IN THE COURT OF APPEAL

AT MALINDI

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

CIVIL APPEAL NO. 93 OF 2017

BETWEEN

AZZURI LIMITED.....APPELLANT

VERSUS

PINK PROPERTIES LIMITED.....RESPONDENT

(Being an appeal from the Judgment of the Environmental and Land Court

at Malindi (Angote J.,) delivered on 2nd May, 2017

in

Malindi E.L.C No. 3 of 2015)

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JUDGMENT OF THE COURT

[1] This appeal impugns the appreciation of facts, evidence and law by the trial Judge (**Angote J.**), in a dispute which centered on allegations of trespass or encroachment of boundaries. The appellant and respondent are registered proprietors of land parcels described as Chembe/Kibabamshe/356 and Chembe/Kibabamshe/272 respectively (the suit land). While the said parcels are adjacent to each other, a road reserve runs through the entire width of the two parcels; effectively separating them.

[2] The appellant's case as presented before the trial court was that the respondent had commenced some construction works of a permanent nature on its parcel which later exceeded the legal boundaries, thereby encroaching upon the road reserve and onto the appellant's land; which acts according to the appellant constituted actionable trespass. All demands made to the respondent to cease and desist from its offensive behavior are said to have fallen on deaf ears, prompting the appellant to mount an action for trespass seeking the following orders:-

> **a) An order directing the defendant *(now respondent)* to forthwith demolish and remove all that development offending the Plaintiff's boundaries of land parcel Chembe/Kibabamshe/356 and/ or which violate, (sic) which encroachment is as is (sic) described by the Malindi District Surveyor's topographical survey and report dated 6th January, 2015, the road reserve/ access road designed under registry map sheet 20 or in default the plaintiff does so demolish at defendant's cost (sic)**
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> **b) An order prohibiting the defendant, its servants, agents, employees, successors in title from violating the plaintiff's boundaries, which encroachment is as is described by the Malindi District Surveyor's topographical survey and report dated 6th January 2015 of parcel of land known as Chembe/Kibabamshe/356 and/or road of access/road reserves plotted, planned and established under registry map sheet No. 15.**
>
> **c) General Damages for trespass.**
>
> **d) Costs and interest of this suit.**

[3] The claim was opposed, vide the respondent's defence and counterclaim dated 12th January, 2015. While an application seeking leave to amend the defence and counterclaim was later made; the same was subsequently withdrawn. In its defence, the respondent contended that the claim was motivated by sheer malice on the appellant's part, given the fact that the appellant had waited for the project to be close to

completion before raising any issue. The respondent contended that the project was commenced in 2012 and that at the time of the appellant's complaint in 2015, the same was almost complete. Consequently, that in view of the appellant's acquiescence during the entire period of construction, it was estopped under the doctrine of estoppel from complaining at that point in time. In addition, the respondent termed the appellant a litigant who was envious of the respondent's beachfront property and whose sole objective was to ensure that the respondent was financially crippled and unable to realize the fruits of its Kshs.40 million investment.

[4] In view of the foregoing, the respondent's counterclaim sought the following reliefs as against the appellant:-

> **a) Estoppels orders (sic) directed against the plaintiff from retreating from the implied consent for the construction of the perimeter wall, construction of a building across the road which if found to have encroached any strip of land belonging to the plaintiff the defendant shall compensate the same in monetary terms of open market value.**
>
> **b) A permanent injunction to restrain the Plaintiff, her servants, agents or any other person acting on her behest from interfering in any manner whatsoever with the defendant's land reference number Chembe/Kibabamshe/272**

[5] In the course of trial, it emerged that the appellant had initially reported the dispute at the Office of the President, Ministry of Interior and Coordination of National Government, who summoned the respondent and advised the parties to engage a joint surveyor; through whom, it was hoped, the boundary between the two parcels could be ascertained and the dispute settled once and for all. To this end, they contacted the Malindi District Lands Office, which in turn appointed a District Surveyor, one Mr. Maurice Tsuma (PW1) to carry out the survey. However, the respondent later became suspicious of the report generated by PW1, given the uncharacteristic swiftness with which he had undertaken the survey work. Not only that, the methodology used therein was shrouded in mystery, leading the respondent to believe that corrupt dealings were afoot in the whole affair. Consequently, the respondent declined to sign the resulting report and instead engaged an independent surveyor, one Batholomew Mwanyungu (DW2) who needless to say, generated a report indicating that no encroachment had occurred as alleged.

[6] Each party called one of its directors and the respective surveyors as witnesses. At the close of hearing, the trial court in a reserved judgment delivered on 12th May, 2017 found that what was disputed was a general boundary and as such, any dispute thereby arising should have been referred to the Land Registrar for resolution and not to surveyors as the parties had done. Further, that the survey report generated by the appellant's surveyor was of little probative value, given that the methodology used in mapping the boundaries was inaccurate, as it failed to incorporate regard of physical features. Consequently, the appellant's suit was dismissed with costs, with the respondent's counterclaim being allowed in part, to the extent that a permanent injunction was issued to restrain the appellant and her proxy from interfering in any manner whatsoever with the respondent's land.

[7] Unhappy with that decision, the appellant mounted the present appeal, which is based on the grounds contained in the memorandum of appeal and in addition thereto, some supplementary grounds of appeal lodged without leave of court. As per the six grounds of appeal outlined in the memorandum of appeal, the appellant contends that the learned trial Judge erred by;

- **failing to appreciate the unanimous expert opinion of the surveyors engaged by the parties which proved the respondent's encroachment;**
- **failing to adjudicate on the public interest aspect of the litigation before him;**
- **finding that PW1 relied solely on the Registry Index Maps (RIM) yet the said witness had attested to having considered general features as well as other methodology such as GPS when conducting the survey;**
- **holding that the report proffered by the respondent's witness (DW2) was correct while at the same time disregarding that proffered by the appellant's expert witness (PW1) yet both reports bore a common conclusion to wit; that the respondent was liable for trespass.**
- **Concluding that the respondent had encroached upon the appellant's property but failing to order the removal of the offending development from encumbering the road reserve.**
- **failing to exercise his discretion properly despite having visited the** *locus in quo*

[8] As stated earlier, there was a supplementary memorandum of appeal, which gave five more grounds of appeal. The import of that list of supplementary grounds shall be addressed shortly. With leave of Court, parties ventilated the appeal by way of written submissions, with oral highlights at the hearing of the appeal. Appearing for the appellant, **Dr. Khaminwa,** submitted that though there was clear evidence of encroachment; a fact appreciated even by the learned trial Judge himself, he nonetheless went against the weight of evidence and ruled against the appellant. Counsel pointed out that according to the unanimous survey reports done by both parties' surveyors, the respondent's construction had encroached on the appellant's property by 0.224 Ha, but the Judge failed to give proper deference to these reports. Citing the case of **Parvin Singh Dhalay v. Republic, Criminal Appeal No. 10 of 1997 (eKLR),** counsel emphasized that courts must always accord due respect to the opinions of experts prior to making a determination on the issues at hand. In this case he said, apart from the expert opinions, the RIM 20 and the site visit all indicated that there was indeed encroachment on the road reserve as well as on the appellant's property.

[9] Given the obvious trespass, counsel for the appellant said, the learned Judge's failure to find in favour of the appellant offended the appellant's right to property as enshrined under **Article 40** of the Constitution. Moving on, Counsel also faulted the Judge's reliance on the google map; which he termed erroneous as the same was of little probative value. Elaborating further, he stated that the google map in question contradicted the contents of the RIM in so far as the demarcation of the access road was concerned and as such, the Judge ought to have given greater weight to the RIM and disregarded the google map entirely. Still on the issue of evidence, counsel contended that by the respondent's own admission, no due diligence was ever done on its part prior to purchasing the land; and accordingly, at the time of purchase, the respondent did not know the exact size of its land. Equally probable, he said, the fact is that the vendors of the respondent's parcel too, had been ignorant of the land's demarcation. In view of the foregoing, counsel contended that the court should have paid greater reliance on the RIM as the most credible authority in so far as the determination of boundaries was concerned.

[10] Appreciating the decisions in the cases of **Crispus Thuku Kinene v. Theresia Waithira Machua, ELC 454 of 2017 (eKLR)** and **Miller v. Minister of Pensions [1947] 2 All ER 372** as cited in **Palace Investments Limited v. Geoffrey Kariuki Mwenda & Another, Civil Appeal No. 127 of 2005 [2015] eKLR;** counsel stated that the burden of proof lies with the party asserting a particular truth and that once that party has adduced sufficient evidence in proof of its case, the burden then passes onto the opposing party. In this case he said, the RIM constituted sufficient evidence of the demarcation of the respective parcels, meaning the appellant had succeeded in discharging its burden of establishing the tort of trespass.

[11] With regard to the public interest of the litigation, learned counsel submitted that under **Article 62(1) (h)** of the Constitution of Kenya, all roads and thoroughfares are considered to be public land and are vested in the County Government in trust for the residents. In this case therefore, the respondent's encroachment upon the road reserve meant that the residents; who include fishermen wishing to access the sea, are in turn forced to trespass on the appellant's property in order to reach their destination. Further, that the non-inclusion of the area residents as interested parties in the matter does not absolve the respondent of blame; as public interest supersedes the private claims of individuals. He stated that contrary to the respondent's spirited assertions, even though the residents were not joined in the suit, under **Article 22 (2) (c)** of the Constitution, public interest maybe agitated by any person either on his own behalf or on behalf of the collective public. On that note, he asserted that the learned Judge erred by failing to consider the interests of the residents; as well as the public interest aspect of the matter.

[12] Lastly, counsel submitted that the Judge also applied double standards in so far as the survey methodology was concerned. He stated that on the one hand, the Judge discounted the survey done by PW1 on the basis that it was solely based on RIM; but on the other hand, agreed with the survey by DW2 even though both surveys were based on similar methodology and had concurring conclusions. Not only that, he argued that the Judge also failed to appreciate that as per PW1's survey, the methodology used included the use of GPS as well as consideration of general boundary features such as a common wall and fixed beacons. By extension therefore, he said, the Judge failed to appreciate that PW1's survey gave a holistic view of the boundary dispute and this in turn resulted in the denial of justice to the appellant.

[13] This appeal was opposed by **Mr. Ogembo,** learned counsel for the respondent who began by objecting to the supplementary memorandum of appeal which he submitted was filed without leave of court, hence outside the law and urged it be ignored. He added that even though the Court of Appeal Rules allow the filing of documents omitted from the initial record of appeal, the same is limited to the documents envisioned under Rule 87(1) & (2) and do not include supplementary memorandum of appeal. According to counsel, filing of the supplementary memorandum of appeal without leave was tantamount to introducing a fresh or duplicate appeal through the back door.

[14] Commenting on the grounds as per the memorandum of appeal, counsel for the respondent submitted that whereas the expert evidence is not automatically binding on the court, to the contrary, a court is always bound to first consider the probative value of the expert opinion prior to relying on it. Mr. Ogembo submitted that in this case, the trial court properly evaluated the evidence and reached the right conclusions. Citing the decision in the case of:- **Amosan Builders Developers Limited v. Betty Ngendo Gachie & 2 others (2009) eKLR,** he emphasized that the evidence of experts must always be considered alongside all other evidence before the court can form an opinion. In addition, that as per the holding in the case of **Stephen Kanini Wang'ondu v. The Ark limited (2016) eKLR;** expert evidence does not trump all other evidence, neither does it exist in a vacuum nor does it operate with mathematical precision. Rather, it should be tested against all other evidence; more so, when there is a conflict of expert opinion.

[15] Regarding evidential weight that was given to the survey reports by the Judge, counsel submitted that contrary to what was stated by the appellant, there was no concurrence of expert opinion in this matter. According to the survey report adduced in evidence by the respondent, he said, the findings therein indicated there was no encroachment and that the report generated by the appellant's surveyor failed to meet the general boundary survey standards and should in fact to be ignored. Further to this, he submitted that DW2 was clear that in a general boundary survey, an encroachment of 1.3m by 1.6m is considered negligible and that in this case, the road was deemed to be in its correct position relative to the respondent's boundary wall. Finally, in view of the defective methodology used by the appellant's surveyor; more so, when considered against the aforesaid findings by the respondent's surveyor, all allegations of trespass came to naught.

[16] The above is the summary of the salient matters that were before the trial Judge; this therefore being a first appeal, we are conscious of our role of reconsidering the entire evidence, evaluate it afresh and to draw our own independent conclusions albeit bearing in mind that we neither saw nor heard the witnesses and should make due allowance in this respect (See **Selle & Another v. Associated Motor Boat Co. Ltd & Others [1968] EA 123)**. Also, a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence, or the judge is shown demonstrably, to have acted on wrong principles in reaching the findings he did (See **Ephantus Mwangi & Another v. Duncan Mwangi Wambugu [1982-88]1 Kar 278).**

From the grounds of appeal, the record and the submissions of parties, we discern two issues which stand out for determination:

a) Whether the supplementary memorandum of appeal should be expunged and;

b) Whether the learned Judge erred in his appreciation of the evidence and law by dismissing appellant's suit and allowing the counter-claim.

[17] On the first issue, we were urged to expunge the supplementary memorandum of appeal on the basis that it was improperly placed on record. It is not in dispute that the supplementary memorandum was lodged without leave of Court on 1st December, 2017. In those circumstances, was it properly on record? While the respondent's strong views were stated with clarity, the appellant chose not to address the issue. Under **Rule 88** of the Court of Appeal Rules, documents that have inadvertently been omitted from the record of appeal can be brought on board without leave of court. The rule provides as follows:

Where documents are omitted from the record of appeal:

Where a document referred to in rule 87(1) and (2) is omitted from the record of appeal the appellant may within fifteen days of lodging the record of appeal, without leave, include the document in a supplementary record of appeal filed under

rule 92(3) and thereafter with leave of the deputy registrar on application.

For clarity purposes, **Rule 87(1)** outlines the documents as follows:

Contents of record of appeal

(1) For the purpose of an appeal from a superior court in its original jurisdiction, the record of appeal shall, subject to sub-rule (3), contain copies of the following documents -

(a) an index of all the documents in the record with the numbers of the pages at which they appear;

(b) a statement showing the address for service of the appellant and the address for service furnished by the respondent and as regards any respondent who has not furnished an address or service as required by rule 79, his last known address and proof of service on him of the notice of appeal;

(c) the pleadings;

(d) the trial judge's notes of the hearing;

(e) the transcript of any shorthand notes taken at the trial;

(f) the affidavits read and all documents put in evidence at the hearing, or, if such documents are not in the English language, certified translations thereof;

(g) the judgment or order;

(h) the certified decree or order;

(i) the order, if any, giving leave to appeal;

(j) the notice of appeal; and

(k) such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant:

Provided that the copies referred to in paragraphs (d), (e) and (f) shall exclude copies of any documents or any parts thereof that are not relevant to the matters in controversy on the appeal.

[18] **Rule 82(2)** on the other hand is inapplicable to this case as it is concerned with documents to be included in a second appeal whereas what is presently before Court is a first appeal.

From the foregoing therefore and as rightly submitted by the respondent's counsel; supplementary memoranda of appeal do not form part of the documents outlined under **rule 87(1)**; which may be brought on board without leave of Court. This conclusion is also partly informed by the fact that a memorandum of appeal is distinct from the record of appeal. Indeed, a memorandum of appeal is usually filed as an independent document, independent of the record of appeal. Under **Rule 82** the institution of the appeal is stipulated as follows:

Institution of appeals

(1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged –

(a) a memorandum of appeal, in quadruplicate;

(b) the record of appeal, in quadruplicate;

(c) the prescribed fee; and

(d) security for the costs of the appeal:

[19] We have recited the above Rules *in extenso* to demonstrate that whereas filing of Notice, Memorandum of appeal and Record of appeal constitute the institution of an appeal, the three are treated as separate documents. Consequently, the supplementary record of appeal that is envisaged is only concerned with documents that were omitted from the initial record of appeal. A supplementary memorandum is not at all mentioned and in our view it has nothing to do with amendment or substitution of the memorandum of appeal as was purportedly done in this case. Simply put, a supplementary memorandum of appeal introduced without leave of the Court cannot bring on board additional grounds of appeal. It is necessary to state that an appellant desirous of amending the initial memorandum of appeal may move the Court for leave to

amend under **Rule 44**. However the appellant herein chose not to exercise that option and instead filed the supplementary memorandum of appeal on its own motion. The said supplementary memorandum of appeal therefore has no legal consequence and is hereby expunged.

[20] That notwithstanding, we have to consider the merits of the grounds raised in the memorandum of appeal by which the appellant faulted the trial Judge's appreciation of the evidence and the law. In particular, the Judge's conclusions regarding the expert evidence placed before him, the site visit, the Registry Index Map and the oral testimony of the witnesses. To the appellant, a case of trespass was established and the learned Judge ought to have granted the appellant the relief sought.

[21] On our part, looking at the impugned judgment, it is clear to us that the decision of the trial court was primarily based not only on the weight of the evidence, but on the failure by the appellant to follow the laid down grievance handling mechanism; namely, referral of the dispute to the Land Registrar as per **section 18** of the **Land Registration Act.** It is common ground that the suit land is in a general boundary area (as opposed to a fixed boundary area). Resolution of disputes in a general boundary area is provided for under **section 18 (supra)** which states:

> **(1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.**
>
> **(2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.**
>
> **(3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:**
>
> **Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act, (Cap. 299).** (Emphasis added)

[22] This means that under the aforesaid provisions, boundary disputes pertaining to lands falling within general boundary areas must be referred to the Land Registrar for resolution; while disputes pertaining to lands with fixed boundaries may be investigated and possibly resolved simply through a surveyor. It was in appreciation of this provision that the learned Judge went on to hold in part that:

> **"Having found an existing dirt road, which is a physical feature, and the Defendant's wall in place, it was incumbent on the Plaintiff, to report any issue of encroachment by its neighbours to the Land Registrar so that he could fix the boundaries and ascertain if indeed there was encroachment.**
>
> **Instead, the Plaintiff resorted to reporting the issue to the Assistant County Commissioner, Malindi who summoned the Defendant vide his letter dated 30th December, 2014.**
>
> **When the efforts by the County Commissioner to resolve the dispute failed, the Plaintiff involved the District Surveyor who prepared a report, which is the basis of the current suit. The filing of the current suit before referring the dispute to the Land Registrar was contra-statute".**

[23] From this analysis of the law, it should be clear from the above that, we are in agreement with the learned Judge's conclusion that the dispute ought to have been heard by the Land Registrar as stated in the statute. Jurisdiction is everything. It has been said many times before, that, without it a court has no powers to make one more step, irrespective of the strength and nature of evidence in the parties' possession. Further and still on that aspect, this court has in the case of ***Kimani Wanyoike versus Electoral Commission Civil Appeal No. 213 of 1995 (UR)*** held that:-

> ***'Where there is a law prescribed by either the Constitution or an Act of Parliament governing a procedure for the redress of any particular grievance that procedure should be strictly followed'.***

In this case, reference of the dispute to the Environment and Labour Court at first instance was proscribed by statute and on that account alone, the appellant's case was a nonstarter. Although this matter would have rested on this point of jurisdiction, we will deal with the issue of evidence purely because counsel made submissions on the same and there was a determination by the Judge.

[24] Counsel for the appellant impugned the Judge's appreciation of the evidence. Both PW1 and DW2 concurred that in resolving disputes pertaining to a general boundary area, regard must be had of the physical features on the ground which include hedges, fences and roads. The Judge visited the site, he heard and saw the witnesses testify out of which evidence he concluded as follows in a pertinent portion as follows;

> **"In the circumstances, the mark that the court was shown when it visited the locus in quo does not change the observation that there were already existing features depicting the general boundaries between plot number 272 and plot number 356.**
>
> **Indeed, the law recognizes the fact that the Registered Index Maps only indicate the approximate boundaries and the approximate situation on the ground (see section 18 (1) of the Land Registration Act)**
>
> **Consequently, it was erroneous for PW1 to place reliance on sheet number 20 and sheet number 21 alone to determine the**

alleged extent of the encroachment of plot number 272.

To the contrary, the defendant's surveyor, DW2, used the correct methodology in determining the dispute between the plaintiff and the defendant.

Having found that the incomplete developments are within the boundaries of Plot No 272, I find that the plaintiff has not established on a balance of probabilities that the wall and developments on plot number 272 have encroached on the road of access and on plot number 356"

[25] We find it impossible to depart from the above findings by the Judge. We have also taken note of the evidence that when the appellant purchased the suit plot, the respondent's fence was in place, and so were all the features. The appellant did not raise an issue of encroachment with the neighbors or the land Registrar so that the boundaries could be fixed. One can deduce from appellant's conduct that it was happy to buy the plot "as is" and turning later to involve the County Commissioner and to file suit prematurely contrary to the statute in a case where the Judge found inadequate evidence of encroachment, the orders made cannot be faulted.

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

Dated and delivered at Mombasa this 14th day of June, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M.K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR