



**Ariero & another v Akengo (Environment and Land Appeal
12 of 2020) [2023] KEELC 17722 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17722 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL 12 OF 2020**

**MN KULLOW, J
MAY 25, 2023**

BETWEEN

PETER ODHIAMBO ARIERO 1ST APPELLANT

PIUS OCHOLA OTIENO 2ND APPELLANT

AND

CHARLES ORWA AKENGO ALIAS SANGRA OKENGO RESPONDENT

JUDGMENT

1. This Appeal emanates from the Judgment and Decree of Hon. D. Onyango delivered on November 25, 2020 in Migori CMELC Case No 446 of 2015, in which the Plaintiff's claim against the Defendants was allowed as prayed. The grounds in the Memorandum of Appeal dated December 24, 2020 and Amended on July 19, 2022 are that: -
 - i. The Learned Trial Magistrate erred in law and fact when he failed to consider the evidence and pleadings thereby reaching to a wrong conclusion that the 1st and 2nd Appellants be evicted from LR No Suna East/ Wasweta I/18031 within 45 days.
 - ii. The Learned Trial Magistrate erred in law and fact when he failed to consider the evidence and pleadings thereby reaching to a wrong conclusion that the 1st and 2nd Appellants be permanently restrained by themselves, servants, agents or anybody acting through their instructions from trespassing on L.R. No Suna East/ Wasweta I/ 18031.
 - iii. The Learned Trial Magistrate erred in law and fact when he failed to consider the evidence and pleadings thereby reaching to a wrong conclusion that the Respondent is at liberty to engage the services of a Surveyor to restore the boundary features of L.R. No Suna East/ Wasweta I/ 18031.
2. Consequently, the Appellants sought the Appeal to be allowed by;



- a. Quashing/ setting aside the lower court judgment/ orders
 - b. Dismissing the plaintiff's suit at the trial court with costs to the Appellants
 - c. Costs of this Appeal be awarded to the Appellants.
3. The backdrop to this Appeal is that; the Plaintiff/ Respondent instituted the suit vide a Plaint dated March 23, 2015 seeking the following orders against the Defendants /Appellants; an order of Eviction, Permanent Injunction restraining the defendants from trespassing into the suit land L.R. No Suna East/ Wasweta I/ 18031, the restoration of boundaries and costs of the suit. It was the Plaintiff's claim that he is the sole registered owner of the suit parcel No 18031 measuring 6.4Ha. That the defendants have encroached into a portion of the said parcel measuring 8 Acres, which they have been cultivating jointly and severally.
 4. It was the Plaintiff's contention that the original parcel of land No 674 was owned by him and his 4 brothers as owners in common; however, the same has since been subdivided amongst the 5 brothers resulting into Nos. 18030 measuring 12.8 jointly registered in the names of the defendants, 18031 registered in his name measuring 6.4Ha, 18032 registered in the name of Pitalis Ongayo measuring 6.4Ha and 18033 registered in the name of Dalmas Oyugi Ochola measuring 6.4Ha.
 5. The Defendants/Appellants in response to the Plaint filed a Joint Statement of Defence dated 26.10.2015, denying all the allegations made against them. It was their contention that the plaintiff's claim did not disclose any reasonable cause of action against them, the claim was misconceived, frivolous and legally untenable. They maintained that they have never trespassed/ encroached onto the plaintiff's portion or cultivated any portion thereof measuring 8 Acres as alleged.
 6. The suit was heard and judgment was delivered on the November 25, 2020 whose effect was to allow the Plaintiff's claim as prayed against the Defendants hence the instant Appeal.
 7. On November 14, 2022, directions were issued that the Appeal be canvassed by way of written submissions, to be filed and exchanged within 30 days. Both parties filed their rival submissions and authorities which I have read and taken into account.

Appellant's Submission

8. The Appellants' counsel summarized all the 3 grounds of Appeal into one main issue to wit; whether the learned trial magistrate erred in law and fact, by reaching a wrong conclusion that the respondent had proved his claim on a balance of probabilities that the appellants has encroached onto the respondent's portion. Counsel submitted that the respondent did not discharge the burden of proving his case on a balance of probability; no Land Registrar Report was produced to prove that the appellants indeed trespassed into his portion.
9. It was his submission that from the record it was not disputed that the land registrar did not visit the suit land to determine the actual boundaries thereto in accordance with the provisions of sections 18-21 of the [Land Registration Act](#), which expressly gives the Land Registrar powers to maintain and determine boundaries.
10. It was further their submission that no evidence was produced to prove that the land registrar endorsed the purported report on the location of the boundary by the surveyor, who testified as PW2. He thus dismissed the purported visit and report by the surveyor as illegal for contravening sections 18-21 of the [Land Registration Act](#).



Respondent's Submissions

11. The Respondent's counsel submitted on two main issues to wit; whether the Appeal was merited and whether the trial court was seized of jurisdiction. On the first issue; counsel submitted that it was common ground that the plaintiff and his 4 brothers were registered as owners in common of the suit parcel No 674 measuring 32.0Ha, with each being entitled 1/5 share (6.4Ha) each. They requested the lands office to have the said land subdivided to create individual shares for each owner in common. Notices were issued to the various parties to attend the said survey exercise and which led to the creation of 4 titles.
12. It is the Respondent's claim that pursuant to the said subdivision and registration of the individual titles; the Appellants demolished the boundary features and trespassed/ encroached into a portion measuring 8 Acres of his share.
13. It was his claim that even though the appellants' appeal is anchored on the provisions of section 18(2) of the *Land Registration Act*, they did not file any counterclaim challenging the subdivision of the original title No 674 into the 4 titles and further that the said subdivision in question was conducted 10 years ago.
14. Counsel further submitted that the appellants had not laid claim to the Respondent's title and/or any portion thereof and maintained that the judgment and decree of the trial court was sound and perfect. Thus since no claim has been made in respect to the respondent's land, the court should order the restoration of the boundary of the suit land and that the same be done under the watch of the land registrar and surveyor instead of the surveyor alone.
15. On the second issue on jurisdiction, counsel submitted that the appellants did not raise any preliminary issue at the trial court and thus maintained that appellants admitted the jurisdiction of the court by conduct, when they voluntarily subjected themselves and participated in the proceedings. It is their claim that the appellants are now estopped from raising matters of jurisdiction at the appellate stage.
16. I have looked at the grounds of Appeal and it is my considered opinion that the main issue arising for determination is whether this Court should interfere with the exercise of discretion by the trial court by setting aside and substituting its judgment delivered on November 25, 2020 and I will proceed to discuss the same on account of;
 - i. Jurisdiction of the trial court to determine the suit
 - ii. Whether the Appeal is merited and the Appellant is entitled to the reliefs sought in the Memorandum of Appeal.
17. 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 and the same does not entail taking on board matters which were never brought to the trial court's attention or were not subject of the said court's consideration. In *Selle v Associated Motor Boat Co.* [1968] EA 123) the Court of Appeal held as follows:

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“ 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.”

18. I will now proceed to re-evaluate each of the party’s claim from the trial court record, the evidence adduced and the trial court judgment in determining whether the trial magistrate exercised his discretion correctly.

I. Jurisdiction of the trial court

19. It is trite that jurisdiction is everything and a court is mandated to down its tool and not make a further step upon establishing that it has no jurisdiction. In the leading case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd.* (1989): the court pronounced itself as follows: -

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

20. I have carefully looked at the testimony by the parties and their witnesses; the plaintiff’s claim was that the defendants uprooted the sisal plants that were used to mark the boundary on his land and encroached onto a portion measuring 8Acres thereof. He maintained that each of the 5 tenants in common was entitled to portion measuring 1/5 (6.4Ha) of the original land.

21. PW2, a County Surveyor, who was tasked with subdividing the land, confirmed that he carried out the subdivision and planted sisal as boundary features. In carrying out the exercise, he was guided by the demarcation on the land done by the parties and the partition was in accordance with law. DW1 stated that each of the tenants in common had their boundaries known even before the parcel of land was partitioned/subdivided and that he had never interfered with the boundary thereof. He confirmed that the original parcel was subdivided by the Surveyor and that he had received the various letters notifying them of the same. DW2 also confirmed that the original parcel was subdivided and that he has never interfered with any boundary.

22. I have also carefully reviewed the pleadings filed in the trial court; particularly the plaint and the orders sought therein and the averments made in the joint statement of defence and from the same, it cannot be said that the issue between the parties herein is purely a boundary dispute as suggested by the Appellants. It is common ground that the subdivision of the original land was conducted by a surveyor, who is an expert in the area and the Appellants, who were present, have never raised any challenge on the manner in which the same was conducted.

23. In view of the foregoing; I find that the trial court was properly vested with the requisite jurisdiction to hear and determine the suit and to grant the orders sought. The trial court did not in any way usurp the jurisdiction of the Land Registrar to determine boundaries as stipulated in section 18 of the *Land Registration Act*.

II. Whether the Appeal is merited and the Appellant is entitled to the reliefs sought in the Memorandum of Appeal.

24. In determining this issue, I will reevaluate the parties’ claim and the evidence adduced in support of the rival claims in the trial court. It is the Respondent’s claim that upon the subdivision of the original suit land No 674 into 4 titles, he became the registered owner of the suit land L.R. No Suna East/ Wasweta



- I/ 18031 measuring approx. 6.4Ha. However, the Appellants have since trespassed into a portion of the suit land measuring 8 Acres; they uprooted the sisal plants used to mark the boundaries and have been using the said portion for cultivating maize and tobacco.
25. He produced a copy of the title deed of the suit land which confirmed his registration and proprietorship of the suit land measuring 6.4Ha and bundle of photographs showing the cultivations on the disputed portion in support of his encroachment claims.
 26. The Respondent also produced various correspondences diversely dated between the Ministry of Land Office and all the tenants in common; summoning them to appear with the view of reestablishing/realigning the boundaries and resolving the dispute between them. I carefully reviewed the said correspondences and I note that the same are in support of the subdivision process and the subsequent registration of the original land in the individual names in accordance to their respective share entitlement; the said process was never challenged and thus the resultant title remains a valid title.
 27. The Appellants on the other hand did not adduce any evidence challenging the findings and/or report by PW2 or the acreage entitlement of the Respondent. They only produced a copy of the Green Card of the original parcel No 674 (Dexh. 2) and a letter dated 11/7/2013 from the Ministry of Lands. Both Appellants confirmed that the surveyor visited the land and subdivided the same; at page 99 of the Record of Appeal, DW2 confirmed that he was present when the surveyor put the boundaries and that his portion was not affected by the new boundaries.
 28. Further, the Appellants did not deny that the Respondent was entitled to a portion measuring 6.4Ha of the original parcel nor adduced any contrary evidence thereof.
 29. In view of the above, it is clear that the Appellants neither made claims that the disputed portion of 8Acres formed part of their share entitlement nor adduced any evidence that the said portion was not part of the Respondent's rightful share. The Respondent on the other hand sufficiently demonstrated that the disputed portion measuring 8 Acres rightfully forms part of his land parcel. No justification and/or basis was provided by the Appellants for their continued use and occupation of the said portion which rightfully belongs to the Respondent.
 30. I have also noted that the Appellants dismissed the evidence and testimony of PW2. However, they neither called a witness nor adduced any contrary report challenging the evidence by PW2. The Appellants cannot merely state that since the Land Registrar did not accompany the Surveyor (PW2) to the subject land during the subdivision exercise and fixing the boundary features or endorsed the Surveyor's report, then the same invalidates the said report and exercise. In the absence of any evidence as to the contrary, I find that the Respondent proved his case to the required threshold
 31. Consequently, having found that the process of subdivision and the registration was valid and lawful and the Respondent is the rightful registered proprietor of the parcel of land L.R. No Suna East/Wasweta I/ 18031 measuring approx. 6.4Ha, I agree with the trial magistrate that he is entitled to all the rights and interests over the suit land as guaranteed under sections 24 and 25 of the [Land Registration Act](#), to the exclusion of everyone including the Appellants herein.
 32. In view of the foregoing, I find that the learned trial magistrate exercised his discretion properly in allowing the plaintiff's claim. The analysis and judgment was purely made upon examination of the full facts of the case together with the documents and evidence adduced in support of each party's claim. I find no need to interfere with the said decision.



Conclusion

33. In conclusion, I accordingly find that the Appeal is not merited and the Amended Memorandum of Appeal dated July 19, 2022 is therefore dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MIGORI 25TH MAY, 2023.

MOHAMED N. KULLOW

JUDGE

In presence of; -

Nonappearance for the Appellant

Nonappearance for the Respondent

Court Assistant- Tom Maurice/ Victor

