



**Kilemba v Mwachofi (Environment and Land Appeal E006 of 2023)
[2024] KEELC 6967 (KLR) (Environment and Land) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6967 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL E006 OF 2023
EK WABWOTO, J
OCTOBER 24, 2024**

BETWEEN

LUCAS KILEMBA APPELLANT

AND

REUBINSON MWASHIGHANDI MWACHOFI RESPONDENT

(Being an appeal from the judgment/decree of Hon. C. Kithinji (PM) delivered on 29th day of November 2023 at Voi Law Courts in ELC Case No. E003 of 2021)

JUDGMENT

1. Litigation giving rise to this appeal started in the subordinate court vide a plaint dated 20th January 2021 which was later and further amended on 25th August 2021.
2. The Plaintiff who is now the Respondent herein averred that he is the owner of the Plot No. 314 Mwakingali Squatters Settlement Squatter Scheme Voi Municipality being the suit property. It was averred that the Defendant who is now the Appellant invaded the Plaintiff's land and erected a fence as he is using the Plaintiff land as a playing field for the pupils of his school which is on a different portion of land. The Plaintiff therefore prayed for judgment against the Defendant for a permanent injunction restraining him from entering, erecting fence, doing constructions, disposing off by way of sale or interfering in any manner which the suit property Plot No. 314 Mwakingali Squatter Settlement Scheme Voi Municipality measuring approximately 0.0181 Ha. The Plaintiff also prayed for costs of the suit and any other relief that the subordinate court may deem fit to grant.
3. The Respondent who was the defendant before the proceedings at the lower court filed a statement of defence and counterclaim dated 2nd December 2021. The Defendant denied the contents of the plaint and averred that he is the bonafide owner of Plot No. 312 Mwakingali Settlement Scheme and the Plaintiff is engaging in nefarious activities aimed at taking over her land. It was also averred that



the Plaintiff through fraud and misrepresentation have been trespassing and causing nuisance on the property. The particulars of trespass were pleaded at paragraph 6 of the statement of defence and counterclaim. The Defendant prayed for dismissal of the suit with costs and sought the following reliefs in the counterclaim; an order of permanent injunction, a declaration that the Defendant is the owner of the suit property and costs and interest.

4. Upon hearing the matter, the learned trial Magistrate Hon. C. Kithinji, PM delivered a judgment on 29th November 2023 dismissing the counterclaim and granted a permanent injunction against the defendant in respect to Plot No. 314, granted an order of the defendant to deliver vacant possession to the Plaintiff within 30 days from the date of the judgment and also awarded costs of the suit to the Plaintiff.
5. Aggrieved with the outcome, the Appellant filed this appeal vide a Memorandum of Appeal dated 28th October 2022. The grounds of appeal are as listed on the face of the Memorandum of Appeal. The Appellant prayed that the appeal be allowed and judgment of the lower court be set aside. The Appellant also prayed for costs of the appeal be borne by the Respondent.
6. The Appeal was canvassed by way of written submissions. The Appellant filed written submissions dated 29th August 2024 while the Respondent filed written submissions dated 7th September 2024. The court has duly considered all the written submissions filed by the parties.

Analysis and Determination

7. Upon considering the court record, pleadings, evidence tendered, grounds of appeal, written submissions as earlier stated and the law, this court has settled on the following issues for determination herein:-
 - i. Whether the trial court had jurisdiction to hear and determine the suit.
 - ii. Whether the trial court erred in law and fact in arriving at its decision.
 - iii. What are the appropriate reliefs to grant herein.
8. In determining the issues raised in the Appeal, this court is cognizant of its duty on a first appeal. See *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR.
9. Similarly, in *China Zhongxing Construction Company Ltd vs 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;
 - 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.”



10. The High Court in the *China Zhongxing Construction Company Ltd case* (supra) cited the Court of Appeal for East Africa in *Peters vs 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 -vs-Thomas* (1), [1947] A.C. 484.”

11. 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.
12. The court shall proceed to determine the said issues simultaneously.
13. The Appellant in his submissions submitted that from the Respondent's own documents and evidence that the matter involved a boundary dispute. It was submitted that PW2 had confirmed in cross examination that the dispute involved boundaries and the matter ought to have not been referred to the Land Registrar and that case was premature.
14. It was also submitted that pursuant to Section 18(2) of the *Land Registration Act*, the courts shall not entertain any action relating to boundaries of registered land unless the boundaries have been determined by the Land Register. It was also submitted that pursuant to Section 19 of the *Land Registration Act* the duty to fix boundaries to registered land is vested in the Land Registrar and the Respondent therefore approached the wrong forum. The cases of *Azzuri Limited vs Pink Properties Limited* [2018] eKLR and *Willis Ocholla vs Mary Ndege* [2016] eKLR were cited in support.
15. On the issue of jurisdiction, the Respondent submitted that the suit property does not fall within an adjudication scheme but rather a settlement scheme. It was submitted that the suit property falls within Mwakingali Settlement Scheme Voi Municipality which is a settlement scheme that was allocated to households upon planning and survey pursuant to the provisions of Section 134 (6) of the *Land Act*. It was further submitted that Section 26 (4) of the Environment and Land Court and Section 9 of the Magistrates' Court Act confers jurisdiction upon the trial court to hear and determine the dispute.
16. In trying to determine whether or not the trial court had jurisdiction to hear and determine the dispute, this court has no alternative but to look into the pleadings filed by the parties. My perusal of the Plaintiff indicates that the Plaintiff's complaints against the Defendant was that the Defendant has invaded his land and erected a fence as he is using the Plaintiff's land as a playing field for the pupils of his school which is on a different portion of land. The Plaintiff also averred that the actions of the Defendant was calculated at depriving off the Plaintiff his land and the Plaintiff sought an injunction.
17. In the statement of defence and counterclaim that was filed by the Respondent, it was pleaded that Appellant had trespassed into his land Plot No. 312 claiming to be the owner of the same. The Respondent sought for a permanent injunction, a declaration that the Appellant had trespassed into his property and costs of the suit and counterclaim.
18. It is trite law that parties are bound by their pleadings and issues flow from the pleadings. Having perused the plaint and the statement of defence and counterclaim filed herein and as pleaded by the



parties, it is evident that the parties did not refer to a boundary dispute. The Appellant had pleaded trespass in his counterclaim against the Respondent and even proceeded to particularise the same at paragraph 6 of the statement of defence and counterclaim. The Respondent on the other hand pleaded invasion by the Appellant into his land. In the circumstances it would not be prudent for the court to assume that the dispute herein was based entirely on a boundary dispute and in the circumstances, it is the finding of this court that the trial court had jurisdiction to hear and determine the suit that was before it.

19. It was further submitted that the trial court erred in its judgment in finding that the Respondent had proved his case to the required standard. It was submitted that since the Respondent had confirmed in his evidence before the trial court that he did not have a title deed to the property and was relying on the allotment letter dated 15th August 2007 that was issued to Elkana Mwasicho. It was also submitted that Elkana Mwasicho exchanged the suit land with one Onesmus Mwalughongo. He also produced a sale agreement dated 19th May 2020 showing that the said Onesmus then sold the suit land to him for a consideration of Ksh 250,000/-. It was also submitted that he had failed to produce any evidence that the original proprietor of the suit complied with the conditions as set out in the letter of offer with regards to payment of Ksh 3,672 by way of bankers cheque and further that the Respondent herein was not the original allottee of Plot No. 314. The letter of allotment produced by the Respondent herein confirmed that the original allottee was one Elkana Mwasicho.
20. From the evidence that was tendered before the trial court, the Respondent who testified as PW1 stated in cross examination that he was the owner of Plot 314 and had an allotment letter in respect to the same. He also stated that he bought the property from Onesmus Mwalugongo Mwashigadi. He also stated that his plot was 314 and he did not know the owner of Plot 312. In re - examination he stated that the Appellant owns Plot 312.
21. The evidence of PW2 the Surveyor confirmed encroachment of Plot No. 314. He stated that the disputes affect the boundaries of Plot 312, 314 and 133.
22. The evidence of the Appellant was to the effect that he is the owner of Plot No. 312 and the Respondent is the owner of Plot No. 314.
23. The survey report that was produced in evidence indicated that plots number 312 and 313 affecting the boundaries of plot number 314 but the extent of the said encroachment had not been stated and in the circumstances the said surveyor's report cannot be considered to have been conclusive.
24. In view of the foregoing, this court agrees with the submissions made by the Appellant that the trial court fell into error in making its finding that the Appellant had trespassed onto the Respondent's premises without stating which side of the border had encroached onto the suit premises of the Respondent and to what extent.
25. Trespass is defined under Section 3 (1) (d) of the *Trespass Act* as an entry into or remaining on or undertaking acts on private land without reasonable excuse and consent of the occupier. In *PM 6 & Another vs P.N.E.C.* (2019) eKLR, the court cited *Kuene & Nagel Ltd vs Forward International Ltd* (2011) 1 E. A 252 that trespass or detinue lies at the suit of the person who has an immediate right to possession of the good against another, who is in actual possession of them and who, upon proper demand, fails or refuses to deliver them up without lawful excuse.
26. From the evidence on record, the Appellant who had filed a counterclaim did not adduce any evidence to demonstrate the extent of the trespass. In respect to the counterclaim, a counterclaim just like a suit ought to be proved to the required standard on a balance of probability. The Appellant pleaded and particularized trespass as an issue before the trial court. If then there was any interference or



trespass then no evidence was availed by the Appellant to prove his case. Considering that there were differences as to what properties had been encroached and given that he did not adduce any specific survey report confirming the same, it is indeed evident that the Appellant had failed to prove any trespass or encroachment of his parcel by the Respondent.

27. In view of the foregoing, it is the finding of this court that the Learned Magistrate erred in arriving at her decision.
28. Having considered the foregoing and while considering the entire scope of Section 78 of the *Civil Procedure Act*, an appellant court has the powers to inter alia determine a case in finality and can also perform the same powers and duties as are conferred and imposed on the court of original jurisdiction when the suit was filed.
29. The Respondent had sought for several reliefs before the lower court upon which the lower court granted a permanent injunction, delivery of vacant possession and costs of the suit. Considering that the Respondent's case had not been proved to the required standard it is the finding of this court that the said orders warrants interference by this court and to this extend the order that comments itself to grant is to set them aside.
30. In respect to the reliefs that were sought by the Appellant in his counterclaim, it is equally the finding of this court that the Appellant's counterclaim was not proven to the required standard and as such the lower court did not err in so far as it proceeded to dismiss the said counterclaim.
31. On the issue of costs, considering the circumstances of this case, this court directs each party to bear own costs of the appeal.

Final orders

32. In conclusion, the Appellant's appeal partially succeeds and the judgment of the lower court is hereby set aside and substituted with the following orders;
 - a. The Respondent's suit before the lower court in respect to the Further Amended Plaint dated August 25, 2021 is hereby dismissed.
 - b. The lower court's finding dismissing the Appellant's counter claim dated 4th December 2021 is upheld.
 - c. Each party to bear own costs of the appeal and costs of the suit and counter claim before the lower court.

Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 24TH DAY OF OCTOBER, 2024.

E. K. WABWOTO

JUDGE

In the presence of: -

N/A for the Appellant.

Mr. Mwzighe for the Respondent.

Court Assistant: Mary Ngoira.

