IN THE COURT OF APPEAL

AT NAKURU

(CORAM: KARANJA, KIAGE & M'INOTI, JJA.)

CIVIL APPEAL NO. 94 OF 2007

BETWEEN

BROOKE BOND (K) LIMITED.....APPELLANT

AND

JAMES BII.....RESPONDENT

(Appeal from the Judgment and Decree of the Honourable Justice Muga Apondi delivered in the High Court of Kenya at Kericho dated 28th April 2006) in **HCCC No. 16 OF 2001**)

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JUDGMENT OF THE COURT

The appellant is the registered owner of two parcels of land namely L.R. No. 621/1 and 7282 situate within Kericho District of Kericho County. In between the two parcels passes a stream or river variously known as Chepkitach river or Kapkorech river the latter being eponymous to a tea estate owned and run by the plaintiff. Its official name is Kapkorech stream, a tributary of the Nyando River.

The respondent is a neighbor of the plaintiff and is the proprietor of a portion of land nearby known as LR. No. 612/8 which does not, however, abut on the said river.

The dispute between the parties dates back to the year 1999 or thereabouts and is captured in the plaint filed before the High Court at Kericho as follows;

"4. In or about July, 1999, without any colour of right whatsoever and without first obtaining consent from the plaintiff, the defendant entered into the plaintiff's said parcels of lands and started excavating each bank of Chepkitach river, constructing a dam across it using soil so excavated thus not only interfering with the plaintiff's riparian rights but also creating cliffs which pose a danger and hazards to human life at Kapkorech Estate of the plaintiff company.

5. ***By reason of this illegal entry the plaintiff aforesaid lands are in danger of being wasted and totally alienated to the detriment of the plaintiff which will suffer irreparable loss and***

damage.

6. ***Despite notice to the defendant to desist from the trespass complained of herein, to stop construction of the dam and vacate the plaintiff's land the defendant has refused to comply and instead persists in his acts of trespass and alienation, thus rendering the filing of this suit necessary."***

For those premises the plaintiff sought a declaration that the two parcels of land belong to it and that the defendant's entry and occupation of the same was unlawful and constituted a trespass. It therefore sought damages for the said trespass and a permanent injunction to restrain the defendant by self or servants or agents from entering, occupying or doing anything on the said parcels of land.

In a written defence, the respondent neither admitted nor denied the appellant's averments of ownership of the subject parcels of land. He however stated that he had no knowledge and made no admission of the averments as to trespass. He denied the allegations of waste, loss or alienation of the appellant's lands. At paragraph 5 and 6 of the defence he then stated as follows;

"5. WITHOUT PREJUDICE to the foregoing the defendant states that he is resident of L.R. No. 612/8 and have (sic) been granted full permission by the Ministry of Water Development to construct works for the diversions, Abstraction; storage or use of water of Kapkurech river.

6. THAT further and without prejudice to the foregoing the defendant rights of easements are recognized fully".

The issues being thus joined, the suit proceeded for hearing before Muga Apondi J. After taking the testimony offered by witnesses for both parties and the submissions by their respective advocates, the learned judge found that the plaintiff, the appellant herein, had failed to prove its case on a balance of probabilities. He proceeded to dismiss the suit, thereby provoking this appeal.

The appellant's grievances against the finding of the learned trial judge are captured in its Memorandum of Appeal as follows;

"1. The learned judge of the Superior Court totally misapprehended

and confused the evidence on record by handling the matter

before him in a casual manner by failing to appreciate that DEX 1

and DEX 2 had no relevance to the respondent's application

thereby coming to an erroneous finding of fact.

2. The learned trial judge of the Superior Court erred and

misdirected himself in law and fact by not appreciating that the respondent's father was not a party to the suit and therefore played no part either in the evidence on record or in the application for similar project downstream at later years.

3. ***The learned trial judge of the Superior Court erred and misdirected himself in law and fact by not finding that it was necessary to consider which issues were in dispute and upon***

which party the burden of proof rested in respect of such issues.

4. ***The learned trial judge of the Superior Court erred in law and fact in failing to consider arguments and authorities given to him by the appellant as he should have done and as a result came to unbalanced findings that disregarded a title holder under Registration of Titles Act, Cap 281.***

5. ***The learned trial judge of the Superior Court grossly misdirected himself and erred by finding that it was a miscarriage of justice to admit and take into consideration documents which has been made and doctored after the filing of the suit and after the respondent had been injuncted from further acts of trespass of the suit lands.***

6. ***The learned trial judge of the Superior Court grossly erred in finding that the appellant had not proved its case whilst it had provided ample evidence that the respondent had entered the suit land without authority of the landowner.***

7. ***The learned trial judge of the Superior Court misconstrued and disregarded clear provisions of the Water Act as regards permits and easements as a result of which he improperly applied it to the prejudice of the appellant's case.***

8. ***The learned trial judge of the Superior Court erred in law and fact when he went on a frolic of his own by digressing from the issues he was called to adjudicate upon and thereby deciding on matters not raised by either to the suit."***

In considering this appeal, our duty as a first appellate court is to re-evaluate, reassess and analyze all the evidence on record with a view to arriving at a fresh and independent decision thereon, but we do so with the keen awareness that we do not have the advantage the trial judge had of hearing and observing the witnesses as they gave their testimony. This is the approach this Court has taken for many years in numerous cases including recently in **SUSAN MUNYI Vs. KESHAR SHIANI Civil Appeal No. 38 of 2002** (unreported) where we stated;

"As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.

In undertaking this task, however, we always bear in mind that unlike the trial court which had the advantage of hearing and observing the witnesses, we make our conclusions from the evidence as captured in the cold letter of the record. We therefore operate under a decided handicap as there is much to be gleaned from the demeanor and nuanced communication of a live witness that is inevitably unavailable, indeed lost, on the record. For precisely this common sense reason, an appeal court must accord due respect to the factual findings of the trial court and will be circumspect and slow to disturb them."

That is of course far from saying that a trial court's findings of fact cannot be overturned on appeal, or, as was put in **NDIIRITU Vs. ROPKOI & ANOR [2004] eKLR**;

"As a first appellate court, we are not bound by the findings of fact made by the superior court [High Court] and we are under a duty to evaluate such evidence and reach our own conclusions. We should however be slow to differ with the trial judge."

In the case before us, we note that the appellant had tendered oral testimony through ROBERT KIMUTAI BII **(PW1)** who was its Legal and Administrative Assistant. His evidence, which was largely unshaken in cross-examination, was to the effect that in July 1999 the respondent, without any consent from the appellant started digging a dam across Chepkitach River. He did this by making excavation on the appellant's land which was wasting the said land as well as interfering with the appellant's riparian rights to the catchment area and causing soil erosion. His evidence was that the respondent was issued with a notice to stop the work but he ignored it. In cross examination **PW1** testified that the respondent had written to the appellant seeking permission but was not granted instead he had gone ahead and obtained some authority from the Ministry of Water Development.

For his part, the respondent testified that he was a banker by profession. He commenced his testimony by stating that his father, one **KIPRUTO ARAP MITEY**, had on 17th July 1981 obtained "a letter of no objection" from the appellant for the laying of pipes on its land. He added that the letter "also provided for the drawing up of a proper legal easement at a later stage." He produced the said letter in evidence. He also relied on a letter dated 6th March 2001, after the litigation had been commenced by the appellant, which was from the Occupational Health Officer of the Ministry of Labour and Human Resources. The letter followed an inspection of the works he was carrying out requested by the respondent and its conclusion was that the works did not present any serious hazards to warrant prohibition of construction.

On being cross-examined, this is what the respondent is recorded to have said;

"I had applied for a easement in 1995 to the Water Appointment Board. Later I got the authority as shown by Ex 4.[It] was subject to the acquisition of easements by myself.

The construction site belongs to the government but it is situated in company's property. Brooke Bond had a lease to the land. I applied for my easement from the Ministry of Water. My father also applied for an casement and no objection … on condition that a easement be incorporated in the title …

However, according to my knowledge, he never got an easement. The plaintiff is the registered owner of the land L.R. 612/1/R. Kapkurech Estate … The first dam was put up by my father while I am putting the second."

In re examination the respondent reiterated that he applied for and was granted an easement from the Water Apportionment Board. He was categorical that it was not necessary for him to apply to the appellant "because the river belongs to the government."

From our own reading of the record, there is no doubt that the lands subject to the dispute between the parties belonged to the appellant. This was expressly acknowledged by the respondent. It is also not in dispute that in order to construct his dam across the river, the respondent did some excavation works on the appellant's said properties. The issue for determination was whether it was lawful for the respondent to enter upon and do works on the appellants' said lands as aforesaid without the necessary permission from the appellant.

Both at the trial and before us, the respondent made heavy weather of the fact that he had obtained a temporary authorization to construct works for the diversion, abstraction, storage or use of water from the Water Appointment Board. That authorization was dated 26th August 1998 and was on the standard form W.A.B 16. The said form provided inter alia that the respondent was;

"Hereby authorized to construct, <u>subject to the acquisition of the necessary rights of way or easements thereto, if any</u>, the works shown by the said applications, maps, and plans in accordance with the provision of the Water Act, Cap 372."

(Emphasis ours)

The said form itself indicated that the authorization was subject to certain conditions including;

"2 (a) … whenever it shall be necessary to divert, abstract or impound water during the erection or construction of works authorized, such diversion, abstraction, impounding or use of water shall be made at such time and in such manner that the works of other operators are interfered with as little as possible <u>and that no damage will be caused to property of another landholder</u>."

(Emphasis ours)

It is clear from the authorization itself that the respondent was under a duty to not only obtain the necessary rights of way or easements before commencing the works, but to also ensure that his activities did not do damage to the property of any other landholder including, obviously and most directly, the appellant's. His contention that he did not require such an easement or other permission from the appellant "because the river belongs to the government" or that he had authority from the Water Apportionment Board is plainly misconceived in law as well as in fact. We say it is misconceived in fact because, on the respondent's own showing, he was all along aware of the need for such easement from the appellant not only from the express stipulations in the Letters of Authority from the Board, but also from the documents he produced in court as D Exh. 1 and 2 being the "Letter of No. Objection" that his father Kipruto Arap Mitey had obtained from the appellant on 13thMarch 1981. Those letters granted the respondent's father an easement to enable him to lay water pipes over the appellant's property at Kapkirech Estate. That the respondent himself elected not to seek such permission while well knowing its necessity smacks of a serious disregard by him of the rights of the appellant.

The very statute under which he obtained authority to construct his dam across the subject river, the Water Act, Cap 374 Laws of Kenya, states in mandatory terms the requirement for an easement as follows;

"S.22 (1) The holder of a permit which authorizes the construction of works that would (or a portion of which would), when constructed, be situated upon lands not held by the permit holder <u>shall acquire an easement on</u>, over or through the land on which the works would be situated <u>and, unless the works have previously been lawfully constructed, shall not construct or use the works unless and until he has acquired such an easement</u>."

(Our Emphasis)

This provision imposed a positive duty on the respondent to engage, seek and obtain an easement from the appellant but he never did. To the contrary, it is clear from the appellant's letter dated 30th August 1999, to which both Mr. Migiro, learned counsel for the appellant, and Mr. Shivaji, learned counsel for the respondent, referred before us for different propositions, that the respondent knew all along of the need to apply for an easement and of the fact that the works he was undertaking on the appellant's lands, absent such easement, were unlawful and amounted to a trespass. In fact the respondent quite boldly, and with a measure of contumely, in our view, took and espoused the position that the delay in filing suit between the date of the letter and 22nd February 2001 amounted to some kind of that permission on the part of the appellant.

The position in law is that an easement amounts to a conveyance of an interest in land and must be effected by way of a transfer within the meaning of the Registration of Titles Act, **Cap 281** that was in operation of the material time. The precise provision is at Section 34 of the statute in the following terms;

"When land is intended to be transferred or any right of way or other easement is intended to be created or transferred, the registered proprietor … shall execute, in original only, a transfer in form F in the First Schedule, which transfer shall, for description of the land intended to be dealt with, refer to the grant or certificate of title of the land or shall give such description as may be sufficient to indentify it, and shall contain an accurate statement of the land and easement, or the easement, intended to be transferred or created, and a memorandum of all leasers, charges and other encumbrances to which the land may be subject, and of all rights of way, easements and privileges intended to be conveyed."

We are quite satisfied that the respondent's contentions which seemed to suggest a creation of an easement in his favour by delay, default or mere implication has no foundation in law and we reject it. An easement such as is contemplated by the Water Act is creatable only by the conscious act in writing of the parties, and at any rate the land owner of the servient tenement, and required to be noted in the certificate of title.

In this regard we are in agreement with the reasoning and analysis of this Court in the case of **KAMAU Vs. KAMAU KLR (E & l) 1 105**; which dealt with the creation of easements both at common law and in equity. We are of the view that no equitable easement was pleaded or argued in the case before us and the findings of the court on it do not apply. That Court was however quite emphatic with regard to legal easements, such as the one that was requisite in the case under consideration, as follows;

"An easement is a convenience to be exercised by one land owner [here the respondent] over the land of a neighbor [here the appellant] without participation in the profit of that other land. The tenement to which it is attached is the dominant and the other on which it is imposed is the servient tenement.

"How are they created? At common law only by deed or will. Writing under hand or parol grant with or without valuable consideration creates no legal estate or interest in land but only a mere licence of personal to the licensor or lincesee coupled with an interest or grant if it needs the latter to give effect to the common intention of the parties."

The position on easements in Kenya is governed by statute requiring only that the same be created in writing and not by deed.

After discussing easements of necessity which are of no relevance to the case before us, Kneller J.A. adverted to the position that would apply to circumstances such as obtain in the case before us thus;

"Not so however, for the furrow and water from the river to the land of Gregory [here the respondent] (the dominant tenet) for these are not easements of necessity and do not arise from operation of law but were created and must be reflected in the certificate of title or else they are not legally enforceable …"

In the case before us it is not merely registration that did not occur, the easement itself never occurred and all due to the respondent's inattention or outright disregard for both the law and the

express wishes of the appellant who is the owner of what could have been the servient tenements.

With the greatest respect to the learned judge, we find that he treated and dismissed the appellant's case and its first witness in a rather perfunctory and dismissive manner. He also seems to have failed to appreciate that the issue before him was really one of the legal consequence of unpermitted entry upon and wastage of another's land which rendered the Legal and Administrative Officer of the appellant a proper witness. The learned Judge's view that the appellant should have sent its agronomist to come and testify instead is rather difficult to fathom.

Equally, we find some merit in the appellant's complaint as stated in ground 8 of appeal that the "learned Judge erred when he went on a frolic of his own by digressing from the issues he was called upon to adjudicate." By this rather picturesque language the appellant must mean the learned Judge's foray into the conflicts and politics that surround water as follows;

"That river is a natural resource that must be shared equally, fairly and justly by persons within the vicinity of the same without any regard to their economic and social background. Water is strategic and vital resource that cannot be left at the control and disposal of a few individuals.

No wonder communities have historically fought due to this resource. Apart from the above, even civilized nations have threatened to fight due to the same resources."

Our respectful view is that the foregoing views clearly coloured and clouded the learned judge's appreciation of the matter before him and led him to a misapprehension of the same. At the heart of the dispute was never a fight between the appellant and the respondent over the use or utilization of the water of the stream. The bone of contention was the respondent's unauthorized entry upon the appellant's land in total disregard to the latter's rights and in willful violation of the mandatory provisions of the Water Act designed to deal with the very conflict the Judge alluded to unbidden.

The upshot is that the learned Judge's dismissal of the appellant's suit was erroneous and we set it aside. We find and hold that the respondent's entry and occupation of portions of the appellant's parcels of land LR No. 621/1 and 7282 was unlawful and constituted a trespass. An injunction now issues to restrain such trespass as prayed in prayer (c) of the plaint. As the appellant did not make any representation or submission on the question of damages both at the High Court and before us, we make no award thereon.

The appellant shall have the costs of this appeal and of the suit at the High Court.

Orders accordingly.

Dated and delivered at Nakuru this 5th day of July 2013.

W. KARANJA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR