



REPUBLIC OF KENYA



**Wanga v Kowiti & another (Environment and Land Appeal E039 of 2022)  
[2023] KEELC 21165 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21165 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL E039 OF 2022  
GMA ONGONDO, J  
OCTOBER 31, 2023**

**BETWEEN**

**MICHAEL OKWORO WANGA ..... APPELLANT**

**AND**

**JOSEPH OMOL KOWITI ..... 1<sup>ST</sup> RESPONDENT**

**MARGARET ACHIENG OTIENO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment of Hon. J. M. Nang'ea, Chief Magistrate, delivered on 17th August 2022 in Homa Bay Law Courts Environment and Land Case No. 49 of 2020)*

**JUDGMENT**

1. This is an appeal that arises from the trial court's judgment delivered on the 17<sup>th</sup> August 2022 by the Honourable J. M. Nang'ea, Chief Magistrate, in Homa Bay Law Courts Environment and Land Case No. 49 of 2020 where he held, *inter alia*;

“... in the result, I find that the plaintiffs have proven their claim on a balance of probability...”

2. The appellant through the firm of Nyakwamba and Company Advocates mounted the appeal by way of a memorandum of appeal dated 29<sup>th</sup> August 2022 and filed herein on 30<sup>th</sup> August 2022. The appeal is anchored on grounds 1 to 10 as set out on the face thereof and the same include:
  - a. The trial magistrate erred in law and fact by declaring that the boundary between land parcel no. Gem/Kanyanjwa/683 and Gem/Kanyanjwa/1052 is the access road between the two parcels which was at one time closed by the appellant as such unduly increasing the approximate size of LR. No. Gem/Kanyanjwa/1052 and reducing the approximate size of land parcel number Gem/Kanyanjwa/683.



- b. The trial magistrate erred in law and fact by issuing an order directing the appellant to pay costs of Kshs. 100,000 to the 1<sup>st</sup> respondent being the value of trees allegedly destroyed despite confirming that the assessment was unfair to the appellant due to his absence during the exercise.
  - c. That the learned trial magistrate erred in law and fact in failing to analyze and evaluate the inconsistent, incoherent and contradictory oral evidence of Homabay County Land Registrar and Surveyor in order to come upon (sic) with a just determination.
  - d. That the learned trial magistrate erred in law and fact in relying on the inconclusive reports by the Land Registrar and the County Surveyor disputing the area Registry Index Map.
  - e. That the learned trial magistrate erred in law and fact by failing to critically analyse and consider the evidence and the report tendered by the independent surveyor called as a witness by the appellant.
  - f. The trial magistrate failed to appreciate the submissions of the learned counsel for the appellant by finding in favour of the respondent herein.
3. Wherefore, the appellants have sought the orders that this appeal be allowed, the judgment in favour of the respondents be set aside and the appellant be awarded costs of this appeal.
  4. On 19<sup>th</sup> June 2023, the court directed that the appeal be heard by way of written submissions.
  5. Accordingly, the appellant's counsel filed submissions dated 20<sup>th</sup> September 2023 and identified three issues for determination to wit: whether this court has jurisdiction to hear this appeal, whether the appeal raises valid grounds and whom should costs be awarded to?
  6. Counsel submitted that the trial magistrate, by ordering the opening of an access road through land parcel number Gem/Kanyanjwa/683, resulted to an unlawful compulsory acquisition, in contravention of Article 40 of *the Constitution* of Kenya, 2010. That creation of an access road is a function of the Road's Board and National Land Commission thus, the trial magistrate's order is void and untenable. That both the reports of the Land Registrar and Surveyor were inconclusive since they were not accompanied by the relevant plan as envisioned under Section 32 of the *Survey Act* and Sections 18 and 19 of the *Land Registration Act*. That further, the order directing the appellant to pay costs of Kshs. 100,000 in damages to the 1<sup>st</sup> respondent ought to be set aside, as the appellant was absent during the valuation. Thus, counsel urged the court to allow the instant appeal as prayed and set aside the judgment of the trial court. Counsel cited various authoritative pronouncements, including the case of *Selle and another -vs- Associated Motor Boat Co. Ltd. & others* (1968) EA 123, to fortify the submissions.
  7. Learned counsel for the 1<sup>st</sup> respondent, M/s Apondi and Company Advocates, filed submissions dated 6<sup>th</sup> October 2023 and identified three issues for determination to wit: whether the plaintiff can raise the issue of compulsory acquisition and *Public Roads and Roads of Access Act* during the appeal herein; whether the trial magistrate erred in law in granting the orders sought in the plaint and whether the appellant is entitled to the costs of this appeal.
  8. Counsel submitted that since the appellant failed to raise the issue of compulsory acquisition and *Public Roads and Roads of Access Act* at the trial court, he cannot be allowed to raise the same herein as this would occasion an injustice to the respondent, effectively contravening the provisions of Article 50 of *the Constitution* of Kenya, 2010.



9. Further, counsel submitted that the plan referred to in Section 32 of the Survey Act falls within the meaning in Section 2 of the same Act. On quantum of damages, counsel stated that the appellant ought to have been condemned to pay the entire sum of Kshs.270,000/-, being the value of the trees destroyed as indicated in the forester's report, and not Kshs.100,000/-. Reliance was placed on various authorities including the case of Twaher Abdulkarim Mohamed -vs- Independent Electoral and Boundaries Commission (IEBC) and 2 others (2014) eKLR, to fortify the submissions.
10. 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.
11. 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.
12. At the trial court, the suit was commenced by way of a plaint dated 9<sup>th</sup> November 2020 and amended on 1<sup>st</sup> February 2022, mounted by the plaintiffs/respondents against three defendants inclusive of the appellant. They sought the following orders;
  - a. An order directing the 2<sup>nd</sup> and 3<sup>rd</sup> defendants with the assistance of the officer in charge of Rangwe Police Station to open the access road passing through land parcel number Gem/Kanyanjwa/683 that had been closed by the 1<sup>st</sup> defendant and further closing an illegal diversion of the road created by the 1<sup>st</sup> defendant.
  - b. A declaration that the boundary between the above stated land parcel number Gem/Kanyanjwa/683 and Gem/Kanyanjwa/1052 is the access road between the two parcels which was at one time closed by the 1<sup>st</sup> defendant.
  - c. An order of permanent injunction restraining the 1<sup>st</sup> defendant, his agents and or servants from any further action of closing, blocking or diverting the access road passing between the above described parcels of land or in any other manner interfering with the boundary thereof.
  - d. A further order directing the 1<sup>st</sup> defendant to pay the 1<sup>st</sup> plaintiff a sum of Kshs. 270,000/- being the value of the trees destroyed by him.
  - e. The costs of the suit and interest.
  - f. Any other relief the court may grant.
13. PW1, Joseph Omol Kowiti, who was the 1<sup>st</sup> plaintiff at the trial court, adopted his witness statement dated 9<sup>th</sup> November 2021, as part of his evidence. He testified, *inter alia*, that he is the registered owner of land parcels Gem/Kanyanjwa/1042 and 1052. That the 1<sup>st</sup> defendant/ appellant herein, owns land parcel number 683. That on 4<sup>th</sup> July 2017, the Land Registrar Homabay and other land officials visited land parcel numbers 1052 and 683 on the invitation of the appellant herein. That the purpose of the visit was to close an access road and open a different one but the Land Registrar prepared a report wherein he recommended that the existing road be maintained.
14. That sometime in July 2020, the 1<sup>st</sup> defendant blocked the existing road and made a new road through the plaintiff's land parcel number 1052. That this prompted the plaintiff to file the suit at the trial court.



On 12<sup>th</sup> February 2021, the trial court visited the scene in the presence of the parties and land officials who prepared reports in favour of the plaintiff. Thereafter, the trial court ordered on 14<sup>th</sup> December 2021 that the access road be maintained. He averred that the 1<sup>st</sup> defendant trespassed onto his land and destroyed his crops and sought compensation for the loss. He produced in evidence a copy of certificate of official search in respect of land parcel number 1042, a copy of the land register in respect of parcel number 1052, a copy of the land register in respect of parcel number 683, a copy of the report of the Land Registrar, bundle of photos, a copy of the report of the Land Surveyor, a copy of report of the Land Registrar, a copy of the report of the Forest Officer and copy of the Registry Index Map Sheet (PEXhibit 1 to 3, PMFI 4, PEXhibit 5, PMFI 6 to 8 and PEXhibit 9 respectively).

15. On cross examination, PW1 stated that he had earlier filed a suit at Migori Environment and Land Court being Suit No. 703 of 2017, wherein he claimed to have acquired a portion of the 1<sup>st</sup> defendant's land parcel number 683 by way of adverse possession. He, however, clarified that he had abandoned the said suit so as to prosecute the present suit.
16. PW2, Margaret Achieng Otieno, the 2<sup>nd</sup> plaintiff, testified that she is the registered owner of land parcel number 689. She reiterated the averments of PW1 and urged the court to maintain the original access road as had been ordered by the trial court following a site visit carried out on 12<sup>th</sup> February 2021. She produced in evidence a certificate of official search in respect of land parcel number 683 (PEXhibit 10).
17. PW3, Felix Odhiambo Adier, the county surveyor, stated that that together with the court, the Land Registrar and the parties, they visited the site on 12<sup>th</sup> February 2021 and prepared a report dated 8<sup>th</sup> July 2021 which he produced in evidence as PEXhibit 6. He averred that the road separating the two parcels is a first registration and should be left as is. That the map showing the location of the parcels is inaccurate and unreliable.
18. During cross-examination, PW3 stated that a Land Registrar and Surveyor have authority to determine boundaries on the ground, as guided by erected features and the history as given by the parties.
19. PW4, Vitalis Odhiambo, a forester with the Kenya Forest Service, testified that he was asked by a Police Officer from Rangwe Police Station to visit land parcel number Gem/Kanyanjwa/1052 and assess loss occasioned when trees were destroyed on the land. That on 19<sup>th</sup> October 2021, he visited the site and valued the loss at Kshs.270,000. He prepared a report dated 25<sup>th</sup> October 2021 and produced the same in court as PEXhibit 8.
20. In cross-examination, PW4 confirmed that the 1<sup>st</sup> plaintiff was present during the site visit. He stated that:

“ The 1<sup>st</sup> plaintiff was present during the assessment.”
21. Reuben Onyango Kadienge, PW5, relied on his witness statement dated 9<sup>th</sup> November 2020, which was adopted as part of his evidence. He testified, *inter alia*, that he witnessed the appellant herein cut down trees on the 1<sup>st</sup> plaintiff/ respondent's boundary but could not recall the date when it occurred.
22. PW6, Ndege Tiberious, the Land Registrar Homa Bay, produced a report dated 4<sup>th</sup> July 2017 which was prepared by his colleague who executed the same as PEXhibit 4. He testified to have visited the suit land on 12<sup>th</sup> February 2021 and produced a report of his findings. He averred that the right boundary is the access road. During cross-examination, he stated that the access road does not pass through either of the parcels of land in dispute. That he was not aware of mutations done on the basis of the faulty map.



23. The 1<sup>st</sup> defendant, through Nyakwamba and Company Advocates, filed a statement of defence dated 6<sup>th</sup> January 2021 and amended on 14<sup>th</sup> February 2022. Notably, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not participate in the suit.
24. DW1, Michael Okworo Wanga, the 1<sup>st</sup> respondent herein adopted his witness statement dated 6<sup>th</sup> January 2021, as part of his evidence as well as bundle of documents filed on 16<sup>th</sup> February 2022.
25. During cross examination, DW1 stated that he purchased his land parcel number 683 in 1979. In reference to PExhibit 4, DW1 stated that the Land Registrar did not satisfactorily address his complaint. He denied destroying trees on land belonging to the plaintiff.
26. DW2, Onyango Njera George, a private land surveyor, testified that he visited the site on 15<sup>th</sup> December 2021 at the request of the 1<sup>st</sup> defendant. He stated that he did not see an access road, passing through the parcels of land in question. He prepared a report dated 23<sup>rd</sup> December 2022, wherein he recommended that both PW3 and PW6 make another site visit. The same was produced as DExhibit 1.
27. During cross-examination, he stated that he is not a licensed surveyor. That he did not need to notify owners of neighbouring land parcels of his planned site visit.
28. Dalmas Wesonga Okere, DW3, adopted his witness statement filed on 16<sup>th</sup> February 2022. On cross-examination, he acknowledged that there is a road passing through the 1<sup>st</sup> plaintiff's land parcel number 1052 and the 1<sup>st</sup> defendant's land parcel number 683. That the land is situated between the two parcels and separates them.
29. 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](#).
30. In arriving at the impugned judgment, the learned trial magistrate observed, inter alia;

“...PW3's and PW6's expert evidence is that the map is faulty and ought to show the access road as a boundary feature... it is therefore their view that the access road does not pass through the 1<sup>st</sup> defendant's parcel number 683 but rather separates this parcel and the 1<sup>st</sup> plaintiff's parcel number 1052 as the boundary...The 1<sup>st</sup> defendant's evidence does not displace this... His witness (DW2) is not a licensed surveyor...”
31. The appellant contends that the trial magistrate erred in law and fact by declaring that the boundary between land parcel no. Gem/Kanyanjwa/683 and Gem/Kanyanjwa/1052 is the access road between the two parcels, as such unduly increasing the approximate size of LR. No. Gem/Kanyanjwa/1052 and reducing the approximate size of land parcel number Gem/Kanyanjwa/683. That the learned trial magistrate erred in law and fact in relying on the inconclusive reports by the Land Registrar and the County Surveyor disputing the area Registry Index Map.
32. This court is cognizant of Sections 18 and 19 of the [Land Registration Act](#) 2016 (2012) which gives the Land Registrar authority to fix boundaries to registered land. The law further provides that the determination of the position of any uncertain boundary shall be done as stipulated in the [Survey Act](#), Chapter 299 Laws of Kenya.
33. Pursuant to the foregoing, it is noted that the trial court visited the site on 12<sup>th</sup> February 2021, in the presence of the parties, the Land Registrar and Land Surveyor- Homa Bay County. Following the visit, the trial court ordered that the access road that had been closed by the 1<sup>st</sup> defendant/appellant herein be reopened and status quo be maintained.



34. In the reports prepared by the Land Surveyor (PW3) and the Land Registrar (PW6), PExhibit 6 and 7 respectively, it was noted that the Registry Index Map is faulty. The experts relied on the physical features on the ground, such as tree stumps marking the boundary.
35. PW6 also produced a report (PEXhibit 4) which was prepared by his predecessor after visiting the site on 4<sup>th</sup> July 2017, upon the invitation of the 1<sup>st</sup> defendant/appellant herein. In the report, it was resolved that the existing road be maintained.
36. The appellant lamented that the learned trial magistrate erred in law and fact by failing to critically analyse and consider the evidence and the report tendered by the independent surveyor called as a witness by the appellant. However, I must note that DW2 was in fact, not a licensed surveyor. In cross-examination, DW2 admitted thus:

“... I am not licensed as a surveyor...”

37. In fact, DW2 made a recommendation in his report dated 23<sup>rd</sup> December 2022, that the Land Registrar and Land Surveyor should make another visit to the ground for proper survey. This, in my view, would be superfluous, as two site visits had already been conducted and the reports prepared and duly filed in court as hereinabove stated.
38. Indeed, PExhibits 4, 6 and 7 are opinion evidence. The law on opinion of an expert witness is well established; See Sections 48 to 54 of the *Evidence Act*, Chapter 80 Laws of Kenya. Expert evidence is a piece of evidence to be considered alongside other evidence on record; see *Shah and Another -vs- Shah and Others* [2003] 1 EA 290.
39. I am therefore, satisfied that the learned trial magistrate rightly exercised the discretion of the court in considering and adopting the expert opinion evidence. He found no reason to hold otherwise as held in the case of *CD Desouza -vs- B R Sharma* (1953) 26 KLR 41 at 42.
40. The appellant stated that the trial magistrate failed to appreciate the submissions of the learned counsel for the appellant, thereby finding in favour of the respondent herein.
41. It is trite law that submissions are not evidence. They are only a marketing language of the parties to the court to agree to their arguments. In the case of *Daniel Toroitich Arap Moi -vs- Mwangi Stephen Muriithi & Another* [2014] eKLR, the Court of Appeal held infra:

“...Submissions cannot take the place of evidence. The 1<sup>st</sup> respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented...”

42. The appellant lamented that the trial magistrate erred in law and fact by issuing an order directing the appellant to pay costs of Kshs. 100,000/- to the 1<sup>st</sup> respondent. However, from the evidence on record and PExhibit 8, I find that the same is reasonable in the circumstances.
43. Although the appellant has raised the issue of compulsory acquisition and *Public Roads and Roads of Access Act* in his submissions herein, I note that the same were not pleaded at the trial court nor raised as a ground of appeal in the memorandum of appeal filed herein. To that end, this court associates itself



with the reasoning in *Twaber Abdulkarim Mohamed case* (*supra*), wherein the court cited Platt JA in Wachira -vs- Ndanjeru (1987) KLR 252, as follows:

“The principles can be summarised as follows: the discretion to allow a point of law to be taken for the first time on appeal will not be exercised unless full justice can be done between the parties. It will not usually be allowed when to do so would involve disputed facts which were not investigated or tested at the trial. Nor will a party be allowed to raise on appeal, a case totally inconsistent with that which he raised in the trial court, even though evidence taken in that court supports the new case. (See *Tanganyika Farmers Association Ltd. v Unyamwenzi Development Corporation* [1960] EA 620, *Overseas Finance Corporation Ltd v. Administrator General* (1942) 9 EACA 1). But the court will allow a new question concerning the construction of a document or the legal effect of admitted facts, since no question of evidence arises, and it will usually be regarded as expedient in the interests of justice to do so.” (Emphasis added).

44. Clearly, allowing a new point in the instant case will prejudice the respondents herein; see Article 50 of *the Constitution* (*supra*).
45. 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.
46. 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.
47. To that end, it is evident that the respondents who were the plaintiffs at the trial court proved their claim against the appellant and other defendants on a balance of probabilities as per *Kirugi case* (*supra*).
48. 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.
49. Wherefore, the instant appeal lodged by way of a memorandum of appeal dated 29<sup>th</sup> August 2022 and filed herein on 30<sup>th</sup> August 2022, is hereby dismissed.
50. The appellant to bear the costs of this appeal and the original suit.
51. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 31<sup>ST</sup> DAY OF OCTOBER 2023.**

**G. M. A. ONG’ONDO**

**JUDGE**

Present;

Ms. E. Apondi, learned counsel for the Respondents

Mr. Nyakwamba, learned counsel for the Appellant

Luanga Terrence, Court Assistant

