



**Ochieng v Nyanjong (Environment and Land Appeal E014 of 2024)
[2025] KEELC 2920 (KLR) (19 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 2920 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E014 OF 2024
FO NYAGAKA, J
MARCH 19, 2025**

BETWEEN

PAUL MBOYA OCHIENG APPELLANT

AND

JAMES OGIRE NYANJONG RESPONDENT

(Being an appeal from the judgment of the Principal Magistrate Hon. Celesa Okore (PM) delivered on the 4th April, 2024 in Oyugis MCELC E029 of 2021)

JUDGMENT

Brief Facts

1. This is an appeal arising from the ruling of Honourable Celesa Okore Principal Magistrate, delivered on 4th April, 2024 in Oyugis MCELC No. E029 of 2021.
2. The Appellant filed a Memorandum of Appeal dated 19th April, 2024 appealing against the said judgment on the following grounds: -
 1. The trial court misapprehended in substantial material respects the nature and legal tenets of the Respondent's pleaded claim and as a result arrived at an erroneous and unjust decision.
 2. The trial Court's findings that there was encroachment despite all the expert evidence tendered by both parties failing to make any finding of encroachment constitutes failure and miscarriage of justice par excellence.
 3. The trial Court erred in law and principle by acting on a self-invoked presumptions that lacked evidential basis.



4. The trial Court's decision to rely on self-fished technical arguments that stand in conflict with clear contents of the expert reports tendered by both parties is a decision contrary to legal principles governing admissibility, relevance and proof of facts in judicial adjudication.
 5. The trial Court's decision completely disregarding the entire contents of the expert reports tendered by the Appellant is a decision contrary to legal principles governing admissibility, relevance and proof of facts in judicial adjudication.
 6. The trial Court's decision completely disregarding the entire contents of the expert evidence tendered by the Appellant is a decision contrary to the legal principle that judicial function, including discretion, be exercised judiciously.
 7. The trial Court's erred in law and fact in issuing eviction orders in the absence of any evidence proving encroachment.
 8. The trial Court's erred in law and fact in issuing orders of permanent injunction in the absence of any evidence proving encroachment.
 9. The trial Court's erred in law and fact in awarding general damages of trespass in the absence of any evidence proving encroachment.
 10. The trial court erred in law in failing to accord any and thus due probative weight to the evidence tendered in support of the Appellant's case.
 11. The trial Court failed to properly address his mind to his role as a first appellate court and thus arrived at a decision that is defective in law and a failure of justice par excellence.
3. The Appellant seeks orders setting aside the judgment together with costs of the appeal and that of the trial court.

Brief Facts

4. The Respondent had filed a suit against the Appellant vide a plaint dated 29th April, 2021 seeking a permanent injunction against the Appellant from the suit land Central Kasipul/kamuma/440 and an eviction order together with costs of the suit.
5. The Appellant denied the allegations in the plaint vide his Statement of Defence dated 13th May, 2021. The matter was heard and the trial magistrate found that the Respondent had proved his case on a balance of probabilities against the Appellant. She entered judgment in favour of the Respondent against the Appellant as prayed in the Plaint.
6. The Appellant being dissatisfied with the judgment filed the present appeal which was canvassed by way of written submissions.

Submissions

7. Counsel for the Appellant filed his submissions dated 30th October, 2024 where he identified three issues for determination. The first issue was whether the learned trial magistrate arrived at a correct finding that the Appellant had trespassed into the Respondent's land or eviction as decided appropriately made. He submits that that the material placed before the trial magistrate was not conclusive on the exact location of the disputed boundary and the court ought to have ordered a re-survey since there were two conflicting reports it referred to. He submits that the two reports of the sub county Land registrar and surveyor exposed the true and actual underlying problem being that what was occupied by the parties did not marry in the Registry Index Map (RIM). He further submits that



