Nguli v Matheka (Environment and Land Appeal 14 of 2019)
[2024] KEELC 13329 (KLR) (13 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13329 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ENVIRONMENT AND LAND APPEAL 14 OF 2019

TW MURIGI, J

NOVEMBER 13, 2024

BETWEEN

STEPHEN MUTUA NGULI ..... APPELLANT

AND

SAMSON MATHEKA ..... RESPONDENT

JUDGMENT

1. By a Memorandum of Appeal dated 4th July 2019, the Appellant appealed against the Judgment of Hon. Zacharia Joseph Nyakundi delivered on 17th May, 2019 in Makueni PMCC No. 98 of 2012 and set out seven grounds of Appeal

Background

2. The Appellant had sued the Respondent by way of a Plaint dated 12th November 2009 seeking the following orders:-
    a. An injunctive order of the court restraining the Defendant from wasting, damaging or alienating the subject parcel of land.
    b. Special damages- Sh.4,180.00
    c. General damages.
    d. Costs and interest.
3. The Defendant filed a Statement of Defence on 14th July 2010 in which he denied the Plaintiff's claim.
4. In the proceedings before the lower Court, the Appellant was the Plaintiff while the Respondent was the Defendant. After the trial, the Learned Trial Magistrate delivered his judgment on 17th May, 2019 and dismissed the Plaintiff's suit with costs.

5. Aggrieved by the decision, the Appellant appealed to this court on the following grounds: -

   i. That the learned magistrate erred in fact and law by making a finding that the Appellant had not proved his case on a balance of probabilities.

   ii. That the learned magistrate erred in law and fact by failing to consider the allotment letter of offer dated 9th March 2000 in regard to land parcel No 328 for the Appellant as there were no title deeds as at the close of the Appellant's case.

   iii. That the learned magistrate erred in law and fact by failing to consider the letter from Kibwezi Sub-County Surveyor dated 20th November 2017 as per the magistrate's order dated 21st October 2017 which letters were produced by the Plaintiff in court to support the claim that land parcel No. 1008 had encroached part of land parcel No. 328.

   iv. That the learned magistrate erred in fact and law by failing to consider the Respondent/ Defendant does not have a valid title to sustain ownership of land and that he was a trespasser.

   v. That the learned magistrate erred in fact and law in failing to consider the findings by the Kibwezi Sub-County Land Registrar that the boundaries on the ground made the verification of the trespass tricky.

   vi. That the learned magistrate erred in law and fact by failing to consider the findings by the Kibwezi Sub-County Registrar that in view of the glaring difficulties in the ascertainment of the boundaries on the ground and on the map, the Makueni Land Registrar help has to be sought and incorporated in order to solve the dispute.

6. The Appellant prays for:-

   a. That the Appeal be allowed.

   b. That the lower court judgment in Case No. 387 of 2009 be set aside.

   c. A declaration that the Respondent indeed trespassed into the Appellant's land No. 328.

   d. Any other relief that the court may deem fit to grant.

7. The parties were directed to canvass the Appeal by way of written submissions.

The Appellant's Submissions

8. The Appellant's submissions were filed on 23rd June 2020.

9. On his behalf, Counsel identified the following issues for the court's determination

   a. Whether the Learned Magistrate erred in law and fact by making a finding that the Appellant had not proved his case on a balance of probabilities.

   b. Whether the Learned Magistrate erred in law and fact by failing to consider the allotment/ letter of offer dated 9th March 2000 in regard to land parcel No. 328 for the Appellant (Plaintiff in the court a quo) as there were no title deeds at the close of the Plaintiff's case.

   c. Whether the Learned Magistrate erred in law and fact by failing to consider the letter from Kibwezi Sub-County Surveyor dated 19th November 2013 and filed in court on 4th February 2014 and the letter dated 20th November 2017 as per the magistrate's order dated 21st October 2017 which letters were produced in court by the Plaintiff in court which supported the claim that land parcel No. 1008 had encroached part of the land parcel.

d. Whether the Learned Magistrate erred in law and fact by failing to consider that the issue Respondent does not have a valid title to sustain ownership of the land that had been trespassed.

e. Whether the Appellant is entitled to the reliefs sought.

10. On the first issue, Counsel submitted that the Appellant adduced evidence to show that he is the rightful owner of Land Parcel No. 328 Kibwezi Settlement Scheme. Counsel further submitted that the Appellant' evidence on ownership was supported by the report produced by PW2 which shows that the Respondent is the owner of Land Parcel No. 1008 and that he had encroached into the Appellant's land. Counsel submitted that the Appellant had demonstrated in his testimony that the Respondent destroyed the boundary placed by the Ministry of Lands between the two parcels of land.

11. On the second issue, Counsel submitted that the Appellant produced an allotment letter dated 9th March 2000 as proof of ownership of the suit property. It was submitted that ownership of land in Masongeleni Settlement Scheme was at that time governed by the Registered *Land Act* (now repealed) where an allotment letter was proof of ownership. Counsel submitted that the allotment letter was proof of ownership of the suit property as the land had undergone adjudication and subdivision and was awaiting issuance of the title deed. Counsel argued that the title deed issued to the Plaintiff on 2nd February 2018 after the close of his case is clear evidence that he held a valid letter of offer. Counsel argued that the Learned Trial Magistrate erred in law and fact by failing to consider the letter of allotment in the name of the Appellant was proof of ownership of Land Parcel No.328.

12. On the third issue, Counsel submitted that the District Land Adjudication and Settlement Officer Kibwezi, wrote to the court a letter dated 19th November 2013 confirming that the Defendant had encroached into the suit property. That prior to the said letter, the learned trial magistrate ordered the Plaintiff to secure the services of the County Surveyor to establish whether there was any encroachment on land parcel No. 328 Masongeleni Settlement Scheme.

13. Counsel further submitted that the report by the Surveyor demonstrates that the Respondent had encroached into the Plaintiff's land. Counsel contended that the learned trial magistrate erred in law and fact by failing to consider the Surveyor's report and the findings by the Land Registrar Kibwezi which stated that the boundaries on the map and those on the ground do not tally and that the overlaps on the existing boundaries made the verification of trespass tricky.

14. On the fourth ground, Counsel submitted that the Respondent did not adduce any evidence to show that he is the owner of the suit property. Counsel contended that it is evident from the Surveyor's report that the two parcels overlapped each other and that the actual boundaries on the ground varied with those in the map.

15. Finally, Counsel submitted that the Appellant is the rightful owner of the suit property and is therefore entitled to the orders sought.

The Respondent's Submissions

16. The Respondent filed his submissions on 30th October 2020.

17. Counsel submitted that the learned trial magistrate was correct in dismissing the Appellant suit as he failed to prove his case on a balance of probabilities.

18. Counsel further submitted that the Appellant did not adduce any evidence to show that the Respondent trespassed into the suit property. Counsel submitted that the Appellant did not produce a crop assessment report made by a qualified agricultural officer or any survey report to show how

the Respondent had encroached into his land. Counsel further submitted that the Appellant failed to produce a title deed to show that he is the owner of the suit property. Counsel further submitted that the letter by the Land Adjudication Officer dated 19/11/2013 was not marked for identification or produced as an objection was raised on its production.

19. Counsel argued that the Appellant cannot rely on letter by the Adjudication Officer because it was not produced but was marked for identification.

20. Counsel argued that the Appellant did not establish trespass on the suit property as the letter dated 9/3/2000(MFI-1) was not produced but was marked for identification.

21. Counsel submitted that the learned trial magistrate did not err in law and fact by failing to consider the letter dated 20/11/2017 since it was not produced in evidence by the Appellant. Counsel argued that the Appellant did not refer to the letter in his evidence and added that it was marked for identification as no basis was laid for its production.

22. Counsel asserted that the boundary disputes fall within the jurisdiction of the Land Registrar. Counsel further submitted that the document was not received by the court as it does not bear the stamp of the court.

23. On whether the magistrate erred in failing to consider whether the Respondent had a valid title to sustain ownership of the suit property, Counsel contended that the Respondent had no burden to prove in the case.

24. Counsel further submitted that a declaration being a fresh relief cannot be introduced in an appeal as the prayer was not sought in the plaint

25. Counsel contended that Appellant did not prove trespass and was therefore not entitled to damages. Concluding his submissions, Counsel submitted that the Appellant has not laid any basis to warrant the court to set aside the judgment and urged the court to dismiss the Appeal with costs.

Factual Background

The Appellant's Case

26. PW1 Stephen Mutua Nguli testified that he is a farmer from Masongeleni Settlement Scheme. It was his testimony that the Defendant trespassed into his land and damaged his grass and trees. He further testified that he reported the trespass to the chief and that the surveyor established the boundary between the two parcels of land. It was his testimony that he has title to the suit property. On cross examination, he testified that Rhoda was his neighbour and that she had sold a portion of her land (No 1008) to the Defendant.

The Respondent's Case

27. DW1 Rhoda Nduku testified that the Plaintiff is his neighbour and the owner of Plot No. 328 while he is the owner of Plot No. 1008 having purchased the same from Rhoda Nduku in the year 1998. He denied the allegations that he had trespassed into Plaintiff's land.

28. DW2 Rhoda Nduku testified that she sold 6 acres out of land parcel No. 1008 to the Defendant. She denied the allegations that the Defendant had trespassed into the Plaintiffs land.

Analysis And Determination

29. The principles which guide a first Appellate Court were discussed in the case of Selle & Another Vs Associated Motor Boat Company and Others (1968) 1 EA 123 where the Court of Appeal set out the duty of Appellate Courts as follows;

> " An appeal to this court from a trial court by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate itself and drive 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 this respect. In particular, this court is not bound necessarily to follow the trial judge finding 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 demeanour of a witness is inconsistent with the evidence in the case generally."

30. Although the Appellant raised six (6) grounds of appeal, the court is of the opinion that the Appeal may conclusively be determined on the following two grounds: -

1. Whether the Appellant proved his case on a balance of probabilities against the Defendant.
2. Whether the learned trial magistrate analyzed the evidence on record before arriving at his decision.

Whether The Appellant Proved His Case On A Balance Of Probabilites Against The Defendant

31. The Appellant faulted the learned trial magistrate for finding that he had not proved his case on a balance of probabilities. The Appellant contended that the letter of allotment dated 9th March 2009 was proof that he is the registered owner of the suit property. It was the Appellants case that the Respondent had trespassed into his land and caused damage to his trees and grass. It is not in dispute that the Appellant is the owner of Land Parcel No. 328 while the Respondent is the owner of Land Parcel No. 1008. In Civil cases, the standard of proof is on a balance of probabilities. Section 107 (1) and (2) of the *Evidence Act* provides that:-

107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.

(2) when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

32. It is clear from the above provisions that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe.

33. The Appellant had a duty to prove that the Respondent had trespassed into his land.

34. Black's Law Dictionary 10th Edition defines trespass to land as follows;

> " A person's unlawful entry on another's land that is visibly enclosed."

35. In the case of Municipal Council of Eldoret Vs Titus Gatitu Njau (2020) eKLR the Court of Appeal cited the case of M'Mukanya Vs M'Mbijiwe (1984) KLR 761 where the ingredients of tort of trespass were stated as follows;

> " trespass is a violation of the right to possession and a Plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership see Thomson Vs Ward (1953) 2 QB 153."

36. To establish trespass, the Appellant had to prove that he was either lawfully in possession of the properties or was the owner thereof and that the Defendant entered the properties without any justifiable cause.

37. In the case of Gitwany Investments Limited Vs Tajmal Limited & 3 Others [2006] eKLR, the Court held that title to land carries with it legal possession. This means that even if one does not have actual possession of land, so long as he has a title to the land, that is deemed as possession for the purposes of trespass.

38. The Appellant faulted the learned trial magistrate for failing to consider that the letter of allotment was proof of ownership of the suit property as there were no titles as at that time.

39. I have carefully perused the court record and I note that this matter was heard by three judicial officers. On 12/1/2012 this matter was heard by Hon N.N Njagi. The Plaintiff is recorded as the only witness who testified before Hon. Njagi PM. The allotment letter dated 9/3/2000 was marked for identification(MFI-1). On 4/2/2014 the matter was heard by Hon P. Wambugu RM who recorded the evidence of PW2, Geofrey Musila Mutisya, the Land Adjudication and Settlement Officer. The proceedings show that Mr. Kasyoka raised an objection to the production of the letter dated 19/11/2013. The court reserved a ruling date on the objection. I have carefully perused the court record and I find that the ruling was not delivered as scheduled. On 20/11/2018, the matter was heard and concluded by Hon Nyakundi whose judgment is the subject of the Appeal herein.

40. From the proceedings it clear that the matter proceeded de novo though there was no order to that effect. The Appellant faulted the court for failing to consider the allotment letter dated 9/03/2000 the letter dated 21st November, 2017 and the letter from the Kibwezi Sub-County Surveyor dated 19/11/2013.

41. It is clear from the proceedings that the allotment letter was marked for identification in the trial before Hon Njagi. The letter from the surveyor was never marked for identification or produced in support of the Appellant's case. The record shows that the documents were not produced in support of the Appellant's case and as such he cannot fault the trial magistrate for finding that he did not prove his case on a balance of probabilities. The Appellant did not tender any documentary evidence in support of his case.

42. As rightly submitted by the Respondent, the Appellant did not tender any report from the surveyor to show the extent of the encroachment or a report by an Agricultural Extension Officer to show the extent of the damage of his crops. The Appellant had sought for special damages of Kshs 4,180/=. It is trite law that special damages must be specifically be pleaded and proved. Although the Appellant pleaded special damages, he did not prove the same.

43. From the foregoing, I find that the learned magistrate properly analysed the evidence before arriving at his decision. In the end I find that the Appeal is devoid of merit and the same is hereby dismissed. Each party to bear its own costs.

HON. T. MURIGI

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 13 TH DAY OF NOVEMENBER, 2024.

In The Presence Of:

Kioko for the Appellant

Mbulo for the Respondent.