Jaganath Grower Limited v Njiru (Environment & Land Case E018 of 2021) [2024] KEELC 6709 (KLR) (25 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6709 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT & LAND CASE E018 OF 2021

A KANIARU, J

SEPTEMBER 25, 2024

BETWEEN

JAGANATH GROWER LIMITED .... APPELLANT

AND

BENSON NTHIGA NJIRU .... RESPONDENT

JUDGMENT

1. The appeal herein arose from the judgement of the principal Magistrates court at Siakago (Honourable Edwin N. Wasike, Principal Magistrate) in Siakago MCL & E No. 94 of 2020 delivered on 04.11.2021. It sets forth the following grounds of appeal:

    1. The learned trial magistrate erred in law and fact in finding that the respondent is the absolute owner of that land known as Mbeere/Kirima/4223 without any evidence being tendered to prove the same.

    2. The learned trial magistrate erred in law and fact in relying on the respondents list of documents which were never produced at the trial.

    3. The learned trial magistrate erred in law and fact in failing to find that what was before court was a boundary dispute that ought to have been determined by the Land Registrar ousting the court's jurisdiction at the first instance.

    4. The learned trial magistrate erred in law and fact in finding that the respondent had proved trespass despite the courts finding that the respondent had not proved that the appellant had encroached into his land.

    5. The learned trial magistrate erred in law and fact in finding that the respondent was entitled to the prayers of eviction of the appellant from land parcel no. Mbeere/Kirima/4223 as well as an order of restriction without any evidence being tendered to prove the same.

6. The learned trial magistrate erred in law and fact in relying on inconsistent and inadmissible evidence tendered by the respondent and further failing to find that parties are bound by their pleadings.

2. The appellant is asking for orders that:

   a. That the appeal be allowed with costs.

   b. The judgement and decree of the honorable principal magistrate delivered on 04.11.2021 be set aside and the respondent's suit Siakago MCL & E No. 94 of 2020 be dismissed with costs to the appellant.

3. The respondent had instituted the suit in the lower court against the appellant by way of a plaint dated 29.10.2020 where he was seeking the following orders:

   a. An order directing the eviction of the defendant's agents/servants from land parcel no. Mbeere/Kirima/4223.

   b. An order of restriction against the defendant's agents or servants and anyone claiming through it from entering, dealing or working on land parcel no. Mbeere/Kirima/4223.

   c. That the O.C.S Kiritiri Police Station to provide security during the eviction exercise.

   d. Costs of the suit and interest.

4. The appellant filed a defence dated 26.11.2020 and denied the respondents claims that it had trespassed into his land. It contended that the respondent had never utilized the suit land in any way save for claiming it as his own and demanding payment for its use. It further stated that the respondent had been threatening Its agents and employees on several occasions on allegations that the entire parcel belongs to him yet the exact boundaries of the land had not been determined. That the suit land was being surveyed and that neither party knew the exact location of the beacons until the survey was concluded.

5. During trial, the respondent, Benson Nthiga Njiru, testified that he wanted the appellant company to be removed from his 15 acre land. That it should open all the roads into and out of his land. He further prayed for damages for loss of user and mesne profits for the 5 years it had been utilizing his land. He testified that they had agreed on a sum of Ksh. 8,000/= per acre per year. He asked for costs of erecting boundaries and costs of the suit.

6. On cross examination, he testified that his land was parcel no. Mbeere/Kirima/4223 which was community land belonging to Ekambi clan but the same was allocated to him as a community member after meeting all clan's conditions. He testified that the appellant company was a neighbor and that they border each other on the East and West. He testified further that he had a title deed to the suit land but he did not carry out any activities on the land. That the appellants had trespassed into the entire land and removed the beacons therein and that it had started paying him when he threatened to sue them. That it had later stopped paying him.

7. The appellants had two witnesses. DW1 was Gurvin Bassi, the General Manager of the appellant company. He testified that the company is engaged in horticultural business and that the respondent owns a plot that borders theirs which is situated in the middle of their land. That the company's land is Mbeere/Kirima/4449 and 3304 and the total acreage is 270 acres. That there is no demarcation between the company's land and the respondent's land. That the company purchased the property from different parcel owners and that there are no beacons on the land. That in the year 2016, the

company contracted an independent surveyor to ascertain the beacons and it was apparent that it had not intruded into the respondent's property. That the company was compensating the respondent before it realized it had not encroached on his land. He testified that company had made an application for an official government surveyor.

8. On cross examination, he testified that the appellant had invited the respondent for the survey process but he failed to show up. On re-examination he testified that the contentious acreage is 1 acre and that the appellant had not erected any infrastructure on the respondent's land.

9. DW2 was Japheth Mutuku Kimathi, a land planner and consultant, who testified that he had been contracted by the appellants to carry out land planning for them. That they did a comprehensive survey of the land and found that the appellants had not encroached the respondent's land. He then stated that the extent of the appellant's encroachment into the respondents land was about 1 acre.

10. The trial court delivered judgment on 04.11. 2021 finding that though the respondent had not produced the title deed for land parcel 4223, his list of documents showed that he was the registered owner of the land which was also a fact that the appellants conceded to. The court went on to say that despite the fact that the respondent failed to prove that the appellant had encroached into his entire 15 acres of land, the fact the appellants witness conceded to the issue of trespass settled the whole issue. The court found that the respondent had been able to establish with the help of the appellant the issue of trespass and ownership of the suit land on a balance of probabilities. The court allowed the respondent's prayer for eviction and restriction of the use of land parcel 4223 to the extent of the encroachment.

11. The appeal was canvassed by way of written submissions. The appellant submitted that courts are mandated by statute to consider a title document as prima facie evidence of ownership to land and as conclusive evidence of proprietorship to land. The provisions of Section 24(a) and 26 of the *Land Registration Act* as well the cases of Dr *Joseph Arap Ngok v Justice Moijo Ole Keiwa & 5 Others Civil Appeal No. CA 60 of 1997* and Embakasi Properties Ltd & Anor v Commissioner of Lands & Anor (2019) Eklr were proffered in support of that position. It was submitted further that the respondent never tendered any evidence before the trial court, as the trial court observed, in support of his claims that land parcel Mbeere/Kirima/4223 is registered in his name as he never produced a copy of his title or his list of documents dated 29.10.2020.

12. It was further submitted that the respondent claimed that the appellant trespassed into his whole parcel of land which turned the dispute into a boundary dispute reserved for the Land Registrar as provided for under section 18(2) of the *Land Registration Act*. That the trial court therefore lacked the jurisdiction to determine the dispute. That further, it is trite law that he who alleges must prove as per section 107(1) of the *Evidence Act* and that the respondent failed to prove that the appellant had encroached into his whole parcel of land. That the respondent failed to provide sufficient evidence in form of trace maps, surveyor's reports, photographs of the respondent's developments on the suit land which would satisfy the court that the appellant was in illegal occupation of the suit land. It was urged that the trial court's judgment be set aside and the lower court case be dismissed with costs to the appellant.

13. The respondent on the other hand submitted that he filed his list of documents on 29.10.2020 where he listed the title deed of the suit land. That during trial, he gave a brief history of how he acquired ownership of the suit land and confirmed that he was the absolute registered proprietor of the land. That the testimony remained uncontroverted by the appellants who conceded that he was indeed the registered owner of the parcel of land. That further, the appellant did not raise the issue of the lower court case being a boundary dispute either by way of an application, counterclaim or preliminary

objection to be determined by the court, a fact which was also observed by the trial magistrate. That on the issue of trespass, the respondent was able to prove the same with the assistance of the appellant and its witnesses and thus was entitled to the prayers sought in the plaint.

14. I have considered the record of appeal, the party's submissions, and the lower court record in general. My duty as the first appellate court is to re-evaluate and re-assess the evidence that was before the lower court and make my own conclusions while bearing in mind that the lower court had the advantage of handling the evidence first hand. The decided cases of Selle Vs Associated Motor Boat Company Limited [1968] EA 123 and Mbogo Vs Shah [1968] EA 93 serve to remind me that I should not rush to interfere with the findings of fact by the lower court unless I am completely convinced that the lower court was wholly wrong in its appreciation of the evidence before it.

15. The issues I have identified for determination are as follows:

    1. Whether the trial court erred in finding that the respondent is the absolute owner of the suit land.

    2. Whether the trial court had jurisdiction to entertain the suit, given the claim of a boundary dispute.

    3. Whether the respondent proved trespass and whether the orders for eviction and restriction were justified.

16. On the first issue, the appellant complains that the trial court erred in finding that the respondent is the registered owner of the suit land, even though the respondent did not produce the title deed during the trial. The trial magistrate in his judgement observed as follows: "Though the plaintiff failed to prove in court the title deed of that parcel of land known as Mbeere/Kirima/4223 a perusal of his list of documents dated 29.10.2020 shows that he is the registered owner of the subject land. The defence conceded to the fact that the plaintiff is the registered owner of the subject land."

