Mwawana v Mwandawa (Environment and Land Appeal 8 of 2023)
[2024] KEELC 4252 (KLR) (Environment and Land) (16 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4252 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VOI

ENVIRONMENT AND LAND

ENVIRONMENT AND LAND APPEAL 8 OF 2023

EK WABWOTO, J

MAY 16, 2024

BETWEEN

SAMUEL MWAWANA ..... APPELLANT

AND

ZAINA NEVERSON MWANDAWA ..... RESPONDENT

(Being an appeal from the Judgment of Hon. C. K. Kithinji (PM) delivered on 24th day of August, 2022 at Voi Law Courts ELC Case No. 27 of 2020)

JUDGMENT

1. This Judgment is in respect to an Appeal filed against the decision of Hon. C. K. Kithinji (PM) in Voi CM ELC No. 27 of 2020 delivered on 24th August 2022. In the said judgment the Learned Magistrate entered judgment in favour of the Respondent herein and granted the following orders:-

    1. An injunction order is hereby issued restraining the Defendant by himself, his servants, agents and any authorized person acting on his behalf from trespassing, constructing, harassing and or erecting structures on subject sections on the suit property being the section between the barbed wire fence and the gulley and that part the gulley on the left side to his house from the county road, the section part the boundary on the right side and that below and as shown at the site visit as well as the 2nd portion to remain with the existing boundary as initially shown.

    2. Each party to bear its own costs.

2. The Appellant being aggrieved by the said decision filed this appeal vide a Memorandum of Appeal dated 25th February 2023 wherein the following grounds were raised:-

1. That the learned Magistrate erred in law and in fact by deciding that the Plaintiff had proved her case on the required standards.

2. That the learned Magistrate erred in law and in fact by issuing a defective injunctive order against the Appellant.

3. That the learned Magistrate erred in law and in fact by deciding that the various sections that were not quantified in terms of size were owned by the Respondent.

4. That the learned Magistrate erred in law and in fact by going beyond the pleadings of the parties and delivered a weird judgment.

5. That the learned Magistrate erred in law and in fact by ignoring the Respondent's evidence, submissions and the authorities.

3. The Appellant thus sought the following reliefs in respect to the appeal:-

a. That the judgment delivered on 24th August 2022 be set aside and or varied.

b. Cost of this appeal be paid by the Respondent to the Appellant.

4. At the hearing of this Appeal, parties took directions that the same be canvassed by way of written submissions. Both parties complied and filed their respective written submissions. The Appellant filed written submissions dated 6th March 2024 while the Respondent equally filed written submissions dated 6th March 2024.

5. The Appellant in his submissions outlined the brief facts of the case and submitted on the following issues:-

i. Whether the Magistrate was right in deciding that the Plaintiff had proved her case on the required standards.

ii. Whether the learned Magistrate was right in issuing injunction orders against the Appellant.

iii. Whether the learned Magistrate erred in law and in fact by deciding that the various sections that were not quantified in form of size were owned by the Respondent.

iv. Whether the learned Magistrate erred in law and in fact by going beyond the pleadings of the parties and delivered a weird judgment.

v. Whether the learned Magistrate erred in law and in fact by ignoring the Appellant's evidence, submissions and the authorities.

6. Counsel for the Appellant submitted that the Respondent had not proved her case to the required standard since according to her plaint she was alleging that the Appellant was interfering with her 6 Acres of land. She did not prove that she owned any 6 Acres of land but only claimed 3 small portions of land and the court went on and declared her the owner of the 3 small portions of land that were not in one place.

7. It was submitted that when the site visit was conducted on 20th May 2022, the Respondent showed the court the 3 portions. The 1st portion was below the Appellant's house and adjacent to the gulley (Korongo), the 2nd portion was adjacent to the Appellant's other parcel of land that he used to do farming and the 3rd portion was a portion which was above the Appellant's house. It was argued that the pleadings and statements were silent on this, however the court decided that the various sections of the land belonged to the Respondent. Counsel argued that the said determination was inconsistent with

the pleadings and reliance was made to the case of *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others* Civil Appeal No. 219 of 2013 [2014] eKLR & Another as reiterated in *Elizabeth O. Odhiambo v South Nyanza Sugar Co. Ltd* [2019] eKLR.

8. Counsel further added that the learned Magistrate's determination was an error since the awarded 3 portions could not cumulatively add up to 6 acres, some of which were not pleaded nor averred in the written statement.

9. Citing the case of *David Singa Ole Tukai v Francis Arap Muge & 2 others* Civil Appeal No. 76 of 2014 [2014] eKLR, it was submitted that parties are bound by their pleadings and in this case the evidence tendered in court by the Plaintiff was at variance with her pleadings.

10. It was further submitted that the court ignored the Appellant's submissions and authorities despite him adducing "clear and strong" evidence. The Appellant faulted the trial court for issuing injunctive orders which according to Appellant was based on an insufficient threshold hence ought to be overturned by this court. The Appellant also prayed for the cost of the Appeal.

The Respondent's submissions

11. The Respondent's written submissions were dated 6th March 2024. Counsel for the Respondent submitted on the following two issues:-

    a. Whether the learned Magistrate erred in allowing the Respondent's case.

    b. Who is to bear the costs of the Appeal.

12. It was submitted that the suit property fell within community land with no defined boundaries. The same was unsurveyed and had not been registered. It didn't have a title and as such the proof to such land ought to be by tracing the root or history of its ownership as was held in the case of *Caroline Awinja Ochieng & another v Jane Anne Mbuthia Gitau & 2 others* [2015] eKLR.

13. The Respondent also submitted that proceedings before the trial court centred on a parcel of land measuring approximately 6 acres. It was submitted that during trial, oral and documentary evidence was led by the Respondent as to ownership of the parcel of land measuring approximately 6 acres and the Respondent also produced minutes of an Alternative Dispute Resolution Mechanism meeting held by the family in the presence of the Appellant. It was submitted that according to the said documentary evidence it was clear that the Respondent was the owner of the suit property and that the Appellant had agreed not to cause any further trouble.

14. The Respondent contended that the evidence adduced by the Respondent remains contended, uncontroverted and unchallenged all through the proceedings. The Appellant in his defence did not adduce any documentary evidence of ownership of the claimed parcel. The case of *Peter Ngigi & Another (Suing as Legal Representatives of the Estate of Joan Wambui Ngigi v Thomas Ondiki Oduor & another* [2019] eKLR was cited in support of this position.

15. It was submitted that indeed DW2 during cross-examination confirmed that as per the documentary evidence produced by the Respondent, the suit property belonged to her. It was also confirmed that the land herein belonged to the deceased Neverson Mwandawa who had shared out portions of his entire estate to his children and the suit property herein was left for the Respondent.

    Additionally, the trial court conducted a visit of the locus and made a report (captured in page 260 – 261 of the Record of Appeal). The findings were that there existed a cattle track on the land which went past the suit property to the grazing fields and a barbed wire fence that was felled. Moreover, it

came out clearly that the Appellant had not been candid with the court. He had quite substantially misled the court as to the correct status of the land.

A case on point, the Appellant had heavily relied on the gulley as his boundary and so to say, the limit of his land. However, in evidence he stated that the gulley had not always been there. At the site visit equally, a baobab tree which he had also referred to as his limit, was not found despite the existence of status quo orders.

16. The Respondent concluded her submissions by urging the court to dismiss the Appeal with costs.

Analysis and Determination

17. The Court has considered the entire Record of Appeal and submissions filed by the parties. In determining the issues raised in the Appeal, this court is cognizant of its duty on a first appeal. In *China Zhingxing Construction Company Ltd v Ann Akuru Sophia* [2020] eKLR it was stated as follows:

> "The appropriate standard of review established in these cases can be stated in three complementary principles:
>
> 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;
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> 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."

18. The Court in the *China Zhongxing Construction Company Ltd* case (supra) cited the Court of Appeal for East Africa in *Peters v Sunday Post Limited* [1958] EA 424 where Sir Kenneth O'Connor stated as follows:

> "It is a 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 has 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 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. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in *Watt v Thomas* (1), [1947] AC 484."

19. From the foregoing, the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the trial court, analyze them and arrive at an independent conclusion, bearing in mind that the trial court had the advantage of seeing and hearing the parties.

20. The court is of the view that the following issues arise for determination herein: -

    i. Whether the trial court erred in law and fact in delivering a judgment not based on the pleadings filed by the parties.

    ii. Whether the trial court erred in not considering the Appellant's written submissions and authorities.

iii. Whether the trial Magistrate was justified based in law and facts in arriving at the decision to grant the Respondent the reliefs that were sought.

21. This court shall now proceed to sequentially and critically examine the issues raised in the appeal taking into account the evidence recorded before the learned trial Magistrate.

Issue No. 1. Whether the trial court erred in law and fact in delivering a judgment not based on the pleadings filed by the parties.

22. Ground 4 of the Appellant's Memorandum of Appeal was to the effect that the learned Magistrate erred in law and in fact by going beyond the pleadings of the parties and delivered a "weird judgment." The appellant in arguing that parties are bound by pleadings submitted that the trial court granted prayers that were not in the plaint. The Respondent on the other hand submitted that the claim by the Plaintiff before the lower court was for ownership of a parcel of land measuring approximately 6 acres being the suit property. The evidence led emanated from the pleadings and as such, the site visit conducted centred on the suit property.

23. The court has perused the Record of Appeal and the plaint dated 17th August 2020 which was filed by the Respondent. It is evident that the cause of action was in respect to the Appellant's action of encroachment to the Plaintiff's property on or about December 2019. The Respondent sought injunctive orders against the Respondent together with mesne profits. As per the Record of Appeal, the Respondent testified during trial and the court upon considering the evidence adduced by the parties granted a permanent injunction as against the Appellant and directed each party to bear own costs of the case.

24. The function of a pleading in civil proceedings is to alert the other party to the case they need to meet, (and hence satisfy basic requirements of procedural fairness), and, further, to define the precise issues for determination so that the court may conduct a fair trial. The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). The expression "material facts" is not synonymous with providing all the circumstances. Material facts are only those relied on to establish the essential elements of the cause of action. A pleading should not be so prolix that the opposite party is unable to ascertain with precision the causes of action and the material facts that are alleged against it.

    It is of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made.

25. Therefore, the general rule is that courts should determine a case on the issues that flow from the pleadings and the court may only pronounce judgement on the issues arising from the pleadings or such issue as the parties have framed for the court's determination. It is also a principle of law that parties are generally confined to their pleadings unless pleadings are amended during the hearing of a case. Once pleadings are filed the parties are bound by them. If the pleadings raise certain issues and the evidence adduced at the trial does not substantiate them, the action (or defence as the case might be) would fail unless amendments are granted.

26. The question then that this court has to ask itself and consider, is whether the Learned Magistrate granted reliefs not pleaded and at variance with the evidence tendered during trial. Upon careful perusal

of the record, this court finds that the learned Magistrate considered the pleadings and delivered a judgment by granting the reliefs that were pleaded in the plaint. In view of the foregoing, it is the finding of this court that the trial court did not go beyond the scope of the reliefs that were not pleaded in delivering its judgment. The trial court only granted the reliefs that were pleaded.

Issue No. 2. Whether the learned Magistrate erred in not considering the Appellant's written submissions and authorities

27. The Appellant contended that the learned Magistrate erred in not considering the Appellant's written submissions and authorities.

28. Paragraph 31 of the learned Magistrate's judgment delivered on 24th August 2022 shows that the trial court considered the Appellant's submissions. The record confirms that the learned Magistrate analysed and considered the issues that were raised by the Appellant in his written submissions in extensio before rendering the decision. In view of the foregoing, it is indeed the finding of this court that the learned trial Magistrate duly considered the Appellant's written submissions and authorities that were cited.

Issue No. 3. Whether the trial Magistrate was justified based in law in arriving at the decision to grant the Respondent the reliefs sought

29. It was submitted that the trial court erred in finding that the Respondent had proved her case to the required standards and thus granting the reliefs sought.

30. The Appellant submitted that the evidence adduced by the Respondent during trial did not meet the threshold for proving her case to the required standards. It was submitted that the Respondent did not prove that she owned any 6 acres of land but claimed some 3 small portions of land. It was also submitted that from the site visit conducted on 20th May 2022, the Respondent showed the court the 3 portions.

31. The Respondent pleaded that the Appellant had trespassed on the said parcel on about December 2019 by making inroads and changing beacons.

32. The evidence on record shows that the court was dealing with unregistered and unsurveyed land which as was held in the case of *Caroline Awinja Ochieng & Another v Jane Mbuthia & 2 others* (2015) eKLR, the court ought to trace the root or history of its ownership. During trial the Respondent adduced evidence and testified of how the said portion was left to her by her deceased husband. The Respondent also produced minutes of the meeting that had amicable tried to resolve the dispute which indeed confirmed that the property belonged to the Respondent. The Appellant did not adduce any evidence to the contrary to dispute and or controvert the averments made by the Respondent. The trial court in its judgment held that the Defendant (Appellant) had the documents since inception of trial and that documentary evidence can only be challenged by cogent evidence. In view of the foregoing, the learned Magistrate cannot be faulted for her decision in granting the prayers sought by the Respondent in her judgment.

33. The upshot is that the court finds the appeal lacks merit and the same is dismissed. On the issue of costs, costs are in the discretion of the court and in this case looking at the circumstances of the Appeal, I order that each party do bear their own costs of the appeal.

JUDGMENT ACCORDINGLY.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 16TH DAY OF MAY, 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Mwazighe for Appellant.

Mr. Mutinda for Respondent.

Court Assistants: Mary Ngoira and Norah Chao.