightful demarcation thereof both at the time of purchase as well as at the time of suit. While the appellant contended that his 0.4104 Ha parcel included the disputed portion and that the respondents had encroached thereon by putting up a fence and structures, the respondents averred that that was never the case; to the contrary, that the disputed portion had always formed part and parcel of their land, not the appellant's and that the structures complained of were part and parcel of the land at the time they purchased it in 2002. Nonetheless, both parties were in agreement that at the time of purchase, none conducted any survey to ascertain their respective demarcations and that they all bought the land on an **'as is'** basis.

[12] According to both parties, the adjoining parcels were hived off from the original plot No. 9822. They both produced a copy of an indenture dated 26th April, 2010 and registered on 19th May, 2010, which was testament of the existence of the mother title. Coupled with this was a deed plan number 193409 showing the respective sub-divisions. It is readily apparent that under the deed plan, the disputed portion falls within the acreage of the suit land. The crux of the dispute is whether, having been oblivious of this fact at the time of purchase, the appellant can now lay claim to the same; considering the respondents' contention that on the ground, the adjacent parcel has always been demarcated to include the disputed portion and that they purchased the same inclusive of that portion and the developments thereon. From the appellant's version of events all that can be gleaned from the survey reports he relied on dated 11th March, 2011 and 25th November, 2013; is that the respondent's wall encroached onto the disputed portion. From those survey reports, it is unclear when the encroachment began. However, looking at the respondents' case, an undated survey report prepared by the Ministry of Lands, Housing and Urban Development bore the following observations *inter alia*:

> ***'5) <u>That the proprietors of portion 9833 bought the property 'as it is' with the current perimeter wall in place.</u> The wall was constructed by the previous owner Mr. Marco Vancini who also sold portion 9831 to the current owner.***
>
> ***6) The Survey plan 'FR 255/52' shows existing structures (houses). This implies that the sub division survey was carried out when the (sic) some properties (including portion 9833) were already marked on the ground <u>hence the survey should have respected existing marks…'</u>*** (emphasis added)

[13] This lends credence to the respondent's contention that the encroachment if any had been there all along. Additionally, in his testimony, the appellant too, stated that he was unsure of the age of the house which sat on the disputed portion. He stated as follows:

> ***'I do not know if the house had been there for 10 years in 2002 when I bought the land I discovered about the encroachment in 2011. I do not know if the defendants' plans were approved by the municipal council. <u>The encroachment is big. I was not shown beacons as at the time of the purchase. I was shown the rough area of the land at the time of purchase'</u>***

This was reiterated by Batholomew Mwanyungu (PW 2) who was one of the licenced surveyors retained by the appellant. He too stated that he was unsure of how old the developments on the disputed portion were.

[14] On a balance of probability therefore, the evidence on record supported the respondents' contention that the encroachment had been there even at the time of purchase of the respective parcels and the learned Judge rightly found as much. As to whether the discovery of the discrepancies in boundaries should have been resolved in the appellant's favour; the appellant has faulted the learned Judge for failing to remedy the situation despite evidence that the boundaries on the ground did not reflect the ones in the Deed plan. It is clear that in this case, what the parties agreed on at the time of purchase as the true demarcations to their respective parcels was wholly based on what they saw on site. It had nothing to do with what the survey records indicated. The appellant himself has acknowledged that the only reason he realized that the disputed portion fell within his boundary, albeit in theory, was after he had a survey conducted in 2011. And even then, his discovery of the proper boundaries to his parcel was for want of a better word, accidental. In his plaint, the appellant avers that the reason he engaged the services of the surveyor was so that he could *'demarcate and put beacons, fence and start developing his property'* and that following the survey, it was then that he discovered that the respondents had encroached onto his land.

[15] The court had to contend with an odd set of circumstances in this matter. The situation pitted what the parties had agreed on the ground against what existed in government records. Readily apparent is that what was agreed upon and purchased on the ground did not tally with what was in the records. Indeed, the appellant never produced a sale agreement showing what he purchased and the acreage thereof. Even from the appellant's own pleading as per the plaint; he claimed that the only time he came to be aware of the disparity in measurements was when he engaged a surveyor. The appellant never exercised due diligence at the time of purchase. At the very least, he never even demanded to be shown the beacons to his property. How then can he now contend that the situation was altered to his detriment *after* purchase? All evidence points to the inescapable conclusion that the demarcations were unascertained at the time of purchase. It is to be remembered that the burden of proof rests upon he who wishes court to believe a fact to be true (see. sections 107- 109 of the Evidence Act).

It is also trite law that courts of law will as much as possible, endavour to give effect to the intentions of contracting parties. In **Jiwaji & others v. Jiwaji & another (1968) E.A 547** the Court of Appeal for Eastern Africa **(Clement De Lestang, V.P)** held:-

> ***'The courts will not, of course, make contracts for the parties but they will give effect <u>to their clear intention</u>....'***

[16] Given this unique set of circumstances regarding what was purchased *vis a vis* what was on paper, it was for the appellant to prove that

what he purchased was inclusive of the disputed portion. Closely related to this, he had the burden of proving that the encroachment had happened after his purchase and that the same was inconsistent with his ownership of the suit parcel. This he failed to do. Devoid of proof that his purchase included the disputed portion, the appellant cannot be allowed to benefit from what is reflected in the deed plan as he now contends. It is to be remembered that courts are courts of equity; which aids the vigilant and not the indolent; and though equity will not suffer a wrong without a remedy, the wrong must be first established.

The **Black's Law Dictionary, 9th Edn** defines trespass as

> *'An unlawful act committed against the person or property of another; esp. wrongful entry on another's real property…'*

It is thus imperative that in order to prove trespass, proof of ownership of the disputed parcel was necessary; which in the circumstances of this case, included proof of purchase of the disputed portion.

[17] Lastly, in regard to the contention that the respondents' purchase was based on fraud as the vendor, Marco Vancini was an unauthorized person. This is an allegation that only cropped up on appeal. The issue was never pleaded, pleadings are binding not just on the parties, but on the court as well (see. **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR).** Fraud is a question of both fact and law and having not been raised at trial the same cannot be deliberated upon at this stage. This ground of appeal also fails.

[18] The upshot of the above analysis is that we find this appeal lacking in merit, consequently it is hereby dismissed with costs to the respondents.

Dated and delivered at Mombasa this 22nd day of March, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

WANJIRU KARANJA

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JUDGE OF APPEAL

M.K. KOOME

....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR