Case Number:	Environment and Land Appeal 15 of 2020
Date Delivered:	27 Apr 2022
Case Class:	Civil
Court:	Environment and Land Court at Meru
Case Action:	Judgment
Judge:	Christopher Kyania Nzili
Citation:	Mwenda Njogu & 2 others v Elizabeth Kathure Matere [2022] eKLR
Advocates:	Mwirigi Kaburu for respondents
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Meru
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal dismissed
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 15 OF 2020

MWENDA NJOGU .....1ST APPELLANT

KINOTI NJOGU .....2ND APPELLANT

GITONGA NJOGU .....3RD APPELLANT

VERSUS

ELIZABETH KATHURE MATERE .....RESPONDENT

JUDGMENT

A. Pleadings

1. The appellants had been sued by the respondent at the lower court for a permanent injunction barring and restraining them from interfering with her ownership, possession, use and occupation of Plot No. 37A Mikumbune Market.

2. The respondent alongside the plaint filed an application dated 24th February 2015 seeking for temporary orders of injunction which was served alongside the summons to enter appearances. The appellant duly entered appearance and filed a response dated 9th March 2016 denying the contents of the plaint.

B. Testimony

3. The respondent told the court he bought Plot No. 37 A from one Cornelius Muthuri and David Mwiti John who were the legal administrators of the estate of Julius Mwobobia following which the property was transferred to him by the defunct county council of Meru. He produced the sale agreement, temporary letters of grant, minutes from the committee of the county council, rates payment receipts, complaint to the sub-county officer after the appellants allegedly started interfering with his plot dated 23.1.2015, summons from the OCS Nkubu police station, a boundary report from the county administrator Meru county all as p. exhibit 1-7 respectively.

4. The appellants told the court Plot No. 35 Mikumbune market was in the names of James M'Ibari, that an officer from the County Government of Meru had visited the locus in quo and was therefore claiming nothing from the respondent since his Plot No. 35B was distinct from the respondents Plot No. 37A as indicated in the boundary report. The appellants were categorical that they had no right to trespass into the respondent plot.

C. Judgment

5. Parties were directed to file written submissions 28 days from 7.11.2018. The respondent filed his copy dated 26.11.2018 but the appellant did not comply.

6. In a judgment dated 3.4.2019 the court made a finding that the respondent had proved her claim to the required standard on account of trespass and permanent injunction.

D. Application for review of judgment

7. By an application dated 21st May 2019 the appellants sought for the review of the judgment and in the alternative the suit to start denovo, and a site visit for the court to confirm the alleged digging of trenches by the appellants. The basis of the said application was that the plots were distinct and in two different localities. The application was opposed by the respondents ground of opposition dated 5.11.2019 and a replying affidavit sworn on 5.11.2019 on the basis that:- the application raised factual issues which were handled by the court in the judgment; there was adequate legal representation during the trial; the application was only designed to muddle the issues and delay the fruits of judgment and lastly it was an abuse of the court process.

8. Parties once more with leave canvassed the application through written submissions dated 7.11.2019 and 5.11.2019 respectively. By a ruling dated 5.2.2020 the court found the application without merits.

E. The Grounds of Appeal

9. The appellants complaints before this court are that the trial court filed to exercise its discretion judicially failed to exhaust Article 159 (2) of the Constitution; filed to put seriousness to the application dated 21.5.2019 especially the prayer for a scene visit; failed to allow prayer 3 of the application which could have shed light to the whole dispute; visited mistakes/blunders of the former lawyers on record on an innocent party; erred in law and fact by making a finding that the grounds were for appeal and not review and lastly made a bad ruling in law.

F. Written Submissions to the appeal

10. With leave party's field written submissions to this appeal dated 27.1.2022 and 3.2.2022 respectively. The appellants submitted the issue for determination as whether the application dated 21.5.2019 satisfied the grounds of review.

11. In their view the appellants maintain other than the report forwarded by the OCS Nkubu Police station on 15.1.2016 which the trial court relied upon, no map or market layout was tendered before the court to show the actual position of the suit plots hence the court was on the dark as to the exact location of the plots.

12. The appellant submitted that there were sufficient reasons to review the judgment since the position and the status of the current market layout was not exhaustively determined and that unless the court intervenes, the ramifications of the judgment would breed more misunderstanding and cause injustice to the appellants.

13. Further it was submitted by the appellants that the trial court awarded general damage which were never pleaded nor evidence tendered in support by the respondent contrary to the rules of natural justice.

14. Reliance was placed on ***Caltex oil Kenya Ltd vs Rono Ltd (2016) eKLR,*** Articles 20 (3) (b) 48, 50 (1) and 159 (1) (d) of the Constitution that the court should facilitate access to justice and fair hearing without undue regard to procedural technicalities.

15. On the other hand the respondent submitted the appeal was vexatious, frivolous and irremediable.

16. As regards whether the appellants satisfied the ground of sufficient reasons for review of the judgment, the respondent submitted that misrepresentation by an advocate did not amount to a ground of review as held in ***Josiah Mwangi Mutero & another vs Rachel Wagithi Mutero (2016) eKLR.***

17. The respondent submitted that the decree or order sought to be reviewed was not annexed contrary law. In ***M'Ikiugu M'Murithi & 2 others vs Joseph M'Nkanata M'Murithi Meru HCC No. 21 of 1989 and Suleiman Murunga vs Nilestar Holdings Ltd & another (2015) eKLR.***

18. Regarding the issue of the reopening of the case it was submitted the appellants defended the suit and their pleadings were duly considered as held in ***Henry Mwobobia vs Muthuri Karauri & another Meru HCC No. 104 of 1991, Evans Bwire vs Andrew Nginda*** cited with approval in ***Stephen Githua Kimani vs Nancy Wanjiru Waruingi T/A Providence Auctioneers (2016) eKLR, Sadar Mohamed vs Charan Singh & another (1959) EA 793.***

19. The respondent submitted the court heard and determined the issues substantively hence it did not amount to procedural or

technical issues to be remedied under Article 159 of the Constitution.

20. Further the respondent submitted the trial court was right in distinguishing grounds of appeal and grounds of review as held in ***NBK Ltd vs Ndugu Njau (1997) eKLR***.

21. This being a first appeal the court is mandated to rehear, re-appraise and re-assess the lower court file and come up with independent findings and conclusions ***see Peters vs Sunday post Ltd (1958) E.A 424.***

G. <u>Issues for Determination</u>

22. The issue commending themselves for determination are:-

(i) If the appellants deserved the review of the judgment on account of sufficient reasons.

(ii) If the appellants deserved an order for the re-opening of the suit to start denovo.

(iii) If the appellants deserved orders for the court to visit the locus in quo.

23. Section 80 of the Civil Procedure Act as read together with Order 45 Civil Procedure Rules grants the court the powers to review an order or decree where there is an error apparent on the face of it, on discovery of new and important material which was not available at the time the order or decree was made after the exercise of due diligence and lastly for other sufficient reasons.

24. In the application dated 21.5.2019 the appellants sought for three key prayers namely review of the judgment and dismissal of the suit with costs, review and the suit to start denovo and thirdly review and the court to visit the locus quo and confirm that indeed the appellant were digging trenches ready for construction on Plot No. 35 Mikumbune market and not Plot No. 37A Mikumbune market.

25. The grounds of the review were that there was confusion on both parties while giving testimony; there was no construction on plot no. 37A but Plot No. 35 and the two plots were 200 metres apart; they lacked what they called “legal language” and avenue to let the court know the two plots were different and in different localities; had the former lawyers requested for a scene visit the truth would have come out; they had never worked on or trespassed and or developed the respondent’s plot.

26. It is trite law that parties are bound by their pleadings and issues flow from pleadings. ***See IEBC vs Stephen Mule Mutinda & 3 others (2014) eKLR.***

27. The appellant herein filed a joint defence dated 9.3.2019 in response to the plaint dated 24.2.2016. At paragraph 3, 4, 5, 6 of the plaint and respondent averred she owned plot no. 37A at Mikumbune market measuring 20 ft by 80 ft which the appellants were interfering with. She attached specific list of documents in support of her claim including a site report by the County Government of Meru, Land Adjudication and adjudication officer. The plaint was filed together with an application dated 24.2.2016 seeking for temporary orders which was opposed by the appellants through a replying affidavit sworn on 9th March 2016 by Mwenda Njogu.

28. In the said affidavit the appellant disputed the actual physical location of Plot No. 37 A and alluded to the report from the County Government.

29. At paragraph 7 of the replying affidavit the 1st appellant made it clear that he had been advised by his advocates that there was need for the court to visit the locus in quo to verify the actual positions of the two plots in the presence of the land registrar and officials of the county government registry as the custodians of the record. He also indicated that he had no business with and had not interfered with Plot No. 37 as alleged or at all.

30. Regarding the defence dated 9.3.2016 other than mere denial, there was no specific pleading that the respondent was mistaken, her plot was at a different locality and that what the appellants were developing was distinct from Plot No. 37A.

31. That notwithstanding the appellants had filed a list of documents dated 9.3.2016 among them a letter dated 11.4.2006 stating

that Plot No. 35 Mikumbune was recommended for removal to create room for the construction of a bus park, receipts relating to plot no. 35B, and a letter dated 5.11.2014 making a specific request to the plot verification since there had been discovery that the plot number on the ground was different.

32. Between the filing of the defence, the replying affidavit on 9.3.2016 and the time the appellant took the witness stand on 7.11.2018, the court record does not show any attempt by the appellants for a scene visit by the court or at the very least a specific request for a ground verification report to be undertaken by the county government officers in charge of the land reports.

33. Similarly, the map annexed as EKL to the notice of motion dated 21.5.2019 was not only undated, unverified but also was never part of the appellants' list of documents in support of their defence.

34. Again as regard the ground verification, the appellants attached as part of the list of documents dated 9.3.2016, a map for Mikumbune marked dated 24.12.2006.

35. When the 3rd appellant testified before the trial court on 7.11.2018 he did not produce any of the exhibits in his list of documents in support of his defence that he owned plot no. 35B and its locality vis a vis plot no. 37A. Only the contrary he admitted that there had been a scene visit by the county officer. He did not dispute and or object to the production of the respondent's ownership and the plot verification documents particularly p. exhibit no's 1, 2, 3, 4, 5, 6 and 7.

36. Even after 1st appellant testified he did not seek for any adjournment to call for more evidence particularly from the county government officers if at all he disputed the locality and or authenticity of the documents as produced by the respondents. The respondent was clear in her pleadings and evidence that the person(s) who had allegedly trespassed into her Plot No. 37A were the appellants. If at all the appellant held the view then that there was need for a scene visit and for the ground verification of the locality of the two plots, there has been no explanation why it was not raised up with the trial court yet going by the replying affidavits sworn on 9.3.2016, their advocates on record had advised the appellants about it.

37. In my view the ground of appeal that mistakes of counsel should not be visited upon an innocent party does not hold any water in this case. It lacks basis at all given the clear record. The case did not belong to the lawyers then on record but the appellants. Since they were clearly advised by their lawyers then the appellants are estopped in law from denying that they knew as early as March 2016 what was required of them. Counsel on record had put the advice on record. It is always the duty of parties to take advice and procure witnesses and exhibits.

38. It is not the business of lawyers to procure witnesses and or documents unless availed to them by the parties. The appellants cannot run away from their responsibilities and or lack of condor under the guise of their former lawyers on record. This information and need to update, amend and marshal facts as to the particulars of the two plots was always within the knowledge of the appellants prior to the filing of the suit.

39. He who alleges must prove. The appellants are now claiming that there were no maps or layout market maps and therefore the court was in the dark as to the exact locality of the two plots. This cannot be true going by the list of documents filed by the parties herein as early as March 2016. The report forwarded to the OCS Nkubu police station on 15th January 2016 was clear on the details of the two plots. It was produced before court with no objection by the appellants. The court considered that report alongside the other evidence available. The appellants at the time of testifying were not even aware of who owned Plot No. 31A. So given parties are bound by their pleadings and issues flow from pleadings, the defence filed was a mere denial. It was not been amended at all to raise the issues now stated as sufficient reasons for the court to re-open the case, take them into consideration and either review and or dismiss the suit or review; and or start the matter denovo and or review and visit the locus in quo and confirm the appellants developments were not on Plot No. 37A.

40. In ***Rhoda Kiilu vs Jianx this court citing Raila vs IEBC,*** held whereas the court has powers to reopen a case a party seeking such orders must lay basis and given reasons why such drastic orders should be allowed.

41. In this appeal the trial court had discretion to review or not to review its judgment. The court was entitled to establish whether there were sufficient reasons as alleged for the prayers sought.

42. In my considered view the trial court was right in finding the appellants did not deserve the orders sought. Given the foregoing

reasons above I have reached the irresistible conclusion that the appeal herein lacks merit. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 27TH DAY OF APRIL, 2022

In presence of:

Mwirigi Kaburu for respondents

HON. C.K. NZILI

ELC JUDGE