IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 107 OF 2015

BETWEEN

ROSEBELLA CHEPCHUMBA KEMBOI.....APPELLANT

AND

NJUGUNA MWAURA.....RESPONDENT

(An Appeal from the judgment of the High Court of Kenya, Environment and Land Court at Eldoret, (Munyao Sila, J.) dated 29th January, 2015

in

ELC NO. 980 OF 2012

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JUDGMENT OF THE COURT

[1] This is an appeal from the judgment and decree of the Environment and Land Court ***(Sila Munyao, J.)*** granting a permanent injunction restraining the appellant from entering, utilizing land parcel title **No. Ngeria/Kesses Block 5 (Bayete/38 *(suit land)*** and an order of eviction from the said parcel of land.

[2] The respondent filed a suit against the appellant as the 1st defendant and **Simon Kemboi** as the 2nd defendant claiming, amongst other things, that he was the registered proprietor of the suit land comprising of 8 acres, the appellant and the said Simon Kemboi have since the year 2006 occupied portions of 5 acres and 3 acres respectively of the suit land; that the appellant had purchased three acres from **Joseph Gitu Wariu** in the adjacent land title No**. Ngeria/Kesses Block 5 (Bayete)/36**; that the said Simon Kemboi was the registered proprietor of land title **No. Ngeria/Kesses Block 5/Yayete/37** and that the appellant and Simon Kemboi had failed to vacate the suit land despite several requests.

The reliefs sought were an order of permanent injunction and an order of eviction. The appellant and Simon Kemboi who were represented by one advocate, filed a joint statement of defence merely denying the averments in the plaint.

[3] The respondent gave evidence and produced a copy of the title deed for the suit land issued to him on 8th November, 2000; a copy of title deed issued to Joseph Gitu Wariu in respect of land title **Ngeria/Kesses Block 5 (Bayete/36** on 23rd October, 2000, a sale agreement dated 26th April, 2006 for sale of three acres between Joseph Gitu Wariu and the appellant and a copy of the Register of Bayete Farmers Co-operative Society Ltd.

[4] The appellant testified, amongst other things, that she bought 3 acres in 2006 from land title No. Ngeria/Kesses Block 5 (Bayete)/36; that she was shown the land by **Hillary Koibenett** – a land broker appointed by **Simon Wariu Gitu** *(respondent's witness)*; that re-survey was done in 2011 – 2012 when she was asked to move to another land but that land was occupied by other people; that she does not have title to the 3 acres she bought and that the land she is occupying is within land title No. Ngeria/Kesses Block 5 (Bayete)/36.

According to the evidence of Simon Gitu Wariu, his father **Joseph Wariu Gitau** sold 3 acres to the appellant and 2 acres each to two other people and divided the land on the ground. However, his father died in 2006 and a succession case has not been filed through which the appellant and the two other purchasers could get title. He stated that he has no objection to the appellant getting title to her three acres and that the appellant occupies the respondent's land and has refused to move to the land she bought.

[5] Simon Kipkemei Kemboi testified at the trial that he is the registered proprietor of land title No. Ngeria/Kesses Block 5 (Bayete)/37 comprising of 7 acres where he lived with his brothers and children since 1973. He claimed that he has not collected title because he was given 3 acres instead of 7 acres. According to him, he occupies his own land and not the respondent's land which is about half a kilometer away from his land. He claimed that the problem has been caused by 2012 survey which relocated people from the parcels they had been occupying.

[6] The brief history of the source of the disputes in the area was given by **Charles Kipchumba Kiputia** who testified in support of the appellant and Simon Kemboi. Originally one **Christophema Magdalena** owned land **L.R. No. 11130** which was comprised of 655 acres. She sold the land to two Co-operative Societies, **Wendani Co-operative Society *(Wendani)*** and **Bayete Co-operative Society (Bayete)**, which contributed Shs. 50,000/= and Shs. 20,000/= respectively towards the purchase price. The two Co-operative Societies had a total membership of 115 members.

In about 1990, the land was sub-divided by a private surveyor into two portions, Wendani being allocated 320 acres and Bayete 335 acres. There were disputes amongst members of the two co-operative societies arising from the fact that Bayete was allocated more land than its share of contribution to the purchase price and some members of Wendani settled on Bayete portion. Bayete sub-divided its land to its members in about 1990 and according to the respondent, it was thereafter dissolved. However, Wendani has not distributed its share of the land to its members. In 2011, a Government Surveyor re-surveyed the portions of land allocated to Bayete members and altered and adjusted the ground occupation of portions allocated to Bayete members including portions occupied by the appellant, respondent and Simon Kemboi.

[7] After the trial and before the judgment was drafted the trial court directed the District Surveyor to visit the *locus quo* and

> **(1) identify the 3 parcels on the ground and their acreage,**
>
> **(2) determine who is in occupation of the three parcels of land and the extent thereof and determine the occupation of the respondent, appellant and Simeon Kemboi and find out which land parcels they occupy, their developments if any and the acreages that they occupy.**

The County Land Surveyor duly filed a ground report dated 21st November, 2014 accompanied by a diagram. The surveyor reported amongst other things that:-

> **(i) the marks determining the boundaries of parcel Nos. 38 and 37 were clearly marked on the ground as per the relevant Registry Index Map (RIM) and all marks pointed to the parties present.**
>
> **(ii) parcel No. 36 has been sub-divided into 3 parcels Nos. Ngeria/Kesses Block 5 Bayete/69, 70, 71 but the new numbers had not been registered.**
>
> **(iii) Appellants occupies part of parcel No. 38 up to and including a proposed adjacent road of access to part of parcel No. 69 and total acreage of parcel No. 38 occupied by her is approximately 0.0516 Hectares.**
>
> **(iv) Simeon Kemboi does not occupy part of parcel No. 38.**
>
> **(v) Elijah Kemboi, Pauline Rotich, Monica Rotich and Julius Kemboi occupy portions of plot No. 38.**

[8] Upon review of the evidence, the learned Judge made a finding in respect of the appellant thus:

> **"In my view, the evidence tabled demonstrates that the 1st defendant occupies a portion of the plaintiff's land. Her argument that this is the ground that she was shown when purchasing land parcel No. 36, cannot be an excuse to occupy the plaintiff's land. She needs to find her 3 acres in parcel No. 36 and not occupy a different parcel of land. She has no valid reason for occupying the plaintiff's land and she needs to vacate it."**

As regards the other parties occupying the respondent's land, the learned Judge said:-

> **"There are other occupants of the suit land, but they are not parties to this suit, and therefore I cannot make any orders against them. No evidence has been led that they occupy the land as servants/agents and/or assigns (sic) of either of the defendants. If the plaintiff wants them out of the land, then he needs to file a separate case against them so that they have an opportunity to respond to the claim."**

[9] At the outset we would agree with Mr. **Miyienda** learned counsel for the respondent that the grounds of appeal are unintelligible as they do not clearly specify the points which are alleged to have been wrongly decided. In that respect, the memorandum of appeal does not comply with **Rule 86(1)** of the Court of Appeal Rules. However, it is clear from the lengthy written submissions and oral submissions of **Mr. Oyaro**, learned counsel for the appellant, that the appeal raises three issues which are framed in the written submissions namely:-

> **(i) Whether there was a re-survey altering the boundaries and if so, whether the re-survey was done in accordance with the law;**
>
> **(ii) whether the respondent is the legal owner of the property, subject matter of the suit and**
>
> **(iii) whether the appeal is merited.**

In respect to the first issue, the appellant's counsel submitted that there were two surveys ordered by the court; that the boundaries which existed before 2012 were not established; that the learned Judge failed to consider the fact that titles had already been issued before the re-survey; that the learned Judge failed to consider the surrounding circumstances including that the dispute is just one of the myriad problems that bedevil the entire land once owned by Bayete Society and the possibility that the original boundaries in respect of the suit property could have been altered by the 2012 re-survey.

On the other hand, the respondent's counsel submitted that the court did not order a re-survey but merely asked the surveyor to identify the parcels of land on the ground and make a report on occupation.

[10] It is true that on or about 11th February, 2013, the trial Judge while dealing with an application for interlocutory injunction was of the view that the dispute was a boundary dispute which could be settled by the District Surveyor pointing the boundaries of the respective parcels of land to the parties and directed the District Surveyor:

> **"to visit the land parcel Ngeria/Kesses Block 5 (Bayete)/38, Ngeria/Kesses Block 5 (Bayete)/36 and Ngeria/Kesses Block 5 (Bayete)/37 to demarcate and point out the boundaries to the parties herein and file a report on the occupation on the ground of the 3 parcels of land."**

The District Surveyor filed a report dated 13th August, 2013 stating amongst other things:-

> *"A team of land surveyors accomplished the re-establishment of the boundaries of the above parcels as indicated by the court order. Note that parcel 36 has been sub- divided into three parcels of land i.e. parcel 69, 70 and 71 as indicated in our official survey plan.*
>
> *The report further indicated that only the respondent was present and the defendants were not present to be shown the boundaries of parcel 37 and 36."*

As the learned Judge stated in the judgment, that report did not resolve the dispute. It is also true as the evidence disclosed, that, the re-survey of 2011 -2012 by a Government Surveyor generated numerous disputes between the land owners as it relocated some land owners from the portions they had been previously occupying.

[11] We will revert to the two orders made by the court after considering the second issue raised namely, whether the respondent is the legal owner of the suit property. The appellant submitted that owing to the unique circumstances of the case, a title deed is not conclusive proof of ownership. It was further submitted that the respondent did not explain why he took so long to lay a claim to the suit property.

The respondent produced a copy of the register of Bayete Co-operative Society showing that he was allocated plot No. 38. His title was not questioned at the trial. Indeed, the appellant admitted that the respondent owns parcel No. 38 and stated that the problem was that the respondent's title is where she occupied. There was also uncontroverted evidence that the Government issued title deeds to the proprietors of Bayete land in 2000. **Section 27 (9)** of the Registered Land Act *(now repealed)* under which the respondent was registered provided that the registration of a person as proprietor vested in the proprietor absolute ownership subject to the Act and **Section 28** of the repealed Act provided that the rights of such proprietor shall not be liable to be defeated except as provided by the Act.

The evidence proved that the respondent was the proprietor of the suit land and there was no evidence to the contrary. The respondent also explained that he had not previously occupied the land because of the land clashes in 1990; 1991 and in 1997 and that when he went back he found the land already occupied by the appellant and other people.

[12] Returning to the two orders made by the trial Judge, the orders should be interpreted in the context of the dispute before the learned Judge. The first order of 11th February, 2013 was made in the honest belief that the dispute was a boundary dispute and the first order was intended to assist the parties to know the boundaries of their respective parcels of land.

The second order dated 12th November, 2012 was intended to assist the court to effectively determine the dispute by establishing whether the two defendants were occupying the respondent's land as claimed by the respondent. In neither of the two cases was the District Surveyors required to interfere with the 2012 established boundaries.

Again, in neither case did the District Surveyor alter the Registry Index Map relating to the parcels of land. Indeed, the District Surveyor's report dated 12th November, 2014 clearly states that the boundaries of the three parcels of land were clearly marked on the relevant Registry Index Maps.

The issue raised that the reports of the two District Surveyors did not follow the law is misconceived because the two surveyors did not conduct a re-survey but merely identified the boundaries in accordance with the respective and existing Registry Index Maps. In any case, the parcel No. 36 from which the appellant bought 3 acres is not contiguous to the respondent's parcel No. 38.

[13] In conclusion, this was a case where the court was dealing with a specific dispute whether the appellant and co-defendant were occupying portions of the respondent's land as alleged. The court was not dealing with the general dispute relating to the alleged injustice of the 2011 – 2012 Government survey of the Bayete land. We are satisfied that on the facts presented to the court the learned Judge arrived at the correct decision.

[14] As regards the costs of the suit in the trial court, the evidence indicated that the appellant genuinely but mistakenly believed that there was general uncertainty of the location of various portions of land and that the appellant genuinely but mistakenly believed that she was

occupying the land sold to her. In the circumstance, the order of costs against the appellant was unjust.

But having resolved the confusion, there is no reason why she should not be condemned to pay the costs of this appeal.

[15] In the result, the appeal is dismissed save that the order of costs against the appellant is set aside and substituted with an order that each party meets the costs of the suit in the trial court. However, the appellant shall pay the costs of the appeal to the respondent.

Dated and Delivered at Eldoret this 31st day of May, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR