Maina (Suing as the administrator of the Estate of Wilson Maina Kahora) v Ngunjiri (Environment and Land Appeal E062 of 2023) [2024] KEELC 4237 (KLR) (16 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4237 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA

ENVIRONMENT AND LAND APPEAL E062 OF 2023

YM ANGIMA, J

MAY 16, 2024

BETWEEN

GEOFFREY GITHINJI MAINA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF WILSON MAINA KAHORA) ..... APPELLANT

AND

IGNATIUS KAMAKIA NGUNJIRI ..... RESPONDENT

(Being an appeal against the judgment and decree of Hon. C. Obulutsa (CM) dated 11.03.2021 in Nyahururu CM ELC No.384 of 2018)

JUDGMENT

A. Introduction

1. This is an appeal against the judgment and decree of Hon. C. Obulutsa (CM) dated 11.03.2021 in Nyahururu CM ELC No. 384 of 2018 – Geoffrey Githinji Maina (Suing as administrator of the estate of the late Wilson Maina Kahora) -vs- Ignatius Kamakia Ngunjiri. By the said judgment, the trial court dismissed the Appellant's suit with costs to

the Respondent.

B. Background

2. The record shows that vide a plaint dated 08.10.2013 and amended on 10.12.2018, the Appellant's father sued the Respondent seeking the following reliefs:

    a. A permanent injunction restraining the defendant either by himself, relatives, agents, employees, heirs and any other person from entering, occupying,

selling, disposing, alienating or otherwise interfering in any way with the suit land Parcel No. LR.Nyandarua/Ndemi/15xx.

b. An order that the defendant do open the road of access between his Plot No. 73 and the plaintiff's land No. Nyandarua/Ndemi/15xx and in default the court bailiff do forcefully open road and eject the defendant from Nyandarua/Ndemi/15xx.

c. Mesne profits from June, 2007 up to the determination of the suit.

d. Costs of the suit.

e. Any other or further relief that this honourable court may deem fit to grant.

3. It was pleaded that all material times the late Geoffrey Githinji Maina (the deceased) was the lawful owner of Title No. Nyandarua/Ndemi/15xx (Parcel 15xx) measuring 3.00 ha whereas the Respondent was the owner of adjoining Title Nos. Nyandarua/Ndemi/73 and 6xx. It was further pleaded that sometime in June, 2007 the Respondent had unlawfully entered Parcel 15xx, removed the fence marking its boundary with Parcel 73 and commenced his own developments on Parcel 15xx. It was also contended that the Respondent had closed the access road between those two parcels thereby denying the estate of the deceased access to and enjoyment of Parcel 15xx.

4. The record shows that the Respondent filed a defence dated 23.04.2019 denying the Appellant's claim in toto. Apart from admitting ownership of Parcel 73, he denied that he had in June, 2007 unlawfully entered Parcel 15xx, closed any access road to it or undertaken any developments thereon and put the Appellant to strict proof of his allegations. The Respondent further denied ownership of Parcel 6xx and put the Appellant to strict proof of his allegation in that regard.

5. The Respondent further pleaded that Parcel 15xx was a sub-division of Title No. Nyandarua/Ndemi/13xx and that the boundary between Parcel 73 and 1381 was fixed about 1982 – 1983 and was re-confirmed in 1990 in a boundary dispute involving the owners of Parcel 13xx and 73 hence the Appellant's suit was not filed in good faith. As a consequence, the Respondent prayed for dismissal of the Appellant's suit with costs.

C. Trial Court's Decision

6. The record further shows that upon a full hearing of the suit whereby both parties testified as sole witness on their own behalf, the trial court found and held that the Appellant had failed to prove his claim against the Respondent on a balance of probabilities as required by law. The trial court was of the view that any dispute as to the boundaries involving Parcels 15xx, 73 and 6xx ought to have referred to the land registrar first for resolution under Section 18 of the *Land Registration Act*, 2012 before any court action is undertaken. The court was further of the view that the previous dispute involving the original Parcel 13xx and 73 found no evidence of encroachment by the Respondent hence it resulted in a set of recommendations by a panel of elders. As a consequence, the trial court dismissed the Appellant's suit with costs to the Respondent.

D. Grounds of Appeal

7. Being aggrieved by the said judgment the Appellant filed a memorandum of appeal dated 07.04.2021 raising the following 14 grounds of appeal:

a. That the learned chief magistrate misdirected himself and misapplied the law in arriving at the decision that he did.

b. That the learned chief magistrate erred in fact and in law by failing to appreciate the evidence tendered with regard to ownership of the Appellant's land that the Appellant is the absolute proprietor of the suit property which entitles him to protection of the said title as provide for under the *Land Registration Act*.

c. That the learned chief magistrate erred in fact and in law by failing to make a determination on the question of encroachment and/or trespass by the Respondent on the Appellant's land despite this being the subject of the suit and evidence to this effect.

d. The learned chief magistrate erred in fact and in law by failing to consider the evidence placed before him detailing that the Appellant has been denied access and possession of the whole of the Appellant's land by the Respondent.

e. The learned chief magistrate erred in fact and in law by holding that the suit before him relates to only a boundary dispute as the dispute relates to trespass and/or encroachment of the Appellant's land and the honourable court has competent jurisdiction to determine the said dispute pursuant to powers donated to the honourable court by *the Constitution* and the *Environment and Land Court Act*.

f. The leaned chief magistrate erred in law and in fact in finding that the Respondent could not be found to be a trespasser and in fact be evicted from the suit property which is in the Respondent's possession yet the court appreciated that the Appellant had the rightful title to the suit property, had obtained the right to sue, but was denied physical occupation and access by the Respondent.

g. The learned chief magistrate erred in law in finding that the Appellant cannot be heard on the question of trespass and/or encroachment of the suit property by the honourable court before a Land Registrar has determined the matter.

h. The learned chief magistrate erred in law and in fact in finding that the dispute before him relates to a boundary issue instead of both a case for trespass and/or encroachment and the unlawful closure of the access road to the Appellant's land.

    i. The learned chief magistrate erred in law and fact in determining that the current dispute is related to and/or in the same as the dispute between the Respondent and the former holder of the mother title of the Appellant's land.

j. The learned chief magistrate erred in law and in fact when he disregarded the report of the District Surveyor from the Nyahururu District Survey Office yet the High Court had ordered the District Surveyor to conduct a ground visit and to submit a report on the same.

k. The learned chief maigstrate erred by failing to appreciate that the Appellant had proved its case on a balance of probabilities which was uncontroverted by the Respondent on the question of ownership of the suit property and encroachment by the Respondent.

l. The learned chief magistrate erred by finding that the materials adduced by the Respondent relating to an irrelevant and settled dispute between the holder of the mother title of the suit property and the Respondent were relevant and conclusive of the present suit.

m. The learned chief magistrate erred by failing to find that where trespass is proved a party need not prove that he suffered any specific damage or loss to be awarded damages.

n. The judgment of the court was unjust in all circumstances of the case.

8. As a result, the Appellant sought the following reliefs in the appeal:

a. That the appeal be allowed.

b. That the judgment of the trial court dated 11.03.2021 be set aside and substituted with an order allowing the Appellant's suit in Nyahururu CM ELC No. 384 of 2018.

c. That the Appellant be awarded costs of the appeal.

E. Directions on Submissions

9. When the appeal was listed for directions the parties agreed to canvass it through written submissions. As a result, the parties were given timelines within which to file and exchange their respective submissions. The record shows that the Appellant filed written submissions dated 13.02.2024 whereas the Respondent's submissions were dated 01.03.2024.

F. Issues for Determination

10. Although the Appellant raised 14 grounds in his memorandum of appeal, the court is of the opinion that the same may be summarized into the following key issues:

a. Whether or not the trial court erred in law and fact in dismissing the Appellant's suit.

b. Who shall bear costs of the appeal.

A. Applicable legal principles

1. This court as a first appellate court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of Selle & Another –vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123 at page126 as follows:

> "...Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally."

12. Similarly, in the case of Peters –vs- Sunday Post Ltd [1958] EA 424 Sir Kenneth O' Connor, P. rendered the applicable principles as follows:

> " ...it is strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the 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..."

13. In the same case, Sir Kenneth O'Connor quoted Viscount Simon, L.C in Watt –vs- Thomas [1947] A.C. 424 at page 429 – 430 as follows:

> "My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the class of cases in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a Tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other Tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

14. In the case of *Kapsiran Clan -vs- Kasagur Clan [2018]* eKLR Obwayo J summarized the applicable principles as follows:

    a. First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

    b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

    c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

H. Analysis and Determination

a. Whether or not the trial court erred in law and fact in dismissing the Appellant's suit

15. The court has considered the material and submissions on record in this appeal. The Appellant's advocates submitted that the trial court erred in law and fact in holding that the dispute between the parties was merely a boundary dispute whereas it was clear from the material on record that the dispute was about trespass and encroachment on the Appellant's land. It was thus submitted that the trial court had jurisdiction to entertain the suit contrary to its holding that only the land registrar was mandated to handle the dispute.

16. The Appellant further submitted that the trail court erred in law and fact in disregarding the district surveyor's report tendered in evidence by the Appellant which report was prepared pursuant to a court order. The trial court was also faulted for making reference to previous boundary resolution proceedings between the Respondent and a third party which had no relevance to the suit before it. It was thus the Appellant's submission that he tendered sufficient evidence before the trial court to prove his claim against the Respondent on a balance of probabilities.

17. The Respondent, on his part, fully supported the decision of the trial court in holding that the Appellant had failed to prove his claim to the required standard. It was submitted that the district surveyor's report which was tendered as evidence by the Appellant was prepared without his involvement and that no measurements were taken on his own Parcel 73. It was submitted that Parcel 15xx came into being following sub-division of Parcel 13xx and that it was demonstrated in previous boundary dispute proceedings that Parcel 1381 was actually bigger on the ground that the acreage in its title document and that the Respondent had not encroached upon it or the road reserve.

18. It was the Respondent's submission that the said access road was only created upon submission of Parcel 13xx hence there was no access road in official records between Parcel 13xx and Parcel 73 prior to the said sub-division. It was further submitted that the Appellant had failed to produce the original map used for the demarcation of Ndemi Settlement Scheme which would have resolved the issue of the alleged access road. It was thus Respondent's case that the Appellant had failed to prove the alleged trespass and closure of the access road.

19. The court has noted that the Appellant did not produce the original map for demarcation of Ndemi Settlement Scheme to establish the existence of the alleged access road separating Parcel Nos.15xx or 13xx, on the one hand, and the Respondent's Parcel No. 73 on the other hand. It is not clear whether the road shown in the mutation for Parcel 13xx was created during sub-division of Parcel 13xx or it existed in the original map for Ndemi Settlement Scheme. The Registry Index Map which was produced by the Appellant at the trial merely captures the current position on the ground after its amendment upon registration of the mutation.

20. The court has noted from the material on record that when the suit was pending before the Environment and Land Court before its transfer to the Chief Magistrate's Court, the Judge had made an order for the Director of Surveys to produce the original map for demarcation of Ndemi Settlement Scheme. At some point, a summons or notice to show cause was issued against him when he failed to produce the map. It was not clear why the issue of production of the original map was not pursued by the trial court to its logical conclusion. Such a map would have greatly assisted the court in arriving at a just decision.

21. It is evident from the material on record that when the district surveyor allegedly visited Parcel 15xx before preparing his report dated 16.04.2018 he did not involve the owners of Parcel Nos. 73 and 6xx who were alleged to have encroached upon the whole of Parcel 15xx. The report does not indicate the persons who were present during the visit; it does not indicate what materials and resources were referred to; and it does not contain copies of any official government maps to support the findings and conclusions therein. It was simply not a serious report to be relied upon.

22. The court is of the view that the nature of the dispute between the parties was not simply a boundary dispute. It was the Appellant's allegation that the Respondent had entered and occupied the entire Parcel 15xx and commenced development activities thereon. It was also the Appellant's allegation that the Respondent had unlawfully closed the access road to Parcel 15xx thereby denying him access to and enjoyment of his land. The court is of the opinion that the Appellant's suit could properly have been adjudicated by the trial court. There would be nothing wrong in involving the land registrar and the government surveyor in the resolution of such a dispute and the court was entitled to involve the district surveyor in the matter. However, the manner in which the site visit was conducted and a report prepared left out important stakeholders such as the Respondent and the owner of Parcel 6xx.

23. Since the trial court's decision was substantially influenced by its holding that the Appellant's suit was prematurely filed before reference of the matter to the land registrar under Section 18 of the *Land Registration Act*, 2012, the court is inclined to allow the appeal and direct that the suit be remitted to the subordinate court for a new trial. The decision to order a new trial is also influenced by the fact that the trial court failed to follow up on the production of the original map for demarcation of Ndemi Settlement Scheme and the defective report prepared by the district surveyor without involving all the affected parties during site visit.

b. Who shall bear costs of the appeal

24. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287. Due to the peculiar circumstances of this case, the court is of the view that none of the parties should be penalized in costs. As a result, each party should bear his own costs of the appeal.

I. Conclusion and Disposal Orders

25. The upshot of the foregoing is that the court finds that there is merit in the Appellant's appeal only to the extent that he did not get a fair trial since the trial court erred in law in holding that the dispute before it was a boundary dispute which fell within the mandate of the land registrar. As a result, the court makes the following orders for disposal of the appeal:

a. The appeal be and is hereby allowed to the extent specified hereunder.

b. The judgment of the trial court dated 11.03.2021 dismissing the Appellant's suit with costs is hereby set aside.

c. The suit is hereby remitted to the Chief Magistrate's court for hearing de-novo. The trial court shall follow up on the earlier order for production of the map for demarcation of Ndemi Settlement Scheme to its logical conclusion. The trial court shall also require a fresh site visit to be conducted by the land registrar and government surveyor upon notice to all affected parties.

d. Each party shall bear his own costs of both the appeal and the trial which was concluded before the trial court.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 16TH DAY OF MAY, 2024.

In the presence of:

Ms. Masenge holding brief for Mr. Mongeri for the Appellant

N/A for the Respondent

C/A - Carol

.....

Y. M. ANGIMA

JUDGE