- the trial magistrate fell into error when she viewed the two reports as that of the Appellant but not of the experts. Counsel cited Section 18 and 19 of the [Land Registration Act](#).
8. It was his submission that the trial magistrate went on a frolic and converted herself into an expert and proceeded to castigate the Defendant. He submits that the trial magistrate rubbished the two reports. He submits that the trial magistrate failed to explain critical issues of resurvey thus making her fall into error. He further submits that the Respondent did not explain why he avoided the lowest surveyor at the sub county level who was best placed to solve the issue but instead went to obtain an ex parte order and prepared a unilateral report. He submits that it was doubtful whether the surveyor visited the ground. He added that that he never attended court but relied on the RIM and scaling without undertaking actual measurements from the ground. He submits that the land registrar at the sub-county level only forwarded the report he received from the regional surveyor and the sub-county land registrar. Counsel submits that the trial magistrate erred in law and fact by failing to make a finding to transfer where there were two conflicting reports.
 9. It was his submission that the issue of boundary dispute was the sole preserve of the Land Registrar as provided under Section 18 and 19 of the [Land Registration Act](#). He argues that the trial court acted in error to usurp the powers of the Land Registrar in reaching a conclusion of trespass where the Land Registrar had not reached the said verdict. He submits that there was no proof of trespass since the regional surveyor did not have the mandate to determine and fix boundaries. He added that his report needed to have a separate report from the Land Registrar making a finding of trespass. He submits that there was no conclusive evidence of trespass to warrant eviction as found by the trial magistrate.
 10. The second issue was whether the award of damages of Kshs. 200,000 for general damages for trespass or encroachment as made by the trial court had any basis in law and fact. Counsel relied on the case of Independent Electoral and Boundaries Commission & another V Stephen Mutinda Mule & 3 others [2014] eKLR and submits that parties are bound by their pleadings. He submits that the Respondent did not pray for general damages and thus it was erroneous for the learned trial magistrate to award the same yet it was not pleaded.
 11. The final issue on costs, he submits that the Respondent ought to bear the costs of the appeal and the subordinate court.
 12. Counsel for the Respondent on the other hand filed his submissions dated 19th November, 2024 where he submits that the issue in contention was encroachment and not ownership. He argues that the Appellant did not dispute the Respondent's evidence of encroachment. He submits that from the Appellant's report dated 27th October, 2021, it did not target the suit property but the parcel which the court did not address itself in its judgment. He argues that the said parcels were different from the Respondent's land. It was counsel's submission that the learned trial magistrate rightfully arrived at her decision since the said report showed that parcel No. 4400 and 5883 were distinct from each other. He submits that the Respondent's report on encroachment was never disputed by the Appellant. Counsel relied on the case of Kenya Power & Lighting Company Ltd V Sheriff Molana Habib [2018] eKLR. He argues that the Appellant's assertion of overlap of their properties was an afterthought since there was no overlap between 2013 and 2020 or even prior to the time of sale.
 13. It was his submission that the Respondent accused the Appellant from entering his portion and demolishing the structure thereon, a fact that was not disputed. He further submits that the Respondent produced receipts of incurred costs in rebuilding the demolished structures and the Appellant never challenged its production. He urges the court to dismiss the appeal with costs.



Analysis and Determination

14. Upon consideration of the grounds of appeal, pleadings, submissions and the authorities cited, the following issues are for determination:
 1. Whether the appeal is merited.
 2. Who should bear the cost of the appeal.
15. Being a first appeal, the court relies on a number of principles as set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”
16. The role of a 1st appellate court was further discussed by the Court of Appeal in *Peter M. Kariuki v Attorney General* [2014] eKLR, which held as follows;

“We have carefully considered the judgment of the trial court, the record of the proceedings, the submissions by learned counsel, both written and oral, as well as the authorities from different jurisdictions that were presented to us. We have also, as we are duty bound to do as a first appellate court, reconsidered the evidence adduced before the trial court and reevaluated it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence”
17. It was the Appellant’s case that material placed before the trial magistrate was not conclusive on the exact location of the disputed boundary. The Appellant argued that the trial court ought to have ordered a re-survey since there were two conflicting reports. The Respondent on the other hand claims that the Appellant’s assertion of overlap of their properties was an afterthought since there was no overlap between 2013 and 2020 or even prior to the time of sale.
18. It is not in dispute that both the Appellant and Respondent’s property are distinct from each other being Kasipul/Kamuma/5883 and 4400 respectively. It is also not in dispute that there were two survey reports one from the sub-county surveyor and another from the regional surveyor. The sub county report recommended a resurvey of the area to ensure conformity on the ground and the map while the report from the regional surveyor found that a portion of Kasipul/Kamuma/4400 was fenced off with iron sheets and combined together with Kasipul/Kamuma/5883. It is not in contention that the issue was that of encroachment which the trial court based her finding.
19. It is this court’s view that as things stood at the time the trial court heard and determined the matter, the parcels of land remained as they were with the two survey reports filed before the trial court. It is my opinion that in as much as the properties were separate with the two reports produced as evidence having separate findings, the Appellant did not dispute the fact that he had encroached onto the Respondent’s parcel. Upon cross examination, the Appellant also confirmed that the issue in dispute was encroachment which the trial court rightfully found.
20. In view of the above, it is this court’s view that the trial court did not err in finding that the Respondent had proved his case on a balance of probabilities.



21. The upshot of the foregoing is that the appeal lacks merit and the same is hereby dismissed.
22. On costs, based on the fact that the parties are neighbors, each party shall bear its own costs of the Appeal.
23. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 19TH DAY OF MARCH 2025.

HON. DR. *IUR* F. NYAGAKA

JUDGE

In the presence of,

Terry Ngire Advocate for Respondent

O. M. Otieno Advocate for Appellant

