



**Mika (Suing as the administrator of the Estate of Michael Ondieki
Wamuoso (Deceased) v Ogutu (Environment and Land Appeal
20 of 2020) [2023] KEELC 19208 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19208 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL 20 OF 2020**

**E ASATI, J
JULY 27, 2023**

BETWEEN

**WALTER ODONGO MIKA (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF MICHAEL ONDIEKI WAMUOSO (DECEASED) APPELLANT**

AND

SERFIN AOKO OGUTU RESPONDENT

*(Being an appeal arising from the judgement of the trial court in Tamu SRMC ELC
Suit No.28 of 2018 delivered on 28th April, 2020 by the Hon. Onzere E.M. - SRM)*

JUDGMENT

Introduction

1. The Appellant Walter Odongo Mika, in his capacity as the Legal Administrator of the estate of the late Michael Ondiegi Wamuoso, deceased, sued the Respondent in TAMU SPMCC No 28 OF 2018 (the suit) seeking for a declaration that the estate of the deceased is entitled and has a right of possession and occupation of the suit property and that the Respondent was wrongly in occupation of the suit property and has trespassed onto the same. The suit property is a parcel of land known as Kisumu/koru/292. His case was that the deceased was the owner of the suit land while the Respondent was owner of land parcel No Kisumu/koru/804.
2. The Respondent denied the claim and vide her Statement of Defence dated October 15, 2018 stated that she had never trespassed onto the suit land but had restricted her activities to her land No Kisumu/koru/804.
3. The suit was heard by the trial court which vide its judgement dated April 28, 2020, found that the Appellant had failed to establish a case against the Respondent on a balance of probabilities and dismissed the suit with costs to the Respondent.



4. Dissatisfied with the judgement, the Appellant proffered the present appeal *vide* the Memorandum of Appeal dated May 13, 2020 and sought that the appeal be allowed and the decision of the Principal Magistrate be set aside.
5. The appeal was argued by way of written submissions. The Appellant filed written submissions dated May 29, 2023 through the firm of Mwamu & Company Advocates while the Respondent filed written submissions dated May 25, 2023 through the firm of Oluoch R Odhiambo Advocates.

Issues for Determination

6. The five (5) grounds of Appeal raised in the Memorandum of Appeal are that: -
 - i. the learned trial magistrate did not appreciate strong evidence given by the Appellant as to the encroachment by Respondent onto the Appellant's parcel.
 - ii. the learned trial magistrate completely ignored the evidence of the expert witness called to testify.
 - iii. the learned trial magistrate shifted the burden of proof to the Defendant in a manner unknown in law.
 - iv. the learned trial magistrate erred in law and fact in failing to take into consideration judicial legal grounds in his finding.
 - v. the learned trial magistrate completely ignored the survey report tabled by the District Land Surveyor on the orders of the court.

Out of these grounds of appeal, the appellant framed three (3) issues for this court's determination in this appeal namely:

- i. whether the magistrate erred in law in failing to consider the defence of the appellant.
- ii. whether the magistrate erred in law in failing to consider the surveyor's report.
- iii. whether the magistrate erred in failing to consider that the Appellant was in possession of the suit land.

Analysis and Determination

7. This being a first appeal, the court has reminded itself of the role it has to re-examine and analyse afresh all the evidence adduced before the trial court with a view to arrive at its own independent conclusion.
8. The evidence adduced by the Appellant was, as the record shows, comprised of his own testimony, the exhibits he produced and the testimony of PW2. The Appellant testified that Michael Ondiege Wamuoso (deceased) was his father. That the deceased owned land parcel No 292 at Koru. That the Defendant who was his neighbour bought land parcel No 804 also at Koru. That the Defendant brought a Surveyor who surveyed the land and extended the her land to the deceased's side. That a Surveyor made a report that the Defendant had encroached onto the deceased's land.
9. He produced a certificate of official search as exhibit 2, Grant of Letters of Administration Ad Litem to the Estate of the deceased as exhibit 3 and Title Deed as exhibit 4. He prayed that he be compensated as the Defendant has been using the suit land.
10. On cross-examination, the appellant stated that the court had made an order for a Surveyor to go to the land and determine the boundary and that the Surveyor who went to the land did not take



measurements on the land. That the Surveyor wrote a report then he lied as he did not talk to the parties or take measurements on the land. That his (appellant's) signature was not on the report.

He further added that the Defendant had encroached onto the land of the deceased by 3 feet, put up a posho mill, a cowshed and a kitchen on the encroached part for over 10 years. That the posho mill has been there for around 5 years.

11. PW2 was Paul Kibet Rugut, District Surveyor, Nyando. He testified that on May 24, 2017 he visited land numbers Kisumu/koru/804 and Kisumu/koru/292 as they had been sent by the Land Registrar to solve a land boundary dispute after a complaint was raised by the Defendant and one Pius. That they issued summons to the parties concerned. That at the site, they interviewed the parties and that he (PW2) placed 3 beacons on the land. That they found that land parcel No 804 had encroached onto No 292 by 680m which is 0.068Ha or 0.17 acre. That the Defendant disputed the findings. That the dispute was brought about by a posho mill on the Southern part of the parcel of land. That the fumes from the posho mill interfered with the sugar cane growing on land No 292. That the posho mill is partly on land No 292 and partly on No 804.

That they gave the proprietors 14 days to fence in case there was no appeal. He produced his report dated May 30, 2017 as exhibit P.1.

12. On cross-examination, he stated that the Defendant disputed the findings of the survey. That the existing boundary between the two parcels of land was made of thorns and barbed wire. That he did not know how long the boundary had been there.
13. The evidence of the Respondent comprised of the testimony of the Respondent and that of DW2. The Respondent testified as DW1. She stated that the Appellant was her neighbour. That she had a boundary dispute with the Appellant. That when she bought her land No Kisumu/koru/804, the Appellant's father and the person who sold the land to her brought a surveyor who fixed the boundary. That the Appellant's father asked her to plant trees along the boundary. That later the Appellant brought a Surveyor after the death of his (Appellant's) father who took measurements and moved the boundary.

That the cowshed and the posho mill were on her land. That the Surveyor whom the Appellant brought to the land encroached onto the Respondent's land by 5 metres. That the court made an order that the Surveyor goes to the land and that a Surveyor from Kisumu went to the land in compliance and filed a report.

14. On cross-examination, she stated that the Surveyor from Nyando was brought by the Appellant. That it is not true that the fumes from the posho mill go to the Appellant's land. That when the Surveyor from Kisumu came to the land, the Appellant was present together with his brothers.
15. DW2 was one Geoffrey Okongo. He testified that he was a Surveyor with the County Government of Kisumu. That he received a court order requiring him to visit parcels numbers Kisumu/koru/804 and 292. That he visited the parcels on February 20, 2019 and prepared a report of his findings and filed it in court. That he found that there was a physical boundary between the plots which consisted of trees. That the Appellant had fenced off part of the Respondent's land by about 5m x 150m. That the Appellant had encroached onto the Respondent's land.

That a section of the encroached region formed part of the Appellant's homestead. That there are old trees which form the boundary of the parcels of land. That the posho mill was in land No804. He produced the report dated March 12, 2019 as an exhibit.

16. On cross-examination, he stated that the encroachment was 0.08Ha which was equivalent to 5m x 150m or quarter of an acre.



17. After considering this evidence, the trial court found that the Appellant had failed to prove his case on a balance of probabilities and dismissed the suit.
18. The first issue for determination is whether or not the trial court erred in law in failing to consider the defence of the appellant. The Appellant being the Plaintiff in the lower court, he had no defence which the trial court could have possibly ignored in its judgement. There is no specific submissions made by the Appellant on this issue. The record shows that the court took into account the pleadings filed by the Plaintiff and made a decision thereon.
19. The second issue is whether or not the trial court failed to consider the Surveyor's report. This issue is the subject of grounds (i), (ii), and (v) of appeal. The Appellant submitted that a Surveyor's report particularly if it contains the Registry Index Map (RIM) is very important in identifying a parcel of land. That in the instant case, the disputed area had been surveyed for more than four times under a plan which had been published by the Survey of Kenya. That it was clear that the trial court erred in law and fact by failing to consider the Surveyor's report dated May 30, 2017 which placed the Plaintiff ahead of the Defendant in the claim of ownership of the suit land.
20. It was submitted on behalf of the Respondent on this issue that none of the parties testified that they requested the Land Registrar to help them solve the boundary dispute. That it was not clear how the Land Registrar or PW2 came into the land dispute. That the provisions of Section 19(1) and (2) of the Land Act were not complied with in the survey exercise allegedly conducted by PW2. That the survey exercise done by PW2 was done before the suit was filed and the report produced as exhibit P1 had been generated before commencement of the suit. That the provisions of Section 19(3) of the Land Registration Act were not complied with as there was no note on the register or boundary lines corrected.
21. Perusal of the judgement shows that the trial court critically and intensively interrogated and considered the two contradicting Surveyors' reports placed in its hands by PW2 and DW2, gave its reasons for rejecting the one and accepting the other before reaching its decision on the same. The court stated in part in its judgement;

“there are two difference expert reports produced in evidence. The Plaintiff relied on the report of PW2 dated May 30, 2017 and produced as P. exh.1 while the Defendant relied on the report dated March 12, 2019 and produced as D .exh.1.

I have considered the evidence of the two reports and in deciding which report to adopt, I will consider the independence of the makers of the reports, the initial boundary features and the testimonies of the Surveyors in court. On boundary features which were used by the two Surveyors to establish where the boundary is, the Surveyors used different features. PW2 in his evidence in cross-examination states that he used the existing boundary made of thorns and barbed wire to determine the boundary and stated that there was no sisal on the boundary. DW2 on the other hand testified that he used physical features namely old indigenous and exotic tree which were on the disputed area to establish where the boundary was..... From the evidence of DW2 the barbed wire fence was newly erected and was less than one year old whereas the trees had been there for many years.....

I therefore adopt the report by DW2 concerning the boundary as more credible than the report by PW2 and find that the existing boundary as shown on the sketch map in the report produced as D.exh.1 is the correct boundary of the two parcels of land.



22. The report by DW2 was done pursuant to and in compliance with a court order. There is no evidence as to who called PW2 to arbitrate the boundary dispute and prepare a report. Although from the date of the report the same is indicated to have been done long before the suit was filed, the same was not pleaded or even mentioned in the plaint. PW2 testified that when he went to the site he interviewed the parties and took measurements before preparing the report. However, there were no minutes or proceedings produced to demonstrate this.
23. The Appellant complains in this appeal that the trial court ignored the report. My finding is that the court did analyse the report alongside the rest of the evidence adduced and particularly the report by DW2 and concluded that that report was not authentic. No material has been placed before this court to cause it to interfere with the findings of the trial court as regards the Surveyor's report.
24. The last issue raised by the Appellant is whether or not the Magistrate erred in failing to consider that the Appellant was in possession of the suit land. The claim as contained in the plaint was a boundary dispute wherein the Appellant contended that the Respondent had encroached onto a portion of the suit land, built a posho mill, cow shed and kitchen thereon and thereby denied the appellant enjoyment thereof and polluted crops on the remainder of the suit land.
25. After analysing the Surveyor's report, the court found that the disputed area was part of the Respondent's land. There was no pleading that the Appellant was in occupation or possession of the disputed area. The claim was that the Respondent had encroached and taken possession of the disputed area. The evidence placed before the court was that it was the Respondent who was in possession. I find no material in support of this issue.
26. In conclusion, I find that the grounds of appeal have not been proved. As such I find no reason to interfere with the findings and decision of the trial court. As was held in *Mkuba Vs Nyamuro* [1983] KLR, 403-415, at 403: -

“ A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

It has not been shown that the trial court demonstrably acted on wrong principles in arriving at the decision.
27. The appeal lacks merit. It is hereby dismissed. As the parties are neighbours, let each party bear own costs of the appeal.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 27TH DAY OF JULY, 2023 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen - Court Assistant.

Omondi for the Appellant.

Mwalo for the Respondent.

