



REPUBLIC OF KENYA



KENYA LAW
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**Silas v Minyori (Environment and Land Appeal E100 of 2021)
[2024] KEELC 5396 (KLR) (17 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5396 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E100 OF 2021**

CK NZILI, J

JULY 17, 2024

BETWEEN

LYDIA KURI SILAS APPELLANT

AND

JOSEPH MWIKA MINYORI RESPONDENT

JUDGMENT

1. The appellant, who was the defendant, had been sued at the lower court by the respondent by a plaint dated 6.12.2010 for trespass into parcel number 2855 Athinga Athanja Adjudication Section with effect from April 2010, undertaking farming activities, hence interfering with the recorded owner's quiet and peaceful possession. He prayed for (a) a declaration that the Parcel No. 2855 Athinga Athanja Adjudication Section, measuring approximately 0.90 acres, belonged to him and for a permanent injunction. The plaint was accompanied by a consent to sue dated 12.12.2010 issued pursuant to Section 8 (1) of the Land Consolidation Act and Section 30 of the Land Adjudication Act, a list of statements dated 22.5.2015 and documents dated 20.5.2015.
2. By a statement of defense dated 17.12.2010, the appellant denied the alleged trespass. The appellant averred that she was the recorded owner of parcel number 3178 Athinga Athanja Adjudication Section, which had been in her occupation since 1992, only for the respondent in August, September, and October 2010 to encroach and cause damage to it. The appellant averred that she made a report to the police and filed Meru CMCC No. 641 of 2010 only for the respondent to file this suit.
3. The appellant averred that damage to her land was assessed and due to a change of user of land in the area and an increase in value; the respondent was on a mission to acquire her land illegally. Moreso, the appellant averred that the suit was sub-judice, the value of the suit land was beyond the jurisdiction of the trial court, and therefore, the suit should be either transferred or struck out. The statement of defense was accompanied by a list of witnesses and documents dated 12.6.2012. Similarly, a list of issues



was filed dated 10.9.2013. Additionally, the appellant filed a preliminary objection dated 29.7.2019 on lack of jurisdiction.

4. The lower court record shows that after a temporary order of injunction was issued on 4.11.2011 restraining the appellant from interfering with the suit land, a scene visit took place on 20.3.2012 in the presence of the land adjudication officer and a demarcation officer Tigania West/East.
5. Simon Wachira, a demarcation officer Athinga Athanja Adjudication Section, told the court that the land initially belonged to the appellant, but after an A/R objection, no. 37 of 2008 was heard, the respondent was awarded the land parcel. The demarcation officer said that following the award, the respondent was given consent to pursue an appeal at the High Court, which was still pending.
6. Simon Wachira confirmed that the map sheet LK 5 "1" was from his office. Similarly, he confirmed that the letter dated 6.9.2010 was from his office as well, showing the appellant as the owner of Parcel No. 3178. The demarcation officer further said the initial person to gather the land was Thurairia Ikioo as ancestral land, who sold it to his nephew Kobia Joseph who deposited building materials on the land on 3.12.2007 and erected a building therein, including other development activities such as a barbed wire, fence, three bedrooled stone house, concrete water harvester, planting trees and food crops.
7. On her part, the appellant showed the court two trees she alleged were planted in 1994, which the respondents disputed. Further, the appellant alleged that he bought the land from M'Mungania Ithune, measuring 0.84 acres and planted five trees on the lower side in 2008. Thiruaine, on his part, told the court that he had an initial home and had planted a few trees in the middle of the land.
8. Joseph Mwika Munyoki testified as PW 1. Relying on his witness statement dated 20.8.2015, he told the court that his land measured 0.90 acres while the appellant's land was Parcel No. 3178 measuring 0.84 acres. PW 1 said that he bought the land from M'Thiruane M'Ikiao in 2007 for Kshs.85,000/= and took vacant possession. He said that sometime in 2010, the appellant encroached on his land, claiming ownership and started planting food crops alongside his crops, hence interfering with his land use. PW 1 said that a demand letter was written to the appellant and eventually obtained consent to sue.
9. Similarly, PW 1 told the court that the appellant had also sued him in Meru CMCC No. 641 of 2010. He produced a copy of a sale agreement dated 3.12.2007, a transfer letter, a sketch map, a letter of confirmation of ownership, consent to sue, a DLASO letter dated 30.4.2012, and a demand notice as P. Exh No's. 1-7, respectively.
10. In cross-examination, PW 1 told the court that he bought the land on 3.12.2007 when it was vacant. He said that his immediate neighbors were Katheru and Kanduru. PW 1 admitted that the appellant had sued him for malicious damage in Civil Case No. 641 of 2010. PW 1 also said that he had occupied the land since 2007 after land officers showed him the boundaries and came only to know the appellant in 2010.
11. Joseph Kubai testified as PW 2. Relying on his witness statement dated 20.8.2015, he told the court that the respondent bought the suit land from his uncle in 2007, where he was a signatory to the transfer as a committee member and a witness. PW 2 said that the suit land bordered his late father's land, for it was part of the family's ancestral land.
12. PW 2 told the court that he became aware of the appellant when she teamed up with Wilfred Mutwiri in the A/R objection against his uncle M'Thiruaine M'Ikiao, for both were working at the land office. PW 2 said that the adjudication committee made a scene visit in his presence as a committee member, but the objectors were unable to locate their land, for she never possessed any land in the vicinity; hence, his uncle was successful.



13. The appellant testified as DW 1 relied on her witness statement dated 2.6.2011. She told the court that in 1991, she was transferred to Muthara and one Joseph M'Liburu, a land committee member working with her at the land's office, agreed to sell to her 0.50 acres of his land. Later on, he added to her 0.20 acres. Further, she said that her late husband, Mutwiri Wilfred, bought 0.34 acres from Isaiah M'Imana, making a total of 1.04 acres that were demarcated in 1994.
14. DW 1 said that she took vacant possession of the land and started cultivating it with no claims by any third party.
15. Additionally, DW 1 said that around 1999, 0.20 acres of her land were given to David Kanoru, leaving a balance of 0.84 acres, which she had been utilizing with grown-up eucalyptus, gravellia, and jacaranda trees in existence before she brought the land. DW 1 told the court that she had peacefully co-existed with her neighbors, David Kanoru and Boniface Rutere. DW 1 said that the respondent intruded onto her land in 2010 and cut down her live fence, claiming a purchaser's interest from M'Thiruaine M'Ikiao, who had filed A/R Objection No. 371 in 2008 against her whose outcome was rendered in February 2010. She denied any family ties between Mr. M'Ikiao and M'Mungania M'Ithiri, who had sold her the land. She said that the respondent could not have bought the land from the alleged seller while there was a pending A/R objection. DW 1 produced as exhibits proceedings and decisions in the A/R objections, sketch map, a court order dated 27.4.2010 as D. Exh No's. 1-3.
16. In cross-examination, DW 1 said that she was stationed at the land adjudication offices at Muthara. She denied tampering with the land record to acquire the land, given that she had a sale agreement. According to her, M'Thiruaine M'Ikiao and Mikael Mwiraria lost in the A/R objection against her and in the judicial review case, she had only sued his son. DW 1 said that she did not appeal to the minister since the land was under the *land Consolidation Act* (Cap 283). DW 1 also said that she took vacant possession of the land in 1994 only for the respondent to use goons to evict her in 2010.
17. Francis Nchebere Aritho and Joseph Laiburu testified as DW 2 & 3. Adopting their witness statements dated 7.6.2011, both told the court that they were not only land committee members but also members of the family of the late M'Mungania M'Ithiria, who sold a portion of his land to the appellant between 1992 and 1993, hence becoming a neighbor to DW 2 at Muriri area.
18. DW 2 said that he was present when the land measuring 104 acres was demarcated in the name of the appellant following the acquisition of 0.34 acres of land from Isaiah M'Imana by the appellant's late husband, Wilfred Mutwiri. DW 2 said that the family resolved to relocate the appellant's land from the graveyard of their deceased relatives at Linkurungu to Muriri. He confirmed that the appellant hived off a portion in 1999 and sold it, leaving behind 0.84 acres.
19. DW 3 clarified that he was the one who sold the appellant an extra 0.20 acres in 1993. He confirmed that the appellant took vacant possession in 1993 and had been on the land until 2010, when the respondent encroached onto it, claiming a purchaser's right, yet there was a pending High Court Misc No. 25 of 2010 between the appellant and M'Ikiao.
20. In cross-examination, DW 3 said that the appellant bought her land in two phases adjoining one another. He termed the alleged seller of the land to the respondent as an imposter, a stranger in the area and someone who unjustly succeeded in the A/R objection. Similarly, DW 3 confirmed that though the appellant used to till the land, she had no residence in the vicinity. Additionally, DW 3 admitted that the respondent had erected a house on the land after felling down trees belonging to the appellant.
21. The appellant challenges the lower court decision by a memorandum of appeal dated 17.9.2021, filed by B.G Kariuki and Co. Advocates. The grounds are that the trial court failed to:



- i. Appreciate that the respondent's land was miles away from P. No. Athinga/Athanja/3175.
 - ii. To exercise its power under the Surveys Act to have the dispute resolved.
 - iii. Find the appellant had occupied the land from 1994 until April 2010, when the respondent forcibly evicted her.
 - iv. Ignoring or overlooking the appellant's list of documents that had been produced as exhibits.
 - v. Ignoring the appellant's evidence.
 - vi. Ruling against the weight of the evidence and the law.
22. With leave of court, parties were directed to canvass the appeal through written submissions due by 5.7.2024.
 23. The appellant relied on written submissions dated 4.7.2024. The appellant contended that the trial court failed to serve substantive justice, for it casually took the evidence, occasioning a miscarriage of justice. For instance, the appellant submitted that paragraphs 63-69 of the record of appeal indicate non-compliance with Order 21 Rule 4 of the Civil Procedure Rules for lack of points for determination. The appellant faults the filing of a consent to sue on 21.8.2015 instead of alongside the plaint in 2010; hence, the suit was unprocedurally filed.
 24. As to the site visit on pages 12 – 14 of the record of appeal, the appellant submitted that the record disappeared only to resurface after some years but was not considered by the trial court, yet they could have informed the court of the exact locality of the parcels of land. The appellant submitted that though exhibits had been produced, the trial court, on page 68 of the record of appeal, failed to consider them, hence occasioning an injustice.
 25. The appellant submitted that the trial court failed to invoke order 2 Rule 12 (1) of the Civil Procedure Rules in her favor since there was no reply to the statement of defense; hence was uncontroverted.
 26. The appellant submitted that substantive justice was not served as guaranteed in Article 159 of the Constitution of Kenya as read together with Sections 1A & 1B of the Civil Procedure Act and since the trial court was not alive to that calling, this court guided by *Peter v Sunday Post* (1958) E. A 424 set aside the judgment.
 27. The respondent relied on written submissions dated 3.7.2024. It was submitted that the respondent substantiated his claim by producing P. Exh No's (1) & (2), showing ownership of his parcel of land coupled with D. Exh No. (1) showing the seller successfully disputed the land with the appellant through an A/R Objection.
 28. Further, the respondent submitted that as per D. Exh No. (3), the appellant obtained a temporary order, which unfortunately could not be used to prove ownership, more so when the seller was not even a party to it. The respondent challenged ground one of the appeal, in view of the scene visit on pages 12-14 of the record of appeal coupled with evidence of purchase from genuine initial land owners who even attended the scene visit and confirmed ownership.
 29. As to the analysis of the evidence the respondent submitted that the trial court analyzed the evidence on record and reached a fair decision. The respondent submitted that ownership documents go to the root or history of acquisition, and in this case, the appellant had no material evidence on how she acquired, consolidated and transposed her land into 0.84 acres. In the absence of the root of the title, the respondent submitted that the appellant failed to sustain her defense and therefore, urged the court to dismiss the appeal with costs guided by Section 27 of the Civil Procedure Act.



30. The mandate of this court as an appellate court of the first instance is governed by Section 78 of the Civil Procedure Act. The role is to relook at the lower court record and come up with independent findings as to facts and the law, bearing in mind that the trial court had the benefit of assessing the witnesses firsthand and hearing their testimony. See *Selle & another v Associated Motor Boat* (1968) E.A 123, *Gitobu Imanyara & others v. AG & others* (2016) eKLR and *Abok James Odera & Associates v J.P Machira t/a Machira & Co. Advocates* (2013) eKLR.
31. The court has carefully reassessed the lower court record. The issues for my determination are:
- i. If the respondent pleaded and proved the ingredients of the tort of trespass into his P. No. 2855 Athinga Athanja Adjudication Section by the appellant.
 - ii. If the appellant proved her justification for the alleged encroachment into the respondent's land, namely that it was the respondent who had allegedly encroached into her parcel number 3178 Athinga/Athanja Adjudication Section, felled trees and forcefully evicted her.
 - iii. If the appellant called evidence to sustain her defense and preliminary objection.
 - iv. If the appeal has merits.
32. It is trite law that parties are bound by their pleadings and issues arising therefrom. In *Raila Amollo Odinga & others v IEBC & others* (2017) eKLR, the court emphasized the role of pleadings in an adversarial system and that a court of law only determines issues drawn by the parties or those arising from the pleadings with no room for any other business.
33. In this appeal, the primary pleadings before the trial court were the plaint dated 6.12.2010, the statement of defense dated 17.12.2010 and a preliminary objection dated 29.7.2019. Parties similarly drew their list of issues dated 14.7.2015 and 10.9.2013, appearing on pages 195 and 196 of the record of appeal.
34. Trespass refers to unjustified entry into and commission of acts injurious to the land of another without their permission. See Section 3 (3) of the Trespass Act. In *Kariuki (suing as legal representative of Eustace Karuri Githenya) v Joreth Ltd & others* (Civil appeal E391 of 2020/2024) KECA 420 (KLR) (26th April 2024) (Judgment), the court held that the deceased possession was not apparent when a suit for trespass was filed otherwise, he would have been among those sued for eviction. The court said that the evidence was clear that the deceased did not stay on the suit land but instead made intermittent visits thereon, there were no developments on the suit land and that it was a caretaker who had planted the crops on the field.
35. In *Mucheke & others v Kinyua* (ELC Appeal) E060 of (2022) (2024) KEELC 597 (KLR) 7th February 2024 (Judgment), the court cited *Park Towers Ltd v John Mithamo Njoka & others* (2014) eKLR, that where trespass is proved a party need not prove any loss suffered for trespass is actionable per se. The court cited *AG v . Halal Meat Products Ltd* (2016) eKLR that where a person is wrongfully deprived of his property, he/she was entitled to mesne profits, suffered as a result of the wrongful period of occupation of her land by another. In *Peter Mwangi Mbutia & another v Samow Edin Osman* (2014), the court observed that it was upon a party to place evidence before the court to prove mesne profits.
36. Article 40 of the Constitution grants the owner the right to protection from being deprived of his land. Sections 24, 25, 26 & 27 of the Land Registration Act provide that the registration of a person as owner of land bestows him all the rights and privileges belonging or appurtenant thereto. Proof of trespass entails ownership and evidence of illegal entry without justification. Whoever desires a court to give a



judgment as to a legal right or liability dependent on the existence of facts, which he who asserts, must prove those facts exist.

37. In *Black's Law Dictionary* 8th Edition, trespass is defined as the entry on another person's land without lawful authority and doing some damage. It could also be a permanent invasion.
38. There is no dispute that the trial court visited the suit land in the presence of a demarcation officer and the parties. The demarcation officer, using a sketch map from his office, located the two parcels of land on the ground and pointed them out to the court. The appellant did not challenge or object that the locality of the respondent's land was elsewhere, going by the said map.
39. The evidence of the demarcation officer was not objected to or challenged either at the scene visit or later during the hearing. The appellant had not pleaded that there was forceful entry and eviction from her land in April 2010. Similarly, the appellant did not produce or call a land adjudication officer or / surveyor to produce any tracing map or demarcation records contrary to the earlier one placing the respondent's land miles away from the locality of her parcel of land.
40. The title deed appearing on page 108 of the record of appeal was issued on 11.2.2022. It showed the locality of the Suitland to a specific Registry Index Map Sheet No. 108/4/1/12/16. P. Exh No. (1) and (2) were not challenged or objected to their production as exhibits by the appellant. In paragraph 5 of her statement of defense, the appellant admitted that she was a recorded owner of land P. No. 3178 Athinga/Athanja Adjudication. She did not plead the acreage and the exact locality of her land as different from the exact area the respondent's parcel of land ought to be going by the land records. Other than D. Exh No's. (1), (2) & (3) that were not certified, the appellant failed to produce any other ownership documents of her parcel number.
41. Additionally, D. Exh No. (1) & (2) were not certified. Coming to D. Exh No. (3), the same was an order for leave to commence judicial review proceedings to quash the DLASO award made on 26.2.2010. Evidence of the outcome of the notice of motion filed after the High Court granted leave was never availed before the trial court. Similarly, the appellant had not filed a counterclaim against the respondent if at all she had been illegally, unjustifiably and forcefully evicted from her land.
42. Other than calling DW2 and 3 to confirm possession and the root cause of the appellant's title to the land, the same was not substantiated by any land adjudication or registration records to show that the person(s) who had sold the portion to the appellant totaling 0.84 acres were bonafide recorded owners of the suit land, before it was eventually recorded or registered in the name of the appellant. Documentation of ownership by way of sale agreements, transfers and confirmation letters from the land adjudication office in favor of the appellant and the predecessors in title were not availed before the trial court.
43. The appellant had also pleaded that it was the respondent who encroached into her land in early 2010. There was no evidence tendered by the appellant to show that she had complained to the land adjudication, survey, or registrar's offices over trespass or interference with her boundaries by the respondent. Similarly, even though the appellant had alleged that there were other pending suits in Meru Law Courts regarding malicious damage, judicial review and trespass, the pleadings or outcomes from those cases were never availed before the trial court as a way of showing that the aggressor was the respondent and had been found liable for any trespass to private land and commission of acts of wastage or illegal ownership of the suit land.
44. PW 1 and the father of PW 2 were present during the site visit by the trial court. All the parties were able to show evidence of their developments in their respective parcels of land. The seller of the land to the respondent was able to show what developments he had made on the land before selling and



- transferring the land to the respondent. PW 2 was able to confirm that he witnessed the signing of the transfer forms at the land adjudication office when the respondent bought the land from his uncle.
45. PW 2 was able to confirm to the trial court the ancestral nature of the land that bordered that of his late father and which his uncle legally and lawfully sold and transferred to the respondent. No questions were put to PW 2 that the family of M'Thiruaine M'Ikiaio were strangers or imposters to the area. DW 2 and DW 3 were not called during the scene visit to confront the alleged seller of the land to the respondent that he was not a bonafide owner of the land between 1992 and 1993.
 46. Judicial review decisions appearing on pages 158 – 178 did not form part of the appellant's list of documents and, in particular, D. Exh No. (3). All that the appellant produced as exhibits before the trial court were the proceedings and decisions, sketch map and an order for leave produced as D. Exh No's. 1, 2 & 3.
 47. There is no indication if the appellant sought and was denied a chance to call the land adjudication officer's, demarcation and land adjudication survey clerks. Similarly, there is no indication if the appellant sought a second scene visit report from the demarcation and survey officers to locate the two disputed parcels of land on the ground or if she was dissatisfied with the initial court scene visit on the locality of the disputed parcels of land.
 48. In a claim of trespass a party must prove both ownership, possession and unjustified entry into the land. A party without leave may not introduce new issues or evidence at an appellate stage that were not before the trial court. *Nayan Mansukhlal Salva v Hamikssa Nayan Salva* (2019) eKLR, *Wanje v Sakwa* (1984) KLR 275 and *Walter Joe Mburu v Abdul Shakoor Sheikh & others* (2015) eKLR.
 49. Ground No. (1), (2), (3), and (4) of the memorandum of appeal were not among the facts, pleaded and evidence tendered in support at the lower court. Before this, court leave was not sought and obtained to call for and adduce fresh evidence that was out of inadvertence or due diligence unavoidable before the trial court but with a bearing on the outcome of this appeal. See *Mohammed Abdi Mahamud v Ahmed Abdulabi & others Mohamad & 3 others v SCoK; Ahmed Ali Muktar* (I.P) (2019) eKLR.
 50. Lastly, the appellant has attacked the trial court based on an alleged miscarriage of justice under Article 159 constitution of Kenya Sections 1A & 1B of the *Civil Procedure Act* and Order 21 of the *Civil Procedure Rules*. The trial court record shows that the appellant was ably represented by a competent law firm throughout. Issues of bias, non-compliance with procedural law and miscarriage of justice were not raised at the trial. Demonstration of a real likelihood of bias is missing in this appeal. It is not every time that a party who has lost a case must raise a claim of bias, even when it is evident that the case was lost for lack of evidence or merits.
 51. As to the jurisdiction of the court to hear the suit, the parties, as indicated above, had filed separate issues for the court's determination before the trial commenced. The court record shows that a consent to sue was court-stamped alongside the plaint on 15.12.2010. The consent had also been introduced at the top of the plaint received in court on 15.12.2010.
 52. The demarcation officer, during the scene visit, made comments on LKS "1" – "4" which were attached to the appellant's replying affidavit dated 13.5.2011 against the interlocutory application for injunctions. The affidavit was referred to in the appellant's list of issues dated 10.9.2013. The respondent's list of documents was filed on 21.8.2015 in compliance with Order 11 *Civil Procedure Rules*, the same way the appellant filed a list of witnesses & documents on 13.6.2012 after a statement of defense filed on 17.12.2010.
 53. It is therefore, not accurate that the consent was being introduced in 2015. That is why the preliminary objection dated 29.7.2019 attacking the consent and jurisdiction of the court was found lacking merits.



The appellant did not object to the production of P. Exh No. (6) on account of date, irregularity, and or its expiry.

54. As to compliance with Order 21 of the *Civil Procedure Rules*, the trial court, in my view, on page 5 of the judgment, set out the issues of standard of proof burden of proof, the evidence tendered by each of the parties based on the issues already filed by the parties.
55. Even though the trial court erroneously indicated that D. Exh No's. 1-3 were not produced. I find that the error did not occasion injustice to the appellant. The trial court indicated that it considered the pleadings, the evidence tendered in totality, and the parties' written submissions. I find no injustice or miscarriage of justice occasioned. The upshot is that I find the appeal lacking merits. It is dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 17TH DAY OF JULY, 2024

In presence of

C.A Kananu/Mukami

Appellant

Mr. Kitheka for the respondent

HON. C K NZILI

JUDGE

