



Opanga & another v Ochieng & another (Environment and Land Appeal E004 of 2022) [2023] KEELC 20207 (KLR) (26 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20207 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E004 OF 2022
GMA ONGONDO, J
SEPTEMBER 26, 2023**

BETWEEN

FLORENCE ATIENO OPANGA 1ST APPELLANT

MORNICA ADHIAMBO AGAN 2ND APPELLANT

AND

SUSAN ANYANGO OCHIENG 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. T. M. Olando, Principal Magistrate, delivered on 1st December 2021 in Homa Bay Law Courts Environment and Land Case No. 20 of 2019)

JUDGMENT

1. This is an appeal that arises from the trial court’s judgment delivered on the 1st December 2021 by the Honourable T. M. Olando, Principal Magistrate, in Homa Bay Law Courts Environment and Land Case No. 20 of 2019 where he held, inter alia;

“ ... I thus find that the plaintiffs have not proved their case on a balance of probabilities and the suit is hereby dismissed with costs to the 1st defendant...”

2. The appellants through the firm of G. S. Okoth and Company Advocates mounted the appeal by way of a memorandum of appeal dated 28th January 2022 and filed herein on 18th February 2022. The appeal is anchored on grounds 1 to 5 as set out on the face thereof and the same include:
 - a. The learned trial magistrate erred in law of procedure in failing to appreciate the contents of paragraph 3 of the plaint that the 2nd defendant was sued in a representative capacity on behalf of the District Land Registrar Homa Bay and the District Surveyor Homa Bay and in directing



them to visit the suit land and file a report to court was contrary to the principle of natural justice of *nemo iudex in causa sua*.

- b. The learned trial magistrate erred in law of evidence in failing to take note that although the 2nd defendant filed a statement of defence dated 12th June 2017 the 2nd defendant never called evidence to support his defence and therefore the plaintiffs' evidence particularly on the issue of trespass was uncontroverted since the defence witnesses who gave evidence only limited their evidence to the site visit directed by the court.
 - c. The learned trial magistrate erred in law of evidence in failing to take note of the fact that the surveyor admitted that he did not take actual physical measurements to determine the sizes of the disputed parcels of land to determine whether land parcel number Kanyada/ Kotieno-Katuma 'B'/884 encroached on land parcel number 674 or not.
3. Wherefore, the appellants have sought the order that the judgment and decree of the trial court be set aside and judgment be entered for the appellants with costs.
 4. The appeal was heard by way of written submissions pursuant to this court's directions of 25th October 2022.
 5. Accordingly, the appellants' counsel filed submissions dated 10th February 2023 on 18th February 2023. Counsel urged the honourable court to find that the 1st respondent has trespassed on the appellants' land parcel number Kanyada/Kotieno-Katuma 'B'/674 in the disguise the same is land parcel number Kanyada/Kotieno-Katuma 'B'/884, the latter whose title she acquired fraudulently. Reliance was placed on the case of Samuel Kamere –vs- Lands Registrar, Kajiado (2015) eKLR, to buttress the submissions.
 6. The 1st respondent through L. K. Obwanda Advocates, filed submissions dated 12th May 2023 on 23rd May 2023. Briefly, learned counsel submitted that under Section 18 of the [Land Registration Act](#) (2016), 2012, the Land Registrar is mandated to determine boundary disputes, which he did in the instant case. That Section 19 of the same Act empowers the Land Registrar to fix boundaries for registered land. That therefore, the decision by the trial court to direct the District Land Registrar Homa Bay and the District Surveyor Homa Bay to visit the suit land and file a report to court was in order and not contrary to the principle of natural justice of *nemo iudex in causa sua*.
 7. On whether the 1st respondent herein fraudulently acquired land parcel number Kanyada/ Kotieno/ Katuma 'B'/884, learned counsel submitted that transfer was effected in the name of the 1st respondent since her husband, the purchaser, was already deceased at the time of transfer. That the same was done procedurally and lawfully, without malice. Counsel relied on the report prepared by the Land Surveyor, wherein he stated that the land parcels involved in the present suit, to wit, Kanyada/Kotieno/katuma 'B'/ 577, 674 and 884, all have distinct boundaries on the ground, and submitted that the 1st respondent had not trespassed onto the appellants' land. Thus, counsel submitted that the instant appeal lacks merit and urged the honourable court to dismiss the same with costs to the 1st respondent. Counsel cited various authoritative pronouncements, including the case of Azzuri Limited –vs- Pink Properties Limited (2018) eKLR, to fortify the submissions.
 8. In the foregone, the issues for determination are as captured in the grounds of appeal and boil down to whether the appellant:
 - a. Has demonstrated that this appeal is tenable and
 - b. Is entitled to the orders sought in the memorandum of appeal.



9. It must be noted that the instant appeal is the first one from the trial court in the matter. Therefore, I am obliged to review the record of the trial court, evaluate it and arrive at own conclusions in this appeal; see *Mwanasokoni-vs Kenya Bus Services Ltd (1982-88) 1KAR 278* applied in other cases, inter alia, *Titus Ong'ang'a Nyachio-vs-Martin Okioma Nyauma and 3 others (2017) eKLR*.
10. At the trial court, the suit was commenced by way of a plaint dated 20th March 2017 mounted by the plaintiffs/appellants against the defendants/respondents. The plaintiffs sought the following orders;
 - a. A declaration that land parcel number Kanyada/Kotieno-Katuma 'B'/884 being a subdivision of parcel number Kanyada/Kotieno-Katuma 'B'/670 and not a subdivision of parcel number Kanyada/Kotieno-Katuma 'B'/576 is not situated between parcel nos. Kanyada/Kotieno-Katuma 'B'/674 and 675 and consequently the 1st defendant has trespassed on land parcel number Kanyada/Kotieno-Katuma 'B'/674.
 - b. An order of rectification of the register and survey map for land parcel number Kanyada/Kotieno-Katuma 'B'/674 to reflect the true size and acreage of the same.
 - c. An order of eviction of the 1st defendant together with all the buildings, erections, fences and any other fixtures he has put in the land of the plaintiffs.
 - d. An order that the 2nd defendant do pay general damages to the plaintiffs together with interest thereon at the rate of 12% p.a from the date of judgment until payment in full.
 - e. Costs of the suit together with interest thereon at the rate of 14% p.a from the date of judgment until payment in full.
 - f. Such further or other alternative relief as this honourable court deems fit to grant.
11. The plaintiffs contend that they are the registered owners of land parcel numbers Kanyada/Kotieno-Katuma 'B'/674 and 577. That the 1st defendant hived off a portion thereof and registered the same as a land parcel number Kanyada/Kotieno-Katuma 'B'/884.
12. The 1st appellant, Florence Atieno Opanga (PW1), adopted her witness statement as part of her evidence. She produced in evidence, a letter dated 10th August 2015, a copy of green card for land parcel number Kanyada/Kotieno-Katuma 'B'/884, a copy of green card for land parcel number Kanyada/Kotieno-Katuma 'B'/674, a copy of green card for land parcel number Kanyada/Kotieno-Katuma 'B'/675, a copy of green card for land parcel number Kanyada/Kotieno-Katuma 'B'/577, a copy of green card for land parcel number Kanyada/Kotieno-Katuma 'B'/466, a letter dated 24th September 2015, statutory notice dated 9th September 2015 and a letter of intention to sue dated 9th September 2015 (PExhibits 1 to 9 respectively).
13. In cross-examination, PW1 stated that both the Land Registrar and Surveyor visited the site. This was targeted at ascertaining the ground position of the land parcels in dispute.
14. PW2, Monica Adhiambo Agan, the 2nd appellant herein, relied on her statement on record as part of her evidence. She testified that together with PW1, they own parcel number 674. That she was not aware of the existence of parcel number 884 in respect of which the 1st respondent produced a title deed indicating that the same is registered in her name.
15. The 1st defendant's counsel did not file a statement of defence. However, the 2nd defendant filed a statement of defence dated 12th June 2017 on 20th June 2017 denying the claim.



16. DW1, Susan Anyango Ochieng, the 1st respondent herein adopted her witness statement as part of her evidence. She testified that land parcel number Kanyada/Kotieno-Katuma 'B'/884 was purchased by her husband from one Caren A. Orwa but the transfer was effected in her name. On cross-examination, DW1 stated that the said Caren A. Orwa's name does not appear in documents relating to the said parcel.
17. DW1 produced in evidence a copy of title deed for land parcel number Kanyada/Kotieno-Katuma 'B'/884, a copy of grant dated 28th May 2010, a copy of search certificate for land parcel number Kanyada/Kotieno-Katuma 'B'/884, a copy of green card for land parcel number Kanyada/Kotieno-Katuma 'B'/884, a copy of green card for land parcel number Kanyada/Kotieno-Katuma 'B'/670, a copy of mutation for land parcel number Kanyada/Kotieno-Katuma 'B'/670 and a copy of map (DExhibits 2 to 8 respectively).
18. DW2, Ndege Tiberius, the Land Registrar Homa Bay, testified that he visited the disputed parcels of land on 27th April 2021. He produced a report on his findings thereof (DExhibit 1) which concludes that L.R. No. Kanyada/Kotieno-Katuma 'B'/674 had encroached into L.R. No. Kanyada/Kotieno-Katuma 'B'/884 to the extent of ten (10) feet.
19. During cross-examination, DW2 stated that land parcel number Kanyada/Kotieno-Katuma 'B'/884 was a subdivision of land parcel number Kanyada/Kotieno-Katuma 'B'/670. That it initially belonged to Dominic Odhiambo Oyier then to Mary Atieno Adhiambo and later Susan Anyango Ochieng (DW1).
20. Felix Odhiambo Adisa, County Surveyor Homa Bay (DW3), produced a report (DExhibit 9). During cross-examination, DW3 stated that the boundary in dispute is the one between land parcel numbers Kanyada/Kotieno-Katuma 'B'/884 and 674. That the measurements on the mutation and those on the ground based on the existing boundaries were almost the same.
21. It is noteworthy that the learned trial magistrate set out the parties' respective cases, framed three issues for determination, analysed them and arrived at his decision based on reasons. So, the impugned judgment complied with Order 21 Rule 4 of the Civil Procedure Rules, 2010.
22. In arriving at the impugned judgment, the learned trial magistrate observed, inter alia;

“...In this case the plaintiffs did not produce a map or any evidence at all to prove that land parcel number 884 is misplaced on the ground or that the 1st defendant had actually trespassed onto the plaintiff's land. I find that the plaintiffs failed to prove any kind of fraud on the part of the defendants nor prove that land parcel number 884 is misplaced or had been hived off their land parcels...”
23. The appellants contend that the learned trial magistrate erred in law of procedure in failing to appreciate the contents of paragraph 3 of the plaint that the 2nd defendant was sued in a representative capacity on behalf of the District Land Registrar Homa Bay and the District Surveyor Homa Bay. Further, that in directing them to visit the suit land and file a report to court was contrary to the principle of natural justice of *nemo judex in causa sua*.
24. Notably, at the trial court, the plaintiffs' counsel filed a notice of motion application dated 1st September 2020 to protest court order directing site visit by Land Surveyor and Land Registrar on the same grounds. However, on 11th November 2020, counsel withdrew said application and requested for hearing date of the main suit. Essentially, counsel consented to the site visit conducted by the Land



- Surveyor and Land Registrar as per the trial court's directive. How then can counsel raise the same issue in this court?
25. Be that as it may, the offices of the Land Surveyor and the Land Registrar are distinct and separate from that of the 2nd respondent herein. The plaintiffs ought to have originated the claim against them by way of "personal capacity suit" as defined in Black's Law Dictionary 10th Edition at page 1663.
 26. This court is cognizant of the provision under Section 18(2) of the Land Registration Act, 2016 (2012) which prohibits a court from hearing a boundary dispute unless the boundaries have been fixed in accordance with Section 20 of the same Act.
 27. Disputes relating to general boundaries are the province of the Land Registrar under Section 19 of the said Act. It is my considered view that the same is in order since the Land Registrar is possessed of technical skills and expertise to accomplish this exercise; see also Andrew Marigwa -vs- Josephat Ondieki Kebati (2017) eKLR.
 28. It is trite law that where a statute has provided for a mechanism of dispute resolution, the court cannot abrogate that mechanism. That a litigant must exhaust the said mechanism before moving to the next level. That where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed; see Speaker of the National Assembly v James Njenga Karume [1992] eKLR.
 29. In my considered view, the plaint dated 20th March 2017 mounted by the plaintiffs/appellants against the defendants/respondents at the trial court contains issues that were within the purview of Section 18(2) and 19 of the Land Registration Act, 2016 (2012). The issues were properly resolved by the trial court as provided by statute.
 30. The appellants also contend that the learned trial magistrate erred in law of evidence in failing to take note that although the 2nd defendant filed a statement of defence dated 12th June 2017, the 2nd defendant never called evidence to support his defence. That therefore, the plaintiffs' evidence particularly on the issue of trespass was uncontroverted since the defence witnesses who gave evidence only limited their evidence to the site visit directed by the court.
 31. This court is guided by Section 107 of the Evidence Act, Chapter 80 Laws of Kenya which provides as follows:
 - i. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
 32. It is trite that the burden was always on the plaintiff to prove his case on a balance of probabilities; see Kirugi and another-vs-Kabiya and 3 others (1987) KLR 347.
 33. According to the report by the Land Registrar (DExhibit 1), land parcel number Kanyada/Kotieno/Katuma B/674, belonging to the appellants, has encroached into land parcel number Kanyada/Kotieno/Katuma B/884 which belongs to the 1st respondent. That the extent of encroachment is 10 feet, within which the 1st defendant/respondent has constructed a toilet.
 34. Having established that it is indeed the plaintiffs/appellants who had encroached on to the 1st defendant/respondent's parcel of land, the trial court could not have made a finding that the latter had trespassed into the former's land. In any event, it is the appellants who have trespassed into the 1st respondent's parcel of land.



35. To that end, it is the finding of this court that the appellants who were the plaintiffs at the trial court failed to prove their claim against the defendants/respondents on a balance of probabilities as per Kirugi case (supra).
36. In conclusion, it is the finding of this court that the learned trial magistrate's judgment is not faulty at law. I proceed to uphold the same.
37. Wherefore, the instant appeal lodged by way of a memorandum of appeal dated 28th January 2022 and filed herein on 18th February 2022, is hereby dismissed.
38. The appellants to bear the costs of this appeal and the original suit.
39. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 26TH DAY OF SEPTEMBER 2023.

G.M.A ONG'ONDO

JUDGE

Present

Mr. Bana, holding brief for G. S. Okoth, learned counsel for the appellants

Ms. Kisaka, holding brief for Ms. Obwanda, learned counsel for the 1st respondent