17. It is apparent that the trial magistrate did not solely base his decision on the respondent's title deed which was not produced at trial to determine that the respondent was the registered proprietor of the suit land. The reliance on the said document could be said to be erroneous; see the court of appeal case of Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR where the court observed as follows:

> "Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record."

18. The appellants witness DW1 did admit during his testimony that the respondent was the owner of the suit land. He testified verbatim as follows; “I know the plaintiff. He owns a plot of land that borders ours. His land is in the middle of our land. His land is Mbeere/Kirima/4223.” The appellant’s other witness DW2 also confirmed the same position thus; “the plaintiff’s property parcel no. 4223 is in the middle of the defendant’s property.” So from the foregoing, whether the title deed to parcel 4223 was produced as an exhibit or not, the ownership of land parcel 4223 was never a matter of contention. The issue was whether the appellants had trespassed on the said land. The admission by the appellant’s witnesses that the land belonged to the respondent in my view mitigated the omission to produce the title deed. Therefore, it is my considered view that the trial court did not err in its finding of ownership.

19. The appellants also complained that the nature of the suit before the lower court was a boundary dispute which the court lacked the jurisdiction to determine. The same issue appears to also have been raised in the lower court in the respondents submissions and the trial magistrate in his judgement observed as follows;

> “ The defendant raised an issue of boundary dispute. Unfortunately he did not move the court to make that determination either by way of an application, a counter claim or preliminary objection. Boundary dispute and/or issue is a substantial aspect in land law and it is imperative that a party who raises it moves the court through the established legal channels and not in submissions. I say no more.”

20. I agree with the trial court in that regard as from the plaint, the respondent was very specific in his prayers for eviction and restriction of the appellants from the suit land. The appellants on the other hand in their defence merely denied that they had encroached on the respondent’s land. The case as presented to the court by the respondent in his plaint was to determine whether there was trespass on land parcel 4223 said to be belonging to him. The aim was to require the appellants to be evicted or restricted from using the said land. The issue of determination of boundaries was never raised. It was therefore upon the appellants to raise the same formally in a manner that would afford each party an opportunity to argue their positions before the court to enable it make a proper determination on the issue. It was improper to raise it through submissions.

21. I find relevance in the case of Independent Electoral and boundaries Commission and Another v Stephen Mutinda & 3 Others (2014) eKLR 9 as cited in Nyori v Kigen & 2 others (Environment and Land Appeal E013 of 2022) [2023] KEELC 22467 (KLR) (19 December 2023) (Judgment) where the court cited the decision of the Malawi Supreme Court of Appeal in Malawi Railways Limited v Nyasulu (1998) MWSC 3 in which the learned judges quoted with approval an excerpt from Sir Jack Jacob’ article entitled “ “The Present Importance of Pleadings” published in (1960) Current Legal Problems at page 174 where the author stated as follows:

> “ As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event,

> the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

From the foregoing, I find that the trial court did not err in its findings on the issue. Moreover, the respondent's claim was based on trespass, which was within the jurisdiction of the trial court.

22. Lastly, the other issue for determination was whether the respondent proved trespass and whether the orders for eviction and restriction were justified. The trial court found that "In its defence, the defendant denied the issue of trespass but in their oral evidence in court both DW-1 and DW-2 conceded that the contentious acreage was 1 acre and DW-2, the land Planner went further by stating that the extent to which the defendant had encroached into the plaintiff's land was 1 acre. Despite the fact that the plaintiff failed to prove that the defendant had encroached into his entire 15 acres of land, the fact that the defence witness conceded to the issue of trespass settled the whole issue." I agree with the trial court that the admission by the appellant's own witness that the appellant trespassed onto approximately 1 acre of the land, was sufficient to establish trespass to the required standard, being on a balance of probabilities. As trespass was established, the orders for eviction and restriction were justified, though limited to the area of encroachment of 1 acre.

23. For the above stated reasons, I find no reason to disturb the findings of the trial court. The appeal is hereby dismissed and the judgment and decree of the lower court dated 04.11.2021 is upheld. The respondent being the successful party shall have the costs of the appeal.

JUDGEMENT DATE, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 25TH DAY OF SEPTEMBER, 2024.

A. KANIARU

JUDGE – ELC, EMBU

In the presence of Ms Muthama for appellant, Githinji Ithiga for Njeru Ithiga for respondent.

Court Assistant - Leadys

25. 9.2024