



**Siparo v Kantai (Environment and Land Appeal 7 of 2018)  
[2023] KEELC 16704 (KLR) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16704 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT AND LAND APPEAL 7 OF 2018**

**MN KULLOW, J**

**MARCH 22, 2023**

**BETWEEN**

**SUSAN ENCHUMPAI SIPARO ..... APPELLANT**

**AND**

**DAVID LEMAN KANTAI ..... RESPONDENT**

**JUDGMENT**

1. This appeal emanates from the judgment and decree of Hon A.K Mokeross delivered on September 23, 2015 in Kilgoris PMCC ELC case No 23 of 2009. The grounds in the memorandum of appeal are that: -
  - i. The learned trial magistrate erred in law and in fact in finding and holding that the appellant had encroached onto and/or trespassed upon LR No Trans-mara/Isampin/511, (hereinafter referred to as the suit property) belonging to the respondent, in the absence of a surveyor's report, attesting to the existence of (sic) boundaries between the suit property and LR No Trans-mara/Isampin/72, the latter belonging to and registered in the name of the appellant.
  - ii. In finding and holding that the appellant had trespassed onto the suit property in the absence of a surveyor's report, the trial magistrate relied on and/or placed undue premium on the hearsay evidence, tendered by and/or on behalf of the respondent, which evidence was/is devoid of probative value.
  - iii. The learned trial magistrate erred in law in proceeding to entertain and/or adjudicate upon the subject suit, without referring the same to the determination of the boundary dispute by the land registrar, in accordance with the provisions of sections 18 &19 of the [Land Registration Act](#), No 3 of 2012. Consequently, the judgment and decree of the learned trial magistrate was rendered without jurisdiction.



- iv. The learned trial magistrate erred in law in finding and holding that the respondent's title to and in respect of the suit property, was indefeasible, on account of the provisions of section 143(1) of the [Registered Land Act](#), cap 300, laws of Kenya (now repealed), notwithstanding the fact that the provisions of the Act, had long been repealed, prior to the delivery of the suit judgment and hence the same were obsolete and thus inapplicable.
  - v. The judgment of the learned trial magistrate is anchored and/or founded on obsolete provisions of the law and hence the same is coloured with fundamental errors and thereby the judgment, is illegal and invalid.
  - vi. The learned trial magistrate erred in fact and in law in ordering and/or decreeing eviction of the appellant from the suit property, albeit in the absence of evidence that the appellant had entered upon and occupied the suit property. In a nutshell, the order of eviction was arrived at in vacuum.
  - vii. The learned trial magistrate failed to cumulatively and/or exhaustively evaluate the entire evidence on record and in particular the evidence by and/or on behalf of the appellant and thereby the learned trial magistrate reached and/or arrived at an erroneous conclusion, contrary to the weight of the evidence on record.
  - viii. The judgment of the learned trial magistrate is slanted and hence contrary to the provisions of order 21 rule 4 of the [Civil Procedure Rules, 2010](#). In the premises, the judgment is a nullity.
2. In the premises, the appellant sought the following orders: -
    - a. The judgment and decree of the learned trial magistrate dated September 23, 2015, be set aside and/or quashed and the same be substituted with an order dismissing the respondent's suit *vide* Kilgoris PMCC No 23 of 2009.
    - b. Costs of the appeal and those incurred in the subordinate court be borne by the respondent.
    - c. Such further and/or other orders be granted as this honourable court may deem fit and expedient.
  3. A brief background to bring this appeal into perspective is that; *vide* an amended plaint dated February 12, 2012; the plaintiff/respondent instituted the suit against the defendant/appellant, seeking an order of eviction, permanent injunction from further interference with the parcel of land and a declaration that the plaintiff is the sole and absolute owner of the suit parcel. It was the plaintiff's claim that sometimes in the year 2001; the defendant without any color of right, consent and/or permission, unlawfully laid claim over the suit parcel and purported to lease out the same to strangers. His claim against the defendant as therefore that he is the sole and absolute owner of the suit land and further that his interests thereto are indefeasible.
  4. The defendant on the other hand filed a statement of defence dated December 20, 2011 wherein she denied all the allegations made against her. It was her contention that the suit land No Transmara/ Isampin/511 only existed on paper and the lands registry but the same did not exist on the ground. She maintained that she inherited the suit land and has been using the entire land exclusively and the same therefore belongs to her. She thus urged the court to dismiss the suit with costs.
  5. The appeal be canvassed by way of written submissions, both parties filed their respective submissions which I have read and summarized hereunder;



## **Appellant's Submissions**

6. The appellant submitted on the grounds of appeal separately; on grounds 1 & 2 in the memorandum of appeal, it was her submission that the trial magistrate erred in relying on the title deed and the official search records in finding that the suit parcel belonged to the respondent. It was her contention that a title deed cannot be automatically be held as a *prima facie* evidence of ownership and the court ought to have interrogated the authenticity and validity of the title deed in question. It was further her claim that the trial magistrate ought to have asked for a surveyor's report to determine the boundaries of the suit property and to ascertain whether the suit property as registered exists. She contends that the suit property *vide* the title deed only exists on paper but not on the ground.
7. On ground 3; it was her submission that the trial magistrate erred in entertaining the suit without referring the same for determination of the boundary dispute by the land registrar who has the requisite jurisdiction. It was therefore her submission that the trial court had no authority or jurisdiction to pronounce itself on the dispute.
8. It was her submission on grounds 4 & 5 that the trial court erred in applying section 143(1) of the [Registered Land Act](#) which was repealed by section 109 of the [Land Registration Act](#) and finding that respondent's title to the suit property was indefeasible. It is her claim that a repealed law is bad law and it seizes to speak from the moment the repeal takes effect and applying the same is as good as applying the law retrospectively.
9. On grounds 6 & 7 of the appeal; she submitted that trial magistrate relied on the registration documents produced by the respondent and the information contained in the certificate of search and based on the said information, proceeded to find that she was a trespasser. She contends that the only way to determine whether the suit property was encroached into and by what extent, was through a land surveyor going to the ground and ascertaining the boundaries of LR No Transmara/ Isampin/ 72 and 511 and filing a report thereto. That the onus of proving trespass claim was upon the respondent who was claiming encroachment into the suit parcel and it was necessary for him to tender the said surveyor's report but he failed to do so.
10. On the final ground of appeal 8; it was her submission that it was incumbent upon the trial magistrate to set out the issues for determination, the determination thereof and the reasons for such determination as provided under order 21 rule 4 of the [Civil Procedure Rules](#), clearly addressing the issues raised by both parties and not just one party. She maintained that the trial magistrate glossed over and failed to determine the real issues in dispute. She thus dismissed the trial court judgment as fatally defective and urged the court to allow the appeal with costs.

## **Respondent's Submissions**

11. The respondent also submitted on the grounds of appeal separately. On grounds 3,4 & 5 of appeal; on the reliance on section 143(1) of the [Registered Land Act](#) (now repealed) by the trial court, it was his submission that the cause of action arose in the year 2009 under the regime of [Registered Land Act](#) and further that the rights and interests over the suit were created under the [Registered Land Act](#). He thus maintained that the said law is to apply in resolving the disputes and that the new land laws could not be applied retrospectively.
12. On grounds 1,2,3,6 & 7 of appeal; on the trial court determining a boundary related dispute and making a finding on encroachment without a surveyor's report, it was his submission that the need of a surveyor's report was neither pleaded nor did the same fall for consideration and determination, he submitted that the same were being raised for the first time on appeal.



13. It was his claim that there was adequate evidence on record which proved that the 2 parcels No 511 & 72; had defined and clear boundary and beacons, which was demarcated and surveyed during adjudication process and the same was reiterated by the oral evidence of PW1 & 2 and the oral testimony of the appellant (DW2). He thus submitted that there was sufficient proof that the appellant had without any lawful basis encroached onto the suit property and the respondent was therefore entitled to protection under section 143(1) of the Registered Land Act (now repealed) as the rightful owner of parcel No 511.
14. On ground 8 of appeal on non-compliance with the provisions of order 21 rule 4 of the Civil Procedure Rules, 2010; it was his submission that the trial court judgment was in compliance with the law, the court set out issues and proceeded to determine the same and gave reasons for its findings. In the alternative and without prejudice, he submitted that the failure to strictly comply with the said requirement, was merely want of form and does not go to the root of the judgment. He thus maintained the said allegations are malicious and devoid of merit and should be dismissed.
15. In conclusion, he urged the court to dismiss the appeal with costs.
16. He relied on the following cases in support of his case; Top Tank Company Limited v Amos Ondiek Wandaye [2018] eKLR, PNN v ZWN [2017] eKLR, Chairman, Veterinary Association Central Region v Benson Maina Kimindi [2013] eKLR, Ambale v Masalia [1976] eKLR and Kariuki Lydia & Anor v A M [2018] eKLR.
17. I have keenly reviewed the record of appeal, the grounds outlined in the memorandum of appeal herein and the rival submissions in totality; I find that the main issue for determination is whether in the circumstances, this court should interfere with the exercise of discretion by the trial court and set aside its judgment and decree delivered on September 23, 2015; on account of the ownership and trespass claims, validity and authenticity of the title deed adduced.
18. This being a first appeal, this court has a duty to analyze and re-assess the evidence on record and reach its own conclusion. The court in Kenya Ports Authority v Kunston (Kenya) Ltd, (2009) 2 EA 212 held as follows: -

“This being a first appeal to this court, the duty of the court, is to reconsider the evidence, evaluate and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect...”

See also Selle v Associated Motor Boat Co [1968] EA 123).
19. At the centre of the dispute between the parties herein is the issue of trespass and ownership of land parcel LR No Transmara/Isampin/ 511 and No 72 respectively. It is the appellant’s contention that she is the legal and absolute owner of parcel No 511 and has been using the same exclusively. She maintained that the suit parcel claimed by the respondent only exists on paper and at the lands registry but does not actually exist on the ground. She thus faulted the trial court for solely relying on the title deed and certificate of official search produced by the respondent in making a decision in his favor.
20. The respondent on the other hand maintained that he had satisfactorily proved his claim on encroachment and that the appellant did not have any basis for using and occupying his rightful land. He produced exhibits in support of his ownership and encroachment claims.
21. I will now proceed to re-evaluate and re-assess each of the party’s claim and the exhibits produced in support of each case in totality vis-à-vis the judgment of the trial court in determining the issues in dispute herein.



22. The appellant contends that the respondent did not adduce any evidence in the form of a surveyor's report to ascertain the existence of boundaries and to further confirm whether she had indeed encroached/ trespassed or occupies the suit land. As a result thereof, the trial magistrate erred in ordering that he be evicted from the suit land without sufficient proof. He further claimed that the validity and authenticity of the title deed produced was not interrogated.
23. The respondent on the other hand maintained that he the 2 parcels No 511 & 72, had defined and clear boundaries and beacons, which were demarcated and surveyed during adjudication process and there was sufficient proof to show that the appellant had without any lawful basis encroached onto the suit property.
24. Section 3 (1) of the Trespass Act defines trespass as follows: -

“ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
25. The appellant contends that a surveyor's report is a prerequisite in a claim of trespass and/or encroachment. at grounds 1 and 2 of the memorandum of appeal, it is her claim that the trial court erred in making a finding that she had encroached onto the subject land in the absence of a surveyor's report. My understanding of section 3 above is that any unlawful intrusion into another person's land without consent of the owner or reasonable excuse, enters and remains on another's land is guilty of trespass. While I acknowledge that in certain instances a surveyor's report may be necessary to determine the *locus in quo* and the extent of trespass; in the instant case, this court finds that the surveyor's report was not a prerequisite. No lawful justification and basis was given by the appellant for her continued use of the suit parcel No 511 registered in the name of the respondent herein.
26. The appellant has also called upon the court to examine the validity and authenticity of the title deed adduced by the respondent at the trial court. I wish to restate that the duty of a first appellate court does not entail taking into account matters which were not pleaded/raised, addressed or determined at the trial stage. I have looked at the statement of defence and I must state that the appellant did not specifically plead fraud nor challenged the said title produced by the respondent at the trial stage. It is well settled that allegations of fraud are very serious allegations and must be strictly proved to the required standard.
27. Section 26 of the Land Registration Act envisages 2 instances where a title document may be challenged and the same are either through fraud or misrepresentation or through a corrupt scheme. The appellant has not demonstrated and proved to the required standard either of the two grounds. No evidence was adduced in the trial court to prove that the respondent's title deed was procured through fraud or misrepresentation. Therefore, in the absence of any proof, this court finds that the certificate of title produced by the respondent as Pexh 3 is conclusive evidence of proprietorship that the respondent is the absolute and indefeasible owner of the parcel of land No 511.
28. It is the appellant's claim that parcel No 511 only exists on paper and at the lands registry but the same does not exist on the ground. I however note that in her oral testimony; she acknowledged and confirmed the existence of parcel No 511 and even admitted to have planted sugarcane on the said land despite not holding the title thereto. The appellant cannot therefore be seen to question the existence of the suit land after admitting that she has been using the same, a fact which was equally admitted by DW1 in her testimony.



29. It was further her admission that she did not object to the registration and issuance of title deed in respect to parcel No 511 in the name of the respondent. That even though she claimed that during the adjudication process the respondent was in primary school; she did not demonstrate any steps taken to correct the details in the adjudication register as provided under the *Land Adjudication Act* to reflect her claims on ownership. Adjudication process is an open process and all parties within the adjudication area are always given an opportunity to inspect the register which is a public record. Further, the *Land Adjudication Act* provides an elaborate procedure/ mechanism for the resolution of any dispute that may arise during the adjudication exercise with finality. The registration of the parcel 511 in the name of the respondent is a first registration pursuant to the adjudication process.
30. It is trite law that he who alleges must prove. Section 107(i) of the *Evidence Act* provides that: -
- “Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
31. No proof was provided by the appellant to challenge and/or impeach the respondent’s title deed. This court therefore find the claims made by the appellant on the need of a surveyor’s report as a prerequisite in determining a claim of trespass as unfounded. She did not challenge the title deed produced by the respondent and in her own admission, she acknowledged that even though the land was registered in the name of the respondent, she had been utilizing the same. No proper justification and basis was demonstrated by the appellant for her continued use of the suit parcel at the expense of the registered owner, hence the order of eviction.
32. The respondent on the other hand provided a copy of the title deed, a certificate of official search and the map sheet in respect of LR No Transmara/ Isampin/ 511 all in support of his ownership claims. I find the said exhibits as sufficient and satisfactory in proving the respondent’s case.
33. In view of the foregoing, this court finds that the decision of the trial court was arrived at judiciously, upon analysing and I will not interfere with the same.

### **Conclusion**

34. In conclusion, I accordingly find that the appeal is not merited and I accordingly dismiss the same with costs to the respondent. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 22<sup>ND</sup> DAY OF MARCH, 2023.**

**MOHAMMED N. KULLOW**

**JUDGE**

**In presence of; -**

Mr. Mutua for the Appellant

Nonappearance for the Respondent

**Court Assistant - Tom Maurice/ Victor**

