



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL SUIT 351 OF 2000

NYAGWOKA OGORA *alias* KENNEDY

KEMONI BWOOGORA APPELLANT

AND

FRANCIS OSORO MARKORESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Kisii (Waweru,J) dated 2nd August, 2001

In

H.C.C.C. NO 502 OF 1997)

JUDGMENT OF THE COURT

In a plaint filed in the superior court on 21.11.97, NYAGWOKA OGORA *alias* KENNEDY KEMONI BWOOGORA, the appellant herein, pleaded that he was the allottee of *plot No 24 Nyakoe Market*; that he had erected thereon brink premises and offcut structures and was earning a sum of Kshs 4,900/= as rent from the said premises; that in or about April, 1997, FRANCIS OSORO MARKO, the respondent herein, trespassed upon the said premises, pulled down the buildings standing thereon, laid some to waste and converted others to his own use and that he had suffered loss and damage in consequence of those acts. The appellant further pleaded that the respondent still persisted in the acts of trespass complained of and threatened to convert the whole of the suit premises to his own use and to put up structures of his liking thereon. He accordingly prayed for a declaration that he was the allottee of *Plot No 24 Nyakoe Market*, general damages for trespass, an injunction to restrain the defendant from continuing or repeating any of the acts of trespass complained of or in any way doing injury or interfering any of the acts of trespass complained of or in any way doing injury or interfering with his quiet possession of the suit premises, costs, interest on damages and costs, and any other relief which the court thought just.

In his statement of defence, the respondent pleaded in effect that the structures allegedly demolished were erected by the appellant's father, one *Johnson Kemoni*, on a part of the respondent's land beyond *Plot No 19B* (which plot had also been excised from the respondent's land and sold to the appellant's father) and that the land demolition was pursuant to a court order in Kisii High Court *Civil Case No 127 of 1993* between the respondent, as plaintiff, and the appellant's father, as defendant.

The trial was concluded on 21.2.01. After due reflection on the evidence, the superior court (*Waweru, J*) found as facts that (i) there exists at *Nyakoe Market a plot No 24* and that the said plot was owned by the appellant, (ii) the respondent was the owner of land parcel *L.R. WEST KITUTU/BOGEKA/222* which was next to *Nyakoe Market* and that sometime back the respondent had sold a small portion thereof to the appellant's father which became *plot No, 19B, Nyakoe Market*, (iii) a dispute had arisen between the respondent and the appellant's father whereby the respondent had alleged that the appellant's father had occupied and included in *plot No 19B* more land than sold to him, (iv) the aforesaid dispute was resolved in favour of the respondent in *Kisii High Court Civil Case No 127/1993* and an order was issued in that case for demolition of the structures owned by the appellant's father which stood beyond what was lawfully his land, i.e. *Plot NO 19B*, (v) in execution of that order, the offending structures (which were on the respondent's land) were demolished, and (iv) the demolished structures were not *Plot No 24* and indeed *Plot No 24* was empty at the time of the demolition complained of.

Having found that the structures that the structures demolished were on the respondent's land and not on *Plot No 24 Nyakoe Market*, the learned Judge found that the appellant had suffered no loss and he was consequently not entitled to damages. However, the learned Judge, as the court of first instance, also considered the matter from the perspective that he could be wrong on liability. In that regard, he took the view that had the respondent been entitled to damages, the same would have been such as would have compensated him for the loss actually suffered, that is to say, the value of structures as they stood before they were demolished. He assessed such value at Kshs 100,000/=. In the result, he dismissed the appellant's suit with costs to the respondent. That judgment was delivered on 2.8.2001. The appellant being dissatisfied therewith has preferred the present appeal.

Four grounds of appeal are taken. They are: (1) the learned Judge erred in law and misdirected himself fundamentally by pronouncing judgment out of the stipulated period, (2) the learned Judge erred in law and misdirected himself in holding that the appellant was not entitled to the reliefs sought by reason that the structures demolished was by Court Order in *H.C.C.C. NO 127 of 1993* and were in the respondent's land parcel No *WEST KITUTU/BOGKA/222* and not on *Plot No 24*, (3) the learned Judge erred and acted on wrong principles in making contradictory orders in the judgment firstly in holding that the appellant was the allottee of *Plot No 24 Nyakoe Market* and, secondly holding that the appellant was not entitled to the relief sought in the plaint, and (4) the learned Judge misdirected himself in the quantum of damages he would have awarded the appellant and he acted on wrong principles in not awarding interest and costs on the damages he would have awarded.

Ground (1) of appeal was grounded on the provisions of *Order XX rule 1* which provides that:-

"In suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within 42 days from the conclusion of the trial of which due notice shall be given to the parties or their advocates."

The appellant's complaint is that the judgment appealed against was delivered outside the maximum period of delay of 42 days contemplated by the rule. It was contended on his behalf that in the circumstances, the judgment was either void or voidable – counsel was not altogether clear. For the respondent it was contended that the rule prescribing the period in which judgment should be delivered was inconsistent with the provisions of *Section 25* and *81 (2)* of the Civil Procedure Act and, accordingly, it was not binding on the Judge. *Section 25* provides that after a case has been heard, the court shall pronounce judgment. And *Section 81(2)* provides that without prejudice the generality of the powers conferred by subsection (1) – which provides that the Rules Committee may make provisions for any matter relating to the procedure of Civil Courts – the rules made may provide for the matters specified in paragraphs (a)-(j) inclusive. The respondent's argument was that *Section 25* does not provide for the time within which a judgment should be pronounced and that the period for delivery of judgment was not one of the matters specified in *Section 81(2)* and, accordingly, it was, so to speak, *ultra-vires* for the Rules Committee to have provided for it as it did in rule (1) of *Order XX*. In our considered view, *Order XX rule 1* is not inconsistent with or *ultra-vires* the provisions of *Section 25* and *81(2)* of the Civil Procedure Act. The former section is silent on the period within which a judgment should be pronounced and the latter does not fetter the plenitude of the power of the Rules Committee to regulate the procedure

of Civil Court provided such regulation is not inconsistent with the Act. So *Order XX rule 1* is validly made. The real question is what is the consequence of non-compliance therewith? No doubt the rule is an important one in the expeditious dispensation of justice. And it is made to be obeyed. However, if non-compliance with the rule were to have the effect contended for by the appellant, we think the overall result would be more injustice than justice to the parties. A lot of time and resources spent in litigation would come to naught if judgments delivered after the expiry of 42 days were to be voided or declared void *IPSO facto*. The rule cannot and in our view could not have been intended to deprive a trial Judge of his jurisdiction to write and pronounce judgment in a case he has heard. In our considered view, while non-compliance with the rule and particularly persistent non compliance or inordinate delay in compliance should call for censure of the judicial officers concerned from those in charge of judicial administration, it should not be a ground for vitiating a duly delivered judgment. Being of that persuasion we would reject ground 1 of appeal.

Grounds 2 and 3 of appeal in reality amount to a complaint that the learned Judge erred in fact in finding that the structures demolished at the behest of the respondent were on his land, namely, *West Kitutu/Bogeka/222* and not on plot No 24. In arriving at that finding, the learned trial Judge expressly stated that he had rejected the evidence of the appellant and his witnesses that the demolished structures had been standing on *Plot No 24*. Those witnesses were *Tom Matara Kemoni (PW2)*, a brother of the appellant who had claimed he was the appellant's tenant in a portion of the demolished premises, *Johnan Kemoni Ogora (PW4)*, the appellant's father, *Bernard Onkoba (PW5)*, the auctioneer who had demolished the premises in question, and *John Orare (PW6)*, the valuer who had undertaken a valuation of the demolished structures on the appellant's instructions. The learned Judge did not have to and did not in fact state the obvious converse that he believed the evidence called on behalf of the respondent that the demolished premises were on a portion of the respondent's premises known as *West Kitutu/Bogeka/222* which had been the subject of a dispute between the respondent and the appellant's father in *High Court Civil Case No 127 of 1993* which dispute had been resolved in favour of the respondent.

As this is a first appeal to this Court from the decision of the superior court we should bear in mind and act upon the well established principles which a first appellate court should apply. These are, that although the first appellate court has the power to re-evaluate the evidence and reach its own conclusions, where necessary, it should be very slow to interfere with the finding of fact made by the trial court. As *Sir Kenneth O'Connor, P*, said in *PETERS V. SUNDAY POST LTD [1958] E.A. 424 at 429*.

"It is a strong thing for an appellate court to differ from the finding, on question of fact, of the Judge who tried the case, and who had had the advantage of seeing and hearing the witnesses."

In similar vein, this Court in *HAHN VS. SINGH [1985] K.L.R.. 716* held that:-

"On appeal, of course, before coming to a different conclusion on the typed evidence this Court should be satisfied that the advantages enjoyed by the trial Judge of seeing and hearing the witnesses is not sufficient to explain or justify his conclusion."

The court further held that:-

"Where there is conflict of primary facts between witnesses and where the credibility of the witnesses is crucial, the appellate court hardly interferes with a conclusion made by the trial court after weighing the credibility of the witnesses."

In those premises, the appellate court will only interfere with findings of fact made by the trial court if it is established that they were based on no evidence, or on a misapprehension of the evidence, or that the Judge demonstrably acted on the wrong principles in reaching those findings: (see *MAKUBE VS. NYAMURO [1983] K.L.R. 403*, and *MWANASONOKI VS. KENYA BUS SERVICES LTD [1985] K.L.R. 931*).

Now, bearing in mind those principles we have come to the conclusion that the findings of the trial court that the demolished premises were not on the appellant's *Plot No. 24* but on a portion of the respondent's

land known as *West Kitutu/Bogeka/222* were made on sound evidence and the learned Judge's own appreciation of the credibility of the respective witnesses and should, accordingly, not be interfered with. The Judge was faced with evidence of conflicting primary facts. On the one hand, the evidence of the appellant himself, his brother and father was categorical that the demolition was done on his plot. However the evidence of the two independent witnesses he called was not so unequivocal. *Bernard Onkoba (PW5)*, the auctioneer though testifying in chief that he demolished the premises pointed out to him by the respondent conceded in cross-examination that he was unable to establish the plot upon which the structures he demolished stood. And the evidence of *John Orare (PW6)*, the valuer was contradictory. In his evidence in chief he stated that the plot on which he did the valuation was pointed out to him by the appellant. In cross-examination, however, he conceded that it was the appellant's father who was present when he visited the site and that he (the appellant's father) was the one who showed him the site. And although he stated that he verified the location of the plot three days after the inspection and valuation, he did not produce any sketch plan or map of the plot in question in relation to the other land(s) in the market to support his alleged verification. *Tom Matara Kemoni*, the appellant's brother who claimed to have been his tenant did not produce any proof of his alleged tenancy in the demolished premises. In contradistinction to the above evidence, the evidence of the respondent and his witness *Pius Mbaka (DW2)*, an elder who had an interest in *Nyakoe Market* and who was part of the team which endeavoured to resolve the dispute between the respondent and the appellant's father, was clear and consistent that the demolished structures were on the respondent's land. Faced with that state of the evidence, *Waweru, J.* who had the benefit of hearing and seeing the witnesses preferred the respondent's evidence and disbelieved the appellant's evidence. We are unable to say, on the written word, that he was wrong to do. He acted on solid evidence, he did not misapprehend it, and he did not demonstrably act on any wrong principles. Like him, we think the evidence of the respondent was more credible than that of the appellant. In that regard, apart from the inconsistencies in the appellant's evidence, it must be remembered that his father (who had an independent dispute with the respondent) and his brother (who claimed to be his tenant) were, in the circumstances of the case, likely to be partisan witnesses. That being our view of the matter, ground 2 of appeal is for rejection and it is hereby rejected. As regards ground 3, of appeal, we can find no contradiction between the learned Judge's findings that the appellant was the owner of plot *NO. 24 Nyakoe Market* and that he was not entitled to the relief sought. Obviously, the trial court having found that the demolished structures stood not on *Plot No. 24* but on the respondent's land, the conclusion was inexorable that the appellant had suffered no loss and he was, accordingly, not entitled to any of the reliefs he had sought.

Ground 4 of appeal was on the quantum of damages and interest on damages and costs. Having come to the conclusion that the respondent was not liable to the appellant for the tort of trespass, it is not necessary to consider the quantum of damages which should have been awarded. Neither is it necessary to consider the award of interest on such damages. We will resist the temptation to say more on those aspects of this appeal.

In the circumstances, we dismiss this appeal with costs to the respondent.

Dated and delivered at Kisumu this 11th day of June, 2004.

R.S.C OMOLO

JUDGE OF APPEAL

E.M. GITHINJI

JUDGES OF APPEAL

A.G. RINGERA

AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR