IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO. 72 OF 2016.

KENYA POWER & LIGHTING COMPANY LIMITED ……APPELLANT

AND

MARGARET AKOTH OLANG…….…….. RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Mombasa

*(**P.J. Otieno, J.**) dated 15th July, 2016*

in

H.C.C.C. No. 13 of 2011.)

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JUDGMENT OF THE COURT

In a suit filed before the High Court of Kenya at Mombasa, the respondent contended that she was the registered proprietor of land parcels described as **L.R Nos. 222/MN/V** and **MN/V/220** measuring 18 and 11 acres respectively. She alleged that following a request by the appellant, she agreed to sell and transfer 7.5 acres to it out of the first parcel at a consideration of Kshs.5,700,000/-. A sale agreement to this effect was duly executed on 15th November, 2000 and consideration paid. When the surveyor detailed by the appellant surveyed the parcel for purposes of subdivision pursuant to the agreement, he failed to adhere to the agreed acreage, and instead hived off an extra 0.2621 ha (0.65 acres) over and above the 7.5 acres previously agreed on.

Believing that she was entitled to compensation for the extra portion taken by the appellant, and while alive to the fact that electricity distribution was a public utility, the respondent proposed that the appellant compensate her by giving her an alternate but adjacent parcel of land in its possession of same acreage. The appellant on its part however, asked her to have the encroached portion valued, subject to which she would be compensated. The respondent duly engaged a valuer, who pegged the value of the encroached portion at Kshs.16,250,000/-. However, upon communication of this outcome, the appellant failed to honour its word and refused to compensate her, prompting her to file suit as aforesaid, in the High Court of Kenya at Mombasa.

In its defence, the appellant denied that there was ever a sale agreement between itself and the respondent. Instead, it contended that the wayleave in place was acquired through an easement created through an

agreement dated 26th May, 1969, between itself and the previous owner of the property, **Abdulali Jiwaji & Co. Properties Limited** (*"third party")*. Further, that a caveat on account of the said easement was registered against the title and that the easement which was on either side of the wayleave, ran with the property and was thus acquired as an encumbrance by the respondent when she took over proprietorship. It also denied that its surveyor hived off an extra 0.65 acres from the respondent's land. In view of the foregoing, the respondent's claim to compensation could not stand as she had not suffered loss and damage nor had the appellant trespassed on her land.

Otieno, J., after hearing the evidence of the three witnesses called by the respondent as well as the appellant's sole witness, rendered his judgment on 15th July, 2016 in favour of the respondent in the sum of Kshs.16,250,000/- plus costs and interest. In the judge's view, the appellant departed from its pleadings when it later admitted the existence of a sale agreement between itself and the respondent while initially it was emphatic that there was no such agreement, and when its witness stated that the purpose for the purchase of the land was to settle squatters, as opposed to erection of a third grid. That the appellant's evidence did little to controvert the respondent's case, particularly given that the respondent called a surveyor and a valuer whose evidence was never rebutted by the appellant. Further, that the appellant misconstrued the respondent's case, since the respondent's case was not about the wayleaves but rather that it had acquired on the ground an extra portion of land measuring 0.65 acres.

Dissatisfied with that decision, the appellant preferred this appeal, contending that the judge erred; by relying on the wrong pleadings; finding that the appellant illegally encroached on the respondent's land; holding that the appellant had admitted to being privy to the history of the matter; relying on the opinion of an expert without first establishing its relevance, failing to hold that the wayleave trace under which the respondent claimed was not available for compensation; rewriting the agreement dated 15th November, 2000; concluding that apart from the first parcel of land, the appellant had acquired an additional 2.072 acres from the respondent; failing to find that the only land acquired by the appellant measured approximately 7.5 acres; failing to find that the burden of proving the acquisition of the additional wayleave trace lay with the respondent, and lastly, by ignoring the evidence placed before him and misapprehending the appellant's case altogether.

With leave of court, both parties filed written submissions, and were granted limited time for oral highlights at the hearing of the appeal.

Mr. Munyithya, learned counsel for the appellant, whilst highlighting submitted that the judge relied on a wrong pleading in reaching his decision. Instead of focusing on the further re-amended statement of defence which dealt with the acreage, the judge relied on the re-amended statement of defence. As a result, there was a miscarriage of justice. On evidence, counsel submitted that none of the respondent's witnesses stated that the acreage bargained for had been exceeded and in particular, the surveyor called to testify in fact said that no land had been taken away from the respondent by the appellant. Indeed, none of the respondent's witnesses attested to having measured the size of the wayleave trace and consequently none could tell whether the appellant had exceeded its permitted wayleave area. In conclusion, it was submitted that while it was true that the respondent had purchased the land from the third party, the same was at the time of purchase, already subject to an encumbrance in the form of a wayleave in favour of the appellant. As such, the respondent had no right to compensation over the said wayleave, for it ran with the property as acquired.

Mr. Jengo, learned counsel for the respondent in his oral highlights, urged that the respondent's cause of action was as pleaded in the further re-amended plaint. That in securing the wayleave trace, the appellant had hived off more than the agreed parcel of land, thereby eating into the respondent's land by 0.65 acres. While acceding to the submission that parties are bound by their pleadings and that in the event of an amendment, the court ought to rely on the last amended pleading, he nonetheless submitted that the judge's reference to paragraph 4a of the re- amended defence instead of the further re-amended defence in his judgment, was a slip of the pen as the two documents had similar contents under the said paragraph. The reference, in any event, he said, occasioned no prejudice to the appellant as the import remained the same, in both defences. In any event, he added, under **section 79A** of the **Civil Procedure Act,** reference to the wrong pleading is not a fatal defect and cannot be a sufficient ground to sustain an appeal.

On evaluation of evidence, counsel implored this Court to stay true to the decision in **Mwanasokoni v. Kenya Bus Services Ltd [1985] KLR;** where it was held that the Court of Appeal should be hesitant to interfere with findings of fact by the trial judge, for unlike the trial judge, this Court would neither have the opportunity to hear the witnesses nor to observe their demeanor. On this premise, the Court ought not to interfere with the judge's findings on the issue of encroachment. Further that on the face of it, the witness' testimony revealed that the appellant had taken land in excess of what had been agreed.

With regard to the expert evidence, counsel urged this Court to recognize that while both parties had engaged the services of surveyors and valuers who prepared respective reports, but only the respondent called hers to testify. The appellant did not, for no apparent reason(s). On this premise, counsel urged, the judge was correct in holding that the respondent's land had been unlawfully taken and that she was entitled to compensation, in the absence of contradicting evidence from the appellant and that he was right too in drawing an adverse inference against the appellant for its failure to call the said experts to testify. All these, counsel concluded, left the judge with no other option than to rely on the respondent's expert witness whose evidence was in any event corroborated by DW 1.

This is a first appeal. As such, we are required to revisit the evidence that was before the trial court, look at it afresh, analyse and evaluate it, and then determine independently whether the conclusions reached by the learned trial Judge should stand or not. (See. **Kenya Ports Authority versus Kuston (Kenya) Limited [2009] 2EA 212)** and also **Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR).**

That said, from the plethora of the grounds of appeal, we have determined that this appeal can be disposed on two broad grounds:-

a) Whether the judge based his judgment on wrong pleadings and if so, the consequence thereof; and,

b) Whether the respondent proved her case during the trial.

On the first issue, it is common ground that parties filed a series of amended pleadings, ultimately culminating in a further re-amended plaint dated 5th March, 2014 by the respondent and a further re-amended defence dated 20th March, 2014 by the appellant. Prior to this, the parties had filed a further amended plaint and defence. Both the further amended and re-amended defences, were more or less similar, contained paragraphs 4a. However, at paragraph 4 of the judgment, the judge expressed himself thus:

> **"….In the further amended defence dated 2.5.2012 and filed in court on the 4.5.2012, the defendant initially denied the existence of sale between the parties and declines** (sic) **to comment on the question of acreage of the plots. At paragraphs 4a of the said defence the defendant admit that the sale was necessitated by the need to expand its electric grid but not for settlement of squatters….."**

Owing to the above excerpt, the appellant is convinced that its further re- amended defence was ignored, with the judge instead basing his decision on its earlier pleading- the further amended defence. It is trite law that the court should be guided by the latest pleading on record. In this case, that would have been the further re-amended plaint and defence. As the court stated in the case of **Mohan Meakin (K) Limited v Attorney General [2014] eKLR**:-

> **"….We endorse Hodson, L.J.'s statement in Warner v. Sampson [1959] 2.W.L.R. 109 at page 123-124 that:**
>
> ***'Once pleadings are amended, what stood before the amendment is no longer material before the court.'***
>
> **After amendment, the case is determined on the basis of amended pleadings…."**

So was the decision anchored on a wrong pleading, and if so, was the appellant prejudiced?

Paragraph 4a of the further amended defence reads;

> **"In answer to paragraph 4(b) of the plaint, the defendant admits that the sale was necessitated by the need to expand its electric grid but denies that it also wanted to resettle some people who had been displaced and the plaintiff is put to strict proof."**

On the other hand, paragraph 4a of the further re-amended defence reads;

> **"In answer to paragraph 4(b) of the plaint, the defendant admits that the sale was necessitated by the need to expand its electric grid but denies that it <u>had approached the plaintiff to expand the wayleave on the plaintiff's land and further denies that it</u> also wanted to resettle some people who had been displaced and the plaintiff is put to strict proof."** (Emphasis added)

The only difference between the two is that in the latter, the appellant had also placed a specific denial to having approached the respondent for extra land. A careful reading of the record and indeed the judgment leaves one in no doubt at all that the Judge was actually referring to paragraph 4a of the further re-amended statement of defence. Given the circumstances, we would agree with the submission of the respondent that reference to further amended defence as opposed to further re-amended defence was merely a slip of the pen. In any event, a close scrutiny of the two paragraphs shows that the contents were more or less the same. Accordingly, no prejudice was occasioned to the appellant. Further, the appellant has not shown which particular issue covered in the said pleadings was ignored by the judge in his judgment. The judge's finding for the respondent that DW 1's admission that the land purchased was also for the purpose of settling squatters and that there was a sale agreement between parties, being a departure from the appellant's own pleading that is actually borne out by the further re-amended defence cannot be faulted. To conclude on this aspect of the appeal, we would say that even if the submission of the appellant was correct, it is such a minor departure that does not go to the root of the appellant's case and therefore easily curable under the provisions of **Section 79(a)** of the **Civil Procedure Act**. The appellant was neither occasioned any injustice nor has it shown any. On this premise, we see no merit in this complaint.

On the second issue, the appellant has faulted the judge's appreciation of the evidence and the law; saying that the respondent failed to discharge her burden of proof. Under **Sections 107** and **108** of the **Evidence Act,** the burden is upon he who alleges a fact to prove it. In this case, the respondent's complaint was that the appellant had taken 0.65 acres belonging to her without her consent and or compensation. The appellant rebuffed these claims saying that the land it took was that agreed on and if at all there was any excess, the same was covered by the wayleave agreement entered into between it and the third party which was registered as an encumbrance against the land and ran with it and was therefore equally binding on the respondent.

It is common ground that prior to the dispute, the respondent was the registered owner of the land parcel, thanks to a transfer document furnished in court by the appellant, which had an easement registered against it in the appellant's favour on 18th August, 1969. Following the undisputed agreement dated 15th November, 2000, between the parties, the respondent sold 7.5 acres of the first parcel to the appellant; whereupon the first parcel was subdivided, with 7.5 acres thereof being transferred to the appellant as subdivision No. 2052. According to the respondent, all was well with regard to the conveyance of 7.5 acres until she later discovered that the appellant had taken more land than it had bargained for. To her, the dispute turned into whether *in addition* to the 7.5 acres, the appellant had also taken 0.65 acres worth of her land on the ground.

In order to succeed in her claim, the respondent needed to show that the appellant had taken over 0.65 acres in excess of what was agreed. According to the appellant, she failed to do so, as none of her witnesses adverted to the acreage in contention in their evidence.

However, looking at the testimony of the respondent's witnesses, starting with PW1 herself, that assertion is not correct. She testified in part that:-

> **"…I want the defendant to pay me the portion they took without my consent. It measures 0.65 acres. According to my valuer, it is worth the value assigned** (sic) **the value of Kshs.16,250,000/-…"**

In furtherance of this position, she also called a registered surveyor, **Mr. Frederick Makau Kimotho,** *(PW 2)* and a professional surveyor, **Mr. Edwin Otieno Oduor**, *(PW 3,)* who both testified to the fact that the land taken by the appellant on the ground exceeded that offered in the sale agreement. For the appellant, **Walter Akelo Mboro** (*DW 1*), a wayleaves officer working for the appellant testified. While admitting that he had no knowledge in survey, and disputing the allegation that the appellant had unlawfully taken the respondent's 0.65 acres, under cross-examination he made this rather telling statement:-

> **"Our surveyors have carried out survey to show which of the land was actually taken. I am aware that KPLC & Co. contracted M/s Tysons to carry out a valuation of the subject parcel of land but we have not produced it in court…. The area we acquired should be 7.5 acres. If the area on the ground of the land sold together with that on the trace is more than 7.5 acres, then there would be a problem."**

By this statement, can it be said that the appellant categorically denied that it had acquired more land than that contemplated in the sale agreement? We do not think so. It is also not in doubt that the respondent's evidence tendered through the surveyor and valuer went unrebutted despite the fact that the appellant was in a position to do so, having engaged a surveyor and a valuer of its own. Though it prepared its own report for reasons best known to itself, the appellant failed to avail the report to court. On the authority of **Kimotho v. KCB [2003]1 EA 108**, the trial court cannot be faulted in drawing an adverse inference against the appellant for its failure to call this evidence which was crucial and would have gone a long way in fortifying its case.

We find no merit at all in the argument by the appellant that the court misinterpreted the evidence of DW 1. The learned judge having listened to the witnesses was better placed to consider the significance of their testimony. The judgment of the trial court and its interpretation of the evidence of DW 1 as correctly observed by counsel for the respondent, cannot be faulted. His evidence was properly appreciated and understood by the judge and in any event, the appellant having withheld its surveyor's and valuer's evidence from the court, the respondent's evidence in this aspect was uncontroverted. In any case, this was a finding of fact by the trial court which we are being asked to overturn. Dealing with the same issue in the case **of Peters v Sunday Post Ltd [1958] EA 424**, the predecessor of this Court observed:-

> **…."It is a strong thing for an appellate court to differ from the finding, on a question of fact, or the judge who tried the case, and who has had the advantage of seeing and hearing witnesses. An appellate court has indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion….."**

Of course the appellate court will be perfectly in order to interfere with the finding of fact that is challenged on an appeal if 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 finding he did. See **Ephantus Mwangi & Another v Wambugu [1983-1984] 2 KAR 100**. It has not been demonstrated to us in this appeal that there was no evidence upon which the trial court would have reached the conclusion that there was encroachment on the respondent's land. Indeed, there was overwhelming evidence in this regard. Nor has it been demonstrated that the trial court acted on wrong principles in reaching the finding.

We agree with the appellant's submissions that a court is not bound by the opinion of an expert and or his evidence. We also endorse the appellant's submissions that the court has to consider such evidence together with the other evidence called. However, in this case, the trial court dealt with the issue of expert witnesses thus:-

> **"22. To get to the determination of the question whether or not the defendant ended up with more land that** (sic) **it bought from the plaintiff, actual measurements and calculations must be carried out**
>
> **23. Such is the duty and area of the professions of surveyors. Indeed, the ultimate court's opinion must be guided by an opinion of an expert in that field. Section 48 of the Evidence Act may be of help to the court in this regard…..**
>
> **24. In the matter before me both parties appreciated that it would take the survey or as an expertise** (sic) **to resolve the question. Both parties engaged the services of surveyors in the words of Pw1, Pw2 and Dw1 but only the plaintiff availed a report and called the maker of that report to produce it, give evidence and be cross-examined.**
>
> **25. Based on that report, and there being no evidence or opinion in rebuttal, I am persuaded that my opinion on whether or not there was encroachment can only be founded on the report by the expert……I further make the inference that the defendant having commissioned a surveyor but declined to avail such a report in evidences,** (sic) **he so held back the report because had it produced it, it would have been adverse to its case."**

With this kind of reasoning, how can the trial court be accused of relying on the opinion of an expert surveyor without establishing its relevance? In our view, the respondent's entire evidence and that of DW 1 in cross - examination could lead a reasonable tribunal to the conclusion which the trial court reached. The trial court has ably justified why the evidence of the respondent's surveyor came in handy. The appellant did not expect the trial court to move to the locus and determine the encroachment or otherwise by taking measurements itself. The trial court was least qualified for such undertaking. The trial court may well have come to a different conclusion had the appellant's surveyor testified and tendered evidence in rebuttal. It did not.

The authorities cited by the appellant in support of its case on this aspect that is; **Elizabeth Kamene Ndolo v George Matata Ndolo [1996] eKLR, Kimatu Mbuvi t/a Kimatu Mbuvi & Bros v Augustine Munyao Kioko [2006] eKLR** and **David Musyimi Ndetei t/a Oasis Mineral Water Company & Another v Safepak Ltd [2005] eKLR** do not really help or advance its case.

Finally given the evidence on record tendered by the respondent, the claim by the appellant that if there was any encroachment, the same was covered in the wayleave trace and that the laying of the additional power line was on the existing way leave trace falls flat on its face.

Having found that indeed the appellant had taken from the respondent more land than it had purchased, the fate of the appellant's case was sealed. The appeal fails and is accordingly dismissed with costs to the respondent.

Dated and delivered at Mombasa this 11th day of May, 2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR