



**Dishon v Oyugi (Environment and Land Appeal E031 of 2021)
[2023] KEELC 17438 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17438 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL E031 OF 2021**

MN KULLOW, J

APRIL 27, 2023

BETWEEN

PHILIP MORAIRA DISHON APPELLANT

AND

JENNIFER OYUGI RESPONDENT

JUDGMENT

1. This Appeal emanates from the Judgment and Decree of Hon R K Langat delivered on May 6, 2021 in Rongo SRMC ELC Case No 44 of 2018, in which the Appellant's claim was partly allowed. The grounds in the Memorandum of Appeal are that: -
 - i. The Learned Trial Magistrate failed to cumulatively and/or exhaustively evaluate the entire evidence on record and hence failed to capture and decipher the salient issues and/or features of the suit before him and thus arrived at an erroneous conclusion, contrary to and in contradiction of the evidence adduced.
 - ii. The Learned Trial Magistrate erred in fact and law in finding that the Appellant failed to prove the averments contained in the Plaint as against the Respondent herein on a balance of probabilities thus dismissing the suit as against the Respondent.
 - iii. The Learned Trial Magistrate erred in fact and law in finding and holding that the Respondent herein had proved that same was the owner of L R No Kamagambo/ Kanyajuok/ 1196, contrary to the evidence adduced during trial.
 - iv. The Learned Trial Magistrate erred in fact and law in finding that there was no evidence adduced by the Appellant in regards to the acts of encroachment on the part of the Respondent while the evidence adduced during trial proved otherwise.



- v. The Learned Trial Magistrate erred in fact and law in finding and holding that because there was no Report from the Land Registrar lodged with respect of L R No Kamagambo/ Kanyajuok/ 1196 And L r No Kamagambo/ Kanyajuok/ 1199 (hereinafter referred to as the suit property) the Appellant's suit against the Respondent could not stand.
 - vi. The Learned Trial Magistrate hence arrived at a slanted and erroneous judgment, based on the failure to appreciate and/or discern the claim by and/or to the instance of the Appellant which claim was pegged on recovery of land and not boundary dispute.
 - vii. The Learned Trial Magistrate abdicated his duty in concluding that the Appellant needed to furnish the trial court with a Boundary Dispute Report for purposes of ascertaining encroachment by the Respondent herein on the face of glaring evidence adduced in court by the Appellant.
 - viii. The Learned Trial Magistrate erred in law and fact by believing the evidence of the Respondent herein in regards to ownership of L R No. Kamagambo/ Kanyajuok/ 1196 while no documents were produced in court to ascertain and/or authenticate the assertions therein. For clarity, the existence of the said parcel of land was never proved.
 - ix. The Learned Trial Magistrate misdirected himself by dismissing the Appellant's case against the Respondent herein while the evidence on record in favor of the Appellant were cogent and/or weighty.
 - x. The Learned Trial Magistrate erred in law and fact in disregarding the evidence adduced by the Appellant as concerns the encroachment on the part of the Respondent on the suit property. For clarity, the Respondent adduced evidence that the same was not sure which property she was occupying.
 - xi. The judgment of the learned trial magistrate does not capture the issues for determination, the determination thereof and the reasons for such determination. Consequently, the judgment of the learned trial magistrate contravenes the mandatory provisions of Order 21 Rule 4 of the [Civil Procedure Rules, 2010](#).
2. Consequently, the Appellant sought the following orders against the Respondent: -
- a. The Appeal herein be allowed and the Judgment and Decree of the Trial Magistrate dated May 6, 2021 vide Rongo SRMCC ELC No 44 of 2018, in so far as it relates to the Respondent, be set aside, reviewed, varied and/or quashed.
 - b. The Honourable Court be pleased to substitute therefore an Order allowing the Appellant's suit in the subordinate court vide Rongo SRMCC ELC No 44 of 2018 as against the Respondent.
 - c. Costs of this Appeal and costs incurred in the subordinate court be borne by the Respondent.
 - d. 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; vide a Plaint dated May 08, 2017 the Plaintiff/ Appellant instituted a suit against the 2nd Defendant/Respondent alongside one Yusuf Omondi Mboya, who was the 1st Defendant; seeking an order of Eviction, Permanent Injunction, general damages for trespass together with costs of the suit.



4. It was the Appellant's contention that sometimes in the year 2016; the Respondent entered into/ trespassed into the suit property and commenced construction of structures thereon without the consent of the Appellant. That as a result of the said acts of trespass, the Appellant's right to own property was violated.
5. The 2nd Defendant/Respondent filed a joint Statement of Defence dated May 09, 2018; wherein the 2nd Defendant/ Respondent denied the allegations of trespass and the particulars therein pleaded by the Plaintiff and maintained that she is the lawful occupier of L R No Kamagambo/ Kanyajuok/ 294 and has never encroached on the Plaintiff's land. It was also her testimony that there has never been any boundary dispute between her and the plaintiff/ appellant and further that she was neither a party to the Boundary Dispute nor was her land parcel included in the Report produced by the Land Registrar as Pexh. 6. The case against her was heard and dismissed with costs hence the instant Appeal.
6. The Appeal be canvassed by way of written submissions, both parties filed their respective submissions which I have read and taken into consideration in arriving at my decision hereunder;

Appellant's Submissions

7. The Appellant condensed the grounds of Appeal into 2 main issues; on the 1st issue, it was the Appellant's counsel submission that he was the registered owner of the suit property; L R No Kamagambo/ Kanyajuok/1199 and the Respondent trespassed into the said parcel sometimes in July/ August 2016 and commenced to construct structures thereon. He maintained that the Respondent failed to controvert the said evidence by proving that she was actually in her parcel of land and not that of the Appellant.
8. He also made reference to the testimony by the Respondent at page 20 of the Record of Appeal; where he contends that the Respondent stated that she could not recall the parcel number and thus does not know the parcel number where she has constructed her house. The Appellant further averred that the Respondent did not avail any title documents of L R No Kamagambo/ Kanyajuok/ 1196, 119,1198 & 1200 as evidence in support of her case neither did she demonstrate the registered owners of the said parcels of land. He thus maintained that the Respondent had encroached on his suit property and needed to be evicted.
9. He also made reference to the judgment of the trial court at page 29 of the Record of Appeal and the issue of boundary dispute between parcel No 1199 and 296. In this regard, it was his submission that the claim against the Respondent was on recovery of land and not a boundary dispute. He further claims that Respondent did not prove that she is the registered owner of parcel 119.
10. On the 2nd issue; the Appellant maintained that the dispute between the Respondent and himself was for the recovery of land that was being occupied by the Respondent without his consent and not a boundary dispute. He submitted that no documents were produced to ascertain ownership of the parcel land No 119.
11. In conclusion, counsel submitted that he had discharged the burden of proof during trial by adducing evidence in support of his case and urged the court to set aside the judgment dated May 06, 2021 in so far as the same relates to the Respondent and the instant Appeal be allowed with costs.

Respondent's Submissions

12. The Respondent's counsel on the other hand mainly submitted on the Appellant's claim against her; it was her contention that at paragraph 6 of the plaint, the Appellant clearly stated that she entered upon and/or encroached onto a portion of the suit property No. 1199 and built structures thereon



- without his consent. She responded to the said allegations at paragraph 16 of the joint statement of defence and denied the said allegations of trespass and averred that she is in occupation of a separate land title No Kamagambo/ Kanyajuok/ 294.
13. Counsel further submitted that the Appellant's claim against the 1st Defendant in the lower court was significantly different from the claim against the Respondent. That the claim against the Respondent involved a determination of the question of trespass relating to titles No's Kamagambo/ Kanyajuok/ 1199 and 294 which happened sometimes in July/ August 2016
 14. On whether the Respondent had trespassed onto the Appellant's properties, it was counsel's submission that the trial magistrate correctly found that no evidence was tendered before the court by the Appellant to confirm any encroachment by the Respondent. The 2 parties herein are neighbors with the Appellant owning No 1199 while the Respondent owns No 294.
 15. On the issue of the boundary dispute; it was her submission that no Report was filed before the court by the Land Registrar and/or surveyor. It was her contention that the Appellant had a duty to avail a Report by the Land Registrar, made at the time of the alleged encroachment detailing how and by what extent the Respondent had encroached.
 16. She further stated that while the Appellant alleged that the Respondent built a house on his suit parcel No 1199; he had a duty to avail a surveyor's report confirming that such a house was built on the suit parcel and not No 294 which the Respondent contends she is in lawful occupation thereof. Counsel thus maintained that the trial magistrate correctly concluded that the Appellant had failed to prove trespass against the Respondent and urged the court to dismiss the appeal in its entirety and uphold the decision of the trial court with costs.
 17. Having looked at the Record of Appeal, the Memorandum of Appeal herein and the rival submissions in totality; I find that the main issue for determination is whether this Court should interfere with the trial court's decision and set aside its judgment and decree delivered on May 06, 2021.
 18. This court's jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion. The Court of Appeal in *Selle v Associated Motor Boat Co.* [1968] EA 123) held as follows: -

“ this court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard the witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
 19. The dispute between the Appellant and the Respondent herein is centered on the issue of trespass. It is the Appellant's contention that the Respondent trespassed onto his land parcel No. 1199 and erected a house thereon. In his submissions, he maintained that his claim was for the recovery of land pursuant to section 7 of the *Limitation of Actions Act*. He averred that the onus was on the Respondent to controvert his averments and prove that the subject land actually belonged to her.
 20. The Respondent on the other hand maintained that she is the lawful occupier of suit parcel No 294 and denied any claims of encroachment onto the suit land No 1199 and thus urged the court to uphold the decision of the trial court and dismiss the Appeal with costs.



21. I will now proceed to re-evaluate and re-assess each of the party's claim from the trial court record and the judgment; to determine whether the trial magistrate rightly exercised his discretion in arriving at his decision issued on May 6, 2021.
22. The Appellant maintained that his claim against the Respondent was on the recovery for land and not a boundary issue. I have looked at the Plaintiff's pleadings at paragraph 12; it was his allegation that sometime between July and August 2016, the 2nd Defendant (now Respondent) encroached onto a portion of suit parcel No Kamagambo/ Kanyajuok/ 1199 and built structures thereon. His claim against the Respondent was essentially on trespass and/or encroachment into the suit parcel No. 1199 and cannot now shift the goalpost at the appellate stage that his claim against the Respondent was on the recovery of land pursuant to section 7 of the *Limitation of Actions Act*. Parties are bound by their pleadings.
23. I have also looked at the judgment of the trial court and I note that in dismissing the case against the 2nd Defendant/ Respondent, the trial magistrate held in part as hereunder: -

“As regards the 2nd Defendant, the Plaintiff testified that the 2nd Defendant encroached his parcel 1199 and erected house in it. I agree with the Defendant's counsel that no evidence was tendered in court by the Plaintiff to establish that the boundary between parcel 1199 and the 2nd Defendant's parcel 119 had been established. The Reports that the Plaintiff is relying on was in respect of boundary dispute in respect to parcel 296 and 996 and the same was done in the year 2004. If the 2nd Defendant trespassed on the Plaintiff's parcel of land in 2016 as alleged, then the Land Registrar ought to have been called to establish the boundary between the two disputed parcel and to establish the extent of the trespass if any...”
24. 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.”
25. I have critically reviewed the exhibits produced by the parties in the trial court and I note that the Appellant did not tender any evidence in court to prove his claims of trespass against the Respondent. All of the Appellant's exhibits were in relation to parcel No 1199 and parcel No 296. There was no evidence specifically touching on the Respondent's parcel No 294 or 1196 neither did the Appellant demonstrate the issue of encroachment into the suit land by the Respondent and by what extent. Pexh. 6 was in relation to the suit land and parcel No 296 and from a cursory look at the same, there was no indication of the Respondent's title in the findings thereof at all.
26. The onus was on the Appellant to provide sufficient proof in support of his averments. It is not enough for him to merely lay claim on trespass and shift the burden of proof to the Respondent to prove her ownership. Without any proof, the said averments remain unsubstantiated claims with no evidentiary value.
27. In view of the foregoing, I find that the learned trial magistrate exercised his discretion properly in dismissing the claim of trespass against the 2nd Defendant. The analysis and subsequent decision was purely made upon examination of the facts of the case and the evidence adduced in court. I find no need to interfere with the said decision.



Conclusion

28. In conclusion, I accordingly find that the Appeal is not merited and is therefore dismissed with costs to the Respondent. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 27TH DAY OF APRIL, 2023.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

.....Appellant

.....Respondent

Tom Maurice – Court Assistant

