



**Makokha & 3 others v Munyendo (Environment and Land Appeal
E024 of 2022) [2023] KEELC 17937 (KLR) (13 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 17937 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E024 OF 2022**

DO OHUNGO, J

JUNE 13, 2023

BETWEEN

MONICA MAKOKHA 1ST APPELLANT

JOSEPH MAKOKHA 2ND APPELLANT

PRISCA ANYONJE 3RD APPELLANT

WILBERFORCE WELEMBWA 4TH APPELLANT

AND

JOHNSTONE MUNYENDO RESPONDENT

(Being an appeal from the ruling and order of the Chief Magistrate's Court at Kakamega (Hon. E Malesi, Principal Magistrate) delivered on 5th July 2022 in Kakamega MELC No. 37 of 2021)

JUDGMENT

1. Litigation leading to this appeal was commenced by the respondent through plaint dated 3rd March 2021. He named the appellants herein together with the Chief Butsotso west Sub Location and the Attorney General as defendants. Together with the plaint, he filed Notice of Motion dated 3rd March 2021, under Certificate of Urgency, seeking injunctive relief. The application was placed before Hon. Alego (SPM) on 3rd March 2021 who certified it urgent and granted an injunction restraining the appellants as well as their agents and servants from trespassing upon, surveying or interfering with the parcel of land known as Butsotso/Esumeyia/1980 pending inter parte hearing of the application which was scheduled for 30th March 2021.
2. The appellants reacted to the orders of 3rd March 2021 by filing Notice of Motion dated 17th March 2021, under Certificate of Urgency, seeking setting aside of the said orders and further seeking an order that a re-survey of the parcels of land known as Butsotso/Esumeyia/1979 and Butsotso/Esumeyia/1980 be undertaken by a surveyor appointed by the subordinate court. Once again, Notice



of Motion dated 17th March 2021 was placed before Hon. Alego (SPM) on 25th March 2021 who scheduled it for inter parte hearing on 30th March 2021. The inter parte hearing did not proceed on 30th March 2021, since Hon. H. Wandere (SPM) who was to hear the matter was unwell. Meanwhile, the respondent reacted to Notice of Motion dated 17th March 2021 by filing Notice of Preliminary Objection dated 8th April 2021.

3. The preliminary objection was canvassed before Hon. H. Wandere (SPM) through written submissions. The learned magistrate delivered ruling on 26th October 2021, dismissing the objection and ordering that the Land Registrar and the County surveyor ascertain and fix the boundaries of the parcels. The court stated as follows:

... The issue for determination is therefore on whether the court has jurisdiction to determine this matter which in my view involves a boundary dispute...

Therefore, the court is of the view that the Registrar is empowered under section 16 and 19 of the *Land Registration Act* to give notice to all the affected parties in this case whose land adjoins the boundaries in question and with the assistance of the county surveyor ascertain and fix the disputed boundaries first pending hearing and determination of the main suit. An order is hereby issued to the Land Registrar and Land Surveyor of this county to visit parcel numbers Butsotso/Esumeyia/1980 and Butsotso/Esumyia/1979 for the purpose of establishing the boundaries of the two parcels of land herein which are the subject of this dispute.

A mention date is to be fixed to confirm whether the Land Registrar and the Land Surveyor have visited the said parcels of land and file (sic) their reports. The application dated 17th March 2021.

The Plaintiff's preliminary objection dated 8th April 2021 is dismissed.

Each party to bear their own costs.

4. Subsequently, the Land Registrar and the County surveyor visited the parcels on 15th November 2021 and filed in court reports dated 16th November 2021 and 26th November 2021. The reports were filed on 2nd December 2021. The respondent reacted to the order of 26th October 2021 by filing a new application, Notice of Motion dated 29th November 2021, seeking to stop the establishment of the boundaries or the filing in court of any report arising therefrom.
5. For good measure, the appellants filed yet another application, Notice of Motion dated 10th December 2021, seeking striking out of the respondent's Notice of Motion dated 29th November 2021.
6. Ultimately, upon an application by the respondent, Hon. H. Wandere (SPM) recused herself from the matter on 22nd March 2022. The pending applications then fell for determination by Hon. E Malesi (PM) who, through ruling delivered on 5th July 2022 found that there was no utility in dealing with the applications which he deemed to be detracting the just, expeditious, proportionate, and affordable resolution of the dispute before the court.
7. Aggrieved by the ruling of 5th July 2022, the appellants instantly filed this appeal. The following grounds of appeal are listed on the face of the Memorandum of Appeal dated 5th July 2022:
 1. The Learned Trial Magistrate erred in law in declining to determine on merits the two applications before Court to wit: Notice of Motion dated 29th November, 2021, filed by the Respondent and Notice of Motion dated 10th December, 2021 filed by the Appellant.



2. The Learned Trial Magistrate erred in law in law and fact in reversing the parties' original position prior to filing of the suit and blanketly set aside the Ruling delivered by the Court earlier on 29th October, 2021 without any rationale or basis for the same.
3. The Learned Trial Magistrate erred in law in law and fact in ordering the removal of boundaries features erected on Property Land Reference Number Butso/Esameiya/1979 and Property Land Reference Number Butso/Esameiya/1980, pursuant to a Court Ordered Survey carried out on 16th November, 2021 and Ordered by the very same Court in Kakamega ELC Suit No E037 of 2021 on 26th October, 2021.
4. The Learned Trial Magistrate erred in law in law, in failing to consider and completely ignoring the arguments raised by the Appellants in their Written Submissions filed by the Appellants with respect to the two Motions before Court, to wit: to wit: (sic) Notice of Motion dated 29th November, 2021 filed by the Respondent and Notice of Motion dated 10th December, 2021 filed by the Appellant.
5. The Learned Trial Magistrate erred in law in failing to analyse the facts and legal arguments advanced vide the two Motions before Court thereby reaching to (sic) an erroneous decision.
8. Based on those grounds, the appellants prayed that this court allows the appeal and remits Notice of Motion dated 29th November 2021 and Notice of Motion dated 10th December 2021 back to the Subordinate Court for determination on merits. They also prayed for costs.
9. The appeal was canvassed through written submissions. The appellants argued that the matter before the Subordinate Court is a boundary dispute and that the learned magistrate ought to have determined the applications dated 29th November 2021 and 10th December 2021 on their merits. That the Subordinate Court became functus officio the moment it determined that the matter before it is a boundary dispute.
10. The appellants went on to argue that by proceeding to order removal of boundary features reverting the parties to their original position prior to the filing of the suit, the Subordinate Court reviewed of its orders suo moto without determining the two applications and without having been moved. That the orders of the court were unjust and not in furtherance of overriding objective. They urged this court to allow the appeal and to determine the applications dated 29th November 2021 and 10th December 2021.
11. On his part, the respondent argued that the Land Registrar failed to issue a notice to him and that the notice period was so short since he was notified of the visit by the appellant on 10th November 2021, yet the visit was scheduled for 15th November 2021. That the visit by the Land Registrar and the Surveyor was marred by procedural irregularities, technical flaws and illegal declarations that resulted into an unwarranted sub-division of the parcel of land known as Butso/Esameiya/1980 hence an unwarranted disturbance of boundaries that had existed for a record 31 years. That the disputed survey findings and reports which have never been adopted by the Subordinate Court are the basis upon which the appellants are occupying and interfering with the parcel of land known as Butso/Esameiya/1980.
12. The respondent further argued that the application dated 29th November 2021 was necessitated by an injustice occasioned by the Land Registrar and the Surveyor. That there was a genuine desire by the Subordinate Court to timely dispose of the main suit in a just and expeditious manner without unnecessary distractions by giving effect to the overriding objective as provided under Section 1A of the *Civil Procedure Act*.



13. The respondent went on to argue that the ruling appealed against was reasonable and tactful for case management and a good exercise of judicial discretion. He therefore urged this court to dismiss the appeal.
14. The principles that guide an appellate court while considering an appeal against an order made in exercise of discretion are settled. The Court of Appeal recently reiterated in the case of *Mombasa Cement Limited v Kitsao & 34 others* (Civil Appeal E016 of 2020) [2022] KECA 562 (KLR) (24 June 2022) (Judgment) that an appellate court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong due to misdirection or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration with the result that it arrived at a wrong conclusion.
15. I have considered the grounds of appeal, the pleadings, the parties' submissions, and the authorities cited. The sole issue that arises for determination is whether the learned magistrate erred in proceeding as he did.
16. The suit that is currently pending before the Subordinate Court is before the said court pursuant to Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011 and Section 9 (a) of the *Magistrates' Courts Act*, 2015.
17. It will be noted that following the filing of the suit on 3rd March 2021, no less than four applications have been filed by the parties, each trying to undo steps taken by the other. None of the applications has been heard inter parte. Worse still, the suit is yet to be set down for hearing. Obviously frustrated by the situation, the learned magistrate stated as follows in the impugned ruling:
 4. I have perused the pleadings filed and majorly the plaint and the defence and the witness statements. One of the issues which glaringly comes out is the size of the two parcels of land which mutated from one larger portion. In dispute is a portion said to be measuring 0.35Ha which each side claims to be forming part of their respective portions. If truly this is the bone of contention it will in itself come out with the evidence tendered by each party during the hearing. Therefore, to reduce this contestation as a mere boundary dispute is to lose focus in resolution of the main dispute. If any survey has been conducted and a report prepared, then the same can only be considered alongside any evidence tendered by each party, with each party having the liberty to interrogate the report and availing parallel report if need be.
 5. I do not see the utility in dealing with these applications which I consider detracting in facilitating the just, expeditious, proportionate and affordable resolution of the dispute herein. Instead I will order as follows;
 - i. Any step taken by any of the parties post institution of this suit in court is declared null and void and the position obtaining before the institution of the suit shall be maintained. Consequently, any new boundary feature erected post institution of this suit shall be removed within the next fourteen (14) days failure of which the Officer Commanding Navakholo Police Station shall supervise the removal thereof.
 - ii. Parties to endeavour to file all materials requisite for their respective cases in the next twenty one (21) days noting to frame issues which should be exchanged within the same period.
 - iii. There shall be a pre-trial conference on 26/7/2022
 6. I shall not be making any order as to costs at this stage.



18. I completely understand the learned magistrate's frustrations. Here is a situation where parties have come to court but are not in a hurry to have the case heard and determined on the merits. The respondent seems to want to use the orders of 3rd March 2021 to forestall determination of the boundaries. On the other hand, the appellants obviously want to use the reports dated 16th November 2021 and 26th November 2021 which were filed in court on 2nd December 2021 as a determination of the dispute before the court. Both positions are wrong. The case will only be determined once it is heard. Parties will be free to adduce such evidence as they deem appropriate, including relying on the said reports or such other reports as necessary.
19. When faced with parties who are not keen to proceed, the court is empowered to deploy any instrument within its power to facilitate progress. One such instrument is Paragraph 32 of *Practice Directions on Proceedings in The Environment and Land Courts, and on Proceedings Relating to The Environment and The Use and Occupation Of, And Title to Land and Proceedings in Other Courts* (Gazette Notice No. 5178 of 2014) which empowers the court to resolve interlocutory applications without hearing them on the merits if parties cannot agree on how to resolve them. In doing so, the court upholds the overriding interests of justice to facilitate the just, expeditious, proportionate and accessible resolution of disputes.
20. The learned magistrate was perfectly right to reset the clock so as to put parties to the position where they were at institution of the suit. They were obviously misusing interim orders and interlocutory applications to stall progress. Unfortunately, this appeal has also aided the parties to stall progress since its filing on 5th July 2022. If the parties had diligently prosecuted the suit after the impugned ruling, they would probably have had a judgment by now.
21. In view of the foregoing, this appeal is bereft of merit, and I therefore dismiss it. Considering the circumstances, each party shall bear own costs of the appeal.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 13TH DAY OF JUNE 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Nyikuli holding brief for Mr Rene for the Appellants

Mr Ochutsi for the Respondent

Court Assistant: E. Juma

