



REPUBLIC OF KENYA



**Chelal v Cherop (Environment and Land Appeal E020 of 2022)
[2023] KEELC 20053 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20053 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND APPEAL E020 OF 2022
L WAITHAKA, J
SEPTEMBER 22, 2023**

BETWEEN

RICHARD CHEBET CHELAL APPELLANT

AND

KABON CHEROP RESPONDENT

*(Being a Judgment from Hon. N. M. Idagwa (SRM) in
Kabarnet ELC.No.1 of 2020 delivered on 19th August, 2022.)*

JUDGMENT

Introduction.

1. By a plaint dated October 9, 2020 the appellant herein instituted a suit in the lower court to wit Kabarnet SPM Land Case No E1 of 2020 seeking judgment against the respondent for an order of eviction of the respondent, her family, servants and agents from the parcel of land known as Baringo/Kapropita/2286 measuring approximately 1 ha. (suit property); an order of demolition of the structures erected by the respondent in the suit property; an order of permanent injunction to restrain the respondent, her agents and/or servants from further trespassing onto the suit property; costs of the suit; any other or further relief the court may deem fit to grant.
2. The suit was premised on the grounds that the plaintiff is the registered owner of the suit property; that in 2008 the respondent trespassed into the suit property and forcefully occupied a portion thereof and constructed temporary structures thereon.
3. Lamenting that efforts to evict the respondent from the suit property had been futile; the plaintiff instituted the suit hereto seeking the reliefs listed herein above.
4. The respondent filed a statement of defence denying the appellant's contention that she had trespassed into the appellant's land. The respondent contended that she had been living in the suit land since



1976 when it was allocated to her by the County Council of Baringo. The respondent averred that the appellant's land borders the parcel of land she occupies and that they had lived harmoniously since 2000 or thereabout when the appellant bought his land.

5. The respondent pleaded that in 2018 the appellant extended his boundary to where she was living making her homestead part of the land he, the appellant, claims.
6. The respondent contended that this court lacks jurisdiction to determine the dispute preferred before it because it touches on a boundary dispute which has not been determined in accordance with the applicable law; Section 18(2) of the *Land Registration Act, 2012*.
7. When the matter came up for hearing, the plaintiff availed three witnesses, himself included, and produced the documents contained in his list of documents dated October 9, 2020 after the documents were admitted in evidence. These were:-title deed issued on November 28, 2018; official search dated November 7, 2020; National Identity card; demand letter dated February 19, 2020 and sale agreement dated September 16, 1998.
8. The witnesses led evidence to the effect that the respondent is living in the land belonging to the appellant.
9. The appellant who testified as PW 1, acknowledged that his land is close to the land belonging to the appellant and that there is an unresolved boundary dispute between him and the respondent.
10. The appellant's land is a subdivision of plot number 103 which borders plot number 102 where the respondent resides.
11. On her part, the respondent availed five witnesses, herself included. One of the witnesses, Mark Odhiambo Ochieng, a Deputy District Surveyor, who testified as DW 5 informed the court that he visited the locus in quo on July 30, 2020 and measured plot number 103 as whole because the Registry Index Map (RIM) had not been amended to reflect parcel number 2268 and 2298, which are subdivision of parcel number 103. He further informed the court that he was unable to ascertain the extent of parcel number 102 which is expansive, 81 acres. He produced his report dated November 12, 2020 as Dexbt 1.
12. In cross examination, he maintained that the RIM for plot number 103 was yet to be updated to reflect the subdivisions in respect thereof.
13. In re-examination, he stated that parcel number 2286 (the suit property) is a subdivision of parcel number 103. He explained that the RIM has not been done because there are inconsistencies between the subdivision and the original 103.
14. The other witnesses led evidence to the effect that the respondent is living in plot No 102 belonging to the Government of Kenya and that she had been living thereat since 1976 when she was given permission to live there by the then area District Commissioner (DC).
15. Upon consideration of the cases presented by the parties, the Learned Trial Magistrate *inter alia* stated/held:-

“It is not in dispute that the plaintiff owns parcel Baringo/Kapropita/2286. The bone of contention is whether the defendant is residing on parcel Baringo/Kapropita/102 or has encroached on Baringo/Kapropita/2286. To support their claims both parties called witnesses. Each of the parties' witnesses stated that the party they were giving evidence in support was on their rightful portions.



It is trite law that whoever alleges must prove. It is the plaintiff who has a burden of proof that the defendant has encroached on his parcel of land. Proof of encroachment can only legally be proved through evidence of experts, that is the surveyor and land registrar. The plaintiff did not tender any evidence to prove the extent of encroachment, if at all there was any. From the evidence on record and being guided by the legal principles and law, the plaintiff has failed to prove his case on a balance of convenience. I therefore dismiss the suit with costs to the defendant.

16. Dissatisfied with the decision of the Trial Magistrate, the plaintiff appealed to this court on five (5) grounds which can be reduced to one broad ground namely, the Learned Trial Magistrate erred by dismissing his case.
17. Pursuant to directions given on March 21, 2023, the appeal was disposed off by way of written submissions.

Submissions.

The Appellant's Submissions.

18. In his submissions filed on April 19, 2023 the appellant submits that:-
 - i. The Learned Trial Magistrate erred by applying a standard of proof inapplicable in civil cases, prove beyond reasonable doubt, as opposed to proof on a balance of probabilities.
 - ii. The Learned Trial Magistrate failed to appreciate that he (the appellant) is the registered proprietor of the parcel of land in dispute;
 - iii. The Learned Trial Magistrate failed to appreciate that the respondent did not challenge his (the appellant's) title or establish that his title was obtained fraudulently, illegally, unprocedurally or through corrupt means.
19. It is the appellant's case that having proved that he is the registered owner of the parcel of land in dispute, his rights ought to have been protected by the trial court. The appellant cites the case of *Josphat Kuria Gathoni v. James Maina Njoroge & 3 others* (2019)e KLR where an eviction order was issued against the defendant because he did not demonstrate any right over the suit property in support of his contention that his right as the registered proprietor of the suit property ought to have been upheld by the trial court.
20. Arguing that the Learned Trial Magistrate was biased in her findings against him, especially in her finding that he failed to table in court the surveyor's report despite several court orders upon the surveyor which were never complied with; the appellant submits that it was the surveyor who should have produced the said report before the trial court and not him, the appellant.
21. The appellant urged that it is in the interest of justice that his appeal be allowed.

The Respondent's Submissions.

22. In her submissions filed on May 15, 2023, the respondent submits that the judgment of Learned Trial Magistrate is based on sound and proper reasoning of the law and that the Learned Trial Magistrate exercised her discretion judiciously while dismissing the appellant's suit.
23. The appellant's contention that the Learned Trial Magistrate applied a standard of proof not applicable in civil cases, proof beyond reasonable doubt, is said to be unfounded as the court record does not bear that out.



24. The appellant's contention that the Learned Trial Magistrate failed to appreciate that he is the registered proprietor of the suit property is said to be misleading as the court record shows that the Learned Trial Magistrate appreciated that fact but identified the issue for determination as whether the appellant had proved that the respondent had encroached or trespassed into his parcel of land.
25. The respondent further submits that the dispute presented before the court did not turn on the mere fact that the appellant was the owner of the suit property but on whether the respondent had encroached on the appellant's land which fact, in the circumstances of the case before the court, required expert evidence to prove.
26. The Learned Trial Magistrate is said to have appreciated, through the evidence presented, that the respondent lives on a public land for which she did not need to produce documents to prove ownership.
27. The respondent further submits that the Learned Trial Magistrate properly directed herself when she held that the burden of proof was on the appellant to establish that the respondent had in actual fact encroached on his parcel of land.
28. The respondent agrees with the Trial court's determination that being the one who had taken the respondent to court on the ground that she had encroached on her land, the burden was on the appellant to prove the allegation he had made against her and that the input of the Land Registrar was crucial in the case.
29. On the alleged bias against the Learned Trial Magistrate, the respondent submits that the court record does not bear any bias against the Learned Trial Magistrate. The respondent further submits that the test of pleading bias espoused in the case of *Mumias Sugar Company Ltd vs Director of Public Prosecutions & 2 others* (2012)e KLR has not been satisfied in the circumstances of this case.
30. According to the respondent, no prejudice has been caused to the appellant because he is still in his parcel of land, 2286.
31. It is submitted that it is the respondent who has been prejudiced by the actions of the appellant because she has been inhibited in accessing her home.
32. Terming the appellant's suit premature, incompetent, bad in law, fatally defective and an abuse of the process of the court because it involves determination of the boundary between Baringo/ Kapropita/102 and 103 which had not been fixed by the Land Registrar as required by Section 18 of the *Land Registration Act*; based on the decision in the case of *Geoffrey Mutbinja Kabiru & 2 others vs Samuel Munga Henry & 1756 others* (2015)e KLR, the respondent submits that the suit was premature as the appellant had not exhausted all the laid down and mandatory processes for dispute resolution over the dispute he took to court.
33. It is further submitted that the court lacked jurisdiction to hear and determine the dispute presented before it because it related to a boundary dispute which had not been determined by the Land Registrar in accordance with the provisions of the *Land Registration Act*, 2012. In that regard, reliance was placed on the case of *Willis Ocholla vs Mary Ndege* (2016)e KLR where it was held:-

“In terms of section 18(2) of the *LRA*, proprietors of registered land with a boundary dispute are obligated to first seek redress or solution from the Land Registrar before moving or escalating the dispute to this court. That where such a party fails to do so and comes to court without first seeking redress from the land registry, the court being a court of law has to remind such a party that he/she has moved the court prematurely. That the



provisions of section 18(2) of the [Land Registration Act](#) shows clearly that the court is without jurisdiction on boundary dispute of registered land until after the land registrar's determination of the same has been rendered..."

34. Terming the appeal a sham, intended to frustrate her and to delay her enjoyment of the fruit's of her judgment, the respondent urges the court to dismiss it with costs to her.

Analysis and Determination

35. In exercise of the duty vested in me as the first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard see *Selle & another vs. Associated Motor Boat Co Ltd* (1968)EA 123 and *Mwanasokoni vs Kenya Bus Service Ltd* (1982-88)1 KAR and *Kiruga vs Kiruga & Another* (1988)KLR 348.
36. A review of the evidence adduced in the case hereto shows that the appellant and the respondent's land share a common boundary. That fact was acknowledged by the appellant upon being cross examined by counsel for the respondent by admitting that the respondent's land is close to his. The appellant also admitted that in 2020 Government officers came to the locus in quo to ascertain the boundary but were unable to do so.
37. DW 5, a surveyor, who similarly visited the *locus in quo*, informed the court that the Registry Index Map (RIM) had not been amended to reflect parcel number 2268 and 2298, which are subdivision of 103 and that he was unable to ascertain the extent of plot number 102 which is expansive; 81 acres.
38. The evidence adduced in the lower court is to the effect that the defendant had been living in plot number 102 belonging to the Government. She had lived there since 1976 having obtaining permission of the area DC to live thereon.
39. Whereas the appellants' witnesses led evidence to the effect that the respondent had encroached on the land belonging to the plaintiff/appellant, it is noted that the respondents' witnesses gave evidence to the effect that the respondent was living in the land she had been living on since 1976, meaning she had not encroached on the plaintiff/respondent land.
40. Under Section 3(4) of the [Evidence Act](#), Cap 80 Laws of Kenya, a fact is not proved when it is neither proved nor disproved.
41. In the circumstances of the case before the trial court, the alleged encroachment onto the plaintiff/appellant's land was neither proved nor disproved.
42. The burden of proving that the respondent had encroached on his land lay with the plaintiff/appellant and not the respondent. In that regard see Section 107 of the [Evidence Act](#) which provides as follows:-
- “Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist.”
43. To prove that the defendant/respondent had indeed encroached on his parcel of land, the respondent needed expert evidence/opinion on that issue. That evidence could be given by none other than a surveyor or a Land Registrar. No such evidence was availed by the plaintiff/appellant. The trial court, therefore, cannot reasonably be faulted for determining that the plaintiff/respondent did not discharge the duty imposed on him of proving that the respondent had actually encroached on his land.



44. In any event, the evidence adduced before the lower court shows that the issues taken before the court touched on a boundary dispute which had not been resolved in accordance with the applicable law and procedures. That being the case, the lower court lacked jurisdiction to entertain it. In that regard see the case of *Willis Ocholla vs Mary Ndege supra*.
45. The upshot of the foregoing is that the appeal lacks merits and is for dismissal. Consequently, I dismiss it with costs to the respondent.
46. Orders accordingly.

DATED, SIGNED AND DELIVERED, AT ITEN THIS 22ND DAY OF SEPTEMBER, 2023

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:

Mr. Okara for the appellant.

Mr. Mwaita for the respondents.

