



**Obuon v Onyango & another (Environment and Land Appeal  
E034 of 2022) [2023] KEELC 21145 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21145 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E034 OF 2022**

**E ASATI, J**

**OCTOBER 26, 2023**

**BETWEEN**

**CHARLES OMONDI OBUON ..... APPELLANT**

**AND**

**MICHAEL ORWA ONYANGO ..... 1<sup>ST</sup> RESPONDENT**

**SIMON OUKO ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgement and orders of Hon. R.K. Ondieki (SPM) dated 16th December, 2021 in the Magistrate's Court at Kisumu Civil Case No.374/2018)*

**JUDGMENT**

1. Vide Memorandum of Appeal dated 4<sup>th</sup> May, 2022, the Appellant Charles Omondi Obuon, challenged the Judgement of Hon. R.K. Ondieki (SPM) dated 16<sup>th</sup> December, 2021 in Kisumu CMC.374 OF 2018 and sought for orders that;
  - a. the appeal be allowed
  - b. the entire judgement and orders of the learned Magistrate Hon. R.K. Ondieki (SPM) dated 16<sup>th</sup> December, 2021 be set aside.
  - c. the appellant's counterclaim be reinstated and considered.
  - d. the plaintiff's claim against the Defendant be dismissed.
  - e. judgement be entered for the appellant as claimed in the defence and counterclaim.
  - f. costs of the appeal.
2. The background of the appeal is that the Appellant was the 1<sup>st</sup> Defendant in Kisumu CMC Environment & Land Case No.374 of 2018 wherein together with one Simon Ouko, the 2<sup>nd</sup>



Respondent herein, had been sued by the 1<sup>st</sup> Respondent herein over a piece of land known as Kisumu/Manyatta “A”/351 (the suit land).

3. In the suit, the 1<sup>st</sup> Respondent herein claimed to be the registered owner of the suit land. He pleaded in the plaint dated 2<sup>nd</sup> July 2018 that some times in the month of August, 2017 the 2<sup>nd</sup> Respondent as an employee or agent of the Appellant while carrying out construction works on the Appellant’s land parcel No. Kisumu/Manyatta “A”/309 encroached onto the suit land and caused destruction of the 1<sup>st</sup> Respondent’s property. The 1<sup>st</sup> Respondent therefore sought for orders of permanent injunction, special and general damages, among other reliefs.
4. Vide his amended defence dated 15<sup>th</sup> February, 2021, the Appellant denied the 1<sup>st</sup> Respondent’s claim and raised a counterclaim for a declaration that the 1<sup>st</sup> Respondent had encroached onto his land at a distance of 2.4 metres and an order for recovery of a piece of land measuring 2.4 metres which he claimed was erroneously constituted and included in the suit land.
5. The trial court heard the suit and vide the judgement dated 16<sup>th</sup> December, 2021 found that the Plaintiff had proved his case on a balance of probabilities and entered judgement for the Plaintiff against the Appellant and 2<sup>nd</sup> Respondent herein jointly and severally as prayed. The trial court further made an order striking out the appellant’s counterclaim.
6. Dissatisfied with the judgement, the Appellant brought this appeal on the grounds that:-
  - a. The learned Magistrate erred in law and in fact by failing to consider the merits of the Appellant’s defence and submissions filed in relation to the hearing of the suit in his analysis thus arriving at a lopsided judgement that is devoid of the substance of the law.
  - b. The learned Magistrate erred in law and in fact in his interpretation of Section 18(2) of the *Land Registration Act* 2012 which disregarded the provisions of Section 18(1) and 18(3) of the *Land Registration Act* 2012, Section 13 of the *Environment and Land Court Act*, 2011 and Section 9(a)(i) of the *Magistrate’s Court Acts*, 2015.
  - c. The learned Magistrate erred in law and in fact by failing to appreciate the incongruences prevalent in the 1<sup>st</sup> Respondent’s pleadings vis a vis his evidence so far as the special damages are concerned, thus rendering a judgement that contravenes the provisions of Section 109 of the *Evidence Act*.
  - d. The learned Magistrate erred in law and in fact by disregarding the Appellant’s submissions pointing out the huge difference between the minor special damages proved and the exorbitant special damages claimed thus finding in the 1<sup>st</sup> Respondent’s favour purely on the Magistrate’s own biased opinion on the damage caused to the 1<sup>st</sup> Respondent.
  - e. The learned Magistrate erred in law and in fact by irregularly striking out the Appellant’s Counterclaim on a technicality thus failing to appreciate that the grounds for striking out of pleadings are limited to those outlined under the provisions of Order 2 Rule 15 of the Civil Procedure Rules and no more.
  - f. The learned Magistrate erred in law and in fact by failing to adjudicate on the provisions of Order 2 Rule 14 as juxtaposed with Section 1A, 1B(a) and 3A of the *Civil Procedure Act* and Article 159(1)(d) of the *Constitution*.
  - g. The learned Magistrate erred in law and in fact by acting suo moto on the striking out of the Counterclaim for mere want of form and without being moved in a formal application as provided in law.



- h. The learned Magistrate erred in law and in fact by failing to appreciate the import of Article 159(1)(d) of the *Constitution* and Section 1A and 1B of the *Civil Procedure Act* pertaining to substantive justice without undue regard to procedural technicalities, thus striking out the Appellant’s counterclaim on a mere technicality, preferring to ignore the Appellant unheard.
7. Directions were taken on 3<sup>rd</sup> of July, 2023 that the appeal be canvassed by way of written submissions. The Appellant filed written submissions dated 18<sup>th</sup> August, 2023 and Supplementary Submissions dated 4<sup>th</sup> September, 2023.
8. Vide the supplementary submissions dated 4<sup>th</sup> September, 2023, Counsel referred the court to the decision in Civil Appeal No.228 of 2013, *Nicholas Kiptoo Arap Korir and IEBC & 6 Others* [2013] eKLR.

### **Issues for determination**

9. From the grounds of appeal, the record of appeal generally and the submissions made, I find that the issues that emerge for determination in this appeal are;
  - a. whether or not the trial court erred in awarding the 1<sup>st</sup> Respondent Kshs 708,887 as damages as prayed in the plaint.
  - b. whether or not the trial court erred in striking out the counter-claim
  - c. what orders to make on costs of this appeal.

### **Analysis and determination**

10. This is a first appeal and as such the court has a duty to analyze and re-asses the evidence adduced and be able to reach its own independent conclusion in the matter. In the case of *Selle and another v Associated Motor Boat Company Ltd and others* 1968 E.A 123 it was held that:

“An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has never seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not- necessarily bound to follow the trial court’s findings of fact if it appears either that he clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

11. The first issue for determination is whether or not the trial court erred in awarding the Respondent Kshs 708887 as damages as prayed in the Plaint. In paragraph 8 of the plaint, the 1<sup>st</sup> Respondent pleaded that when the appellant begun constructing and developing his property his balcony overlapped with the 1st Respondent’s security wall and that on 6<sup>th</sup> of March 2018 while the appellant and the 2<sup>nd</sup> Respondent were carrying on construction works a heavy plate fell on the 1<sup>st</sup> Respondent’s roof resulting in serious damage to the roof. He pleaded further that all building materials and debris continued to be deposited and/or poured into the 1<sup>st</sup> Respondent’s property thus causing the 1<sup>st</sup> Respondent and his family members extreme inconvenience. In paragraph 11, the 1<sup>st</sup> Respondent claimed for special damages of Kshs 780,887 being the cost of renovations.



12. In paragraph 10 of his defence, the appellant pleaded that the claim for Kshs 780,887 was not meritorious or owed. The appellant refuted the bill of quantities report by the 1<sup>st</sup> Respondent's quantity surveyor claiming that the same was questionable and not proof that the damage to the 1<sup>st</sup> Respondent's roof was attributable to him. That the claim was a fake extortionist claim.
13. The record shows that the evidence placed before the trial court by the 1<sup>st</sup> Respondent on this issue was his own testimony, the exhibits he produced and the evidence of PW2 the quantity surveyor and the bill of quantities he produced as exhibit. The proceedings show that the 1<sup>st</sup> Respondent adopted the contents of his witness statement as his evidence. He had stated in the witness statement that the cost of repairing and renovating the roof and related damage will amount to Kshs.780,887. PW2 produced the bill of quantities which gave the cost of the renovations at Kshs.708,887. The 1<sup>st</sup> Respondent on cross examination stated that there was a typo error in the amount he claimed. PW2 testified that the estimate of the cost of renovation was the proper estimate and that he saw the damage.
14. The record further shows that after hearing the evidence, the court observed that the Plaintiff produced a report on bill of quantities dated 12<sup>th</sup> June, 2018 on the strength of which it set out the renovation works to be carried out to bring the residential house as near as possible in the state it was in terms of the roof, wall, finishes, ceiling finishes, external works, PC and other contingencies totalling to Kshs.708,887. The court noted that there was no contrary report to the bill of quantities to demonstrate that the damage and the renovation being sought was exaggerated.
15. The trial court further observed that besides damages to the roof, there were other debris deposited on the Plaintiff's property which the 1<sup>st</sup> Defendant did not deny but shifted the blame to his contractor being the 2<sup>nd</sup> Defendant. The court noted further that the tort of trespass is actionable regardless of the extent of the incursion and without showing of injury or damage to the claimant.
16. It was submitted on behalf of the Appellant on this issue that the trial court failed to appreciate the incongruences prevalent in the 1<sup>st</sup> Respondent's pleadings in which he was claiming special damages of Kshs.780,887/- whereas the Bill of Quantities was kshs.708,887/-. That no receipts or evidence were adduced to prove that the 1<sup>st</sup> Respondent expended Kshs.708,887/-.

Counsel relied on the case of *Kemfor Africa Limited t/a "Meru Express {Series (1976)}" & Another – v- Lubia & Another* in which the court stated that;

“the principles to be observed by an Appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge, it must be testified that in assessing the damages, the court took into account an irrelevant factor, or left out of account a relevant one, or that short of this the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damages”

That the Bill Quantities included costs unrelated to the roof such as repair of walls and external wall finishes, yet the claim in the plaint was for damage to the roof. Counsel questioned why the court would condemn the Appellant to pay up costs of renovating the whole house.

That there was no evidence that Appellant or his workers dropped a plate that damaged the 1<sup>st</sup> Respondent's roof.

That estimates of construction materials in the Bills of Quantities is not synonymous with the market cost of the items. That the pictures of the roof tendered in evidence reveal a roof which is old, dilapidated and which had been repaired prior to the filing of the suit in 4 Sections.



17. Counsel submitted further that as evidenced in the proceedings the 1<sup>st</sup> Respondent admitted that he replaced two iron sheets at the cost of about Kshs.600/- to 700/- per iron sheet hence there was no basis to award Kshs.708,887/-. That the award was in the circumstances so inordinately high and wholly erroneous.

Replying on the case of *Capital Fish Kenya Limited – v- Kenya Power and Lighting Company Ltd* 2016 where it was held that a claim for special damages must not only be specifically pleaded but must also be strictly proved, Counsel submitted that the 1<sup>st</sup> Respondent did not prove the claim of Kshs.708,887/-. Counsel further relied on the Section 109 of the *Evidence Act* and the case of *Abmed Mohammed Noor – v- Abdi Aziz Oman* Civil Appeal No.156 of 2018 to submit that the burden of proof was not discharged. That the 1<sup>st</sup> Respondent failed to prove the facts in his pleadings.

18. I find that the evidence placed before the trial court in respect of the claim for Kshs.708, 887/= was sufficient to support the claim. The claim was pleaded and particularized in paragraph 11 of the plaint. The variance of the figures of Kshs.780,887/= in the plaint and Kshs.708, 887 in the Bill of Quantities was explained by the 1<sup>st</sup> Respondent as a typo. No bill of quantities was produced by the appellant to controvert the 1<sup>st</sup> Respondent’s evidence. I find that the trial court was justified to award the 1<sup>st</sup> Respondent the damages.
19. The 2<sup>nd</sup> issue is whether or not the trial court erred in striking out the counter-claim. The record shows that in reply to the Plaintiff’s claim, the Appellant had filed a defence and counter-claim dated 15<sup>th</sup> February, 2021 via the counter-claim, the Appellant sought for orders of;
- a. a declaration that the Plaintiff encroached onto the 1<sup>st</sup> Defendant’s land at a distance of 2.4 metres.
  - b. an order against the Plaintiff directing him to adjust and officially change his boundary to enable the ground status of parcel number Kisumu/Manyatta “A”/309 to conform to its title specifications
  - c. an order for the recovery of the 2.4 metres of land erroneously constituted and included in Kisumu/Manyatta “A”/351 and for the inclusion of this area of 2.4 metres in the 1<sup>st</sup> Defendant’s land area through the re-beaconing of the Kisumu/Manyatta “A”/309 to recover the area of 2.4. metres in Kisumu/Manyatta “A”/351.
20. The appellant pleaded in the counterclaim- that at his request a surveyor from Rokos Mapping Consultants conducted a site visit of the suit property on 11<sup>th</sup> December 2020 and established that the parcel number Kisumu/Manyatta “A”/309 is a distinct plot, that the proprietor of the suit land- had encroached to parcel number Kisumu/Manyatta “A”/309 at a distance of 2.4 metres.
21. In his reply to defence and defence to counterclaim dated 29<sup>th</sup> March 2021, the 1<sup>st</sup> Respondent denied the allegations in the counterclaim, put the appellant to strict proof thereof and prayed that the counterclaim be dismissed.
22. From the judgement it is clear that the surveyor was called a DW2, testified and confirmed the contents of his report.
23. The court in its judgement held that the provisions of section 18(2) of the *Land Registration Act* prohibit the court from entertaining any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in that section. That power to deal with such boundary disputes is vested with the Land Registrar. The trial court



further found that in the present case the parties had a common boundary and that the boundary had not been determined by the Land Registrar.

24. The trial court further dealt with the issue raised by the 1<sup>st</sup> Respondent that the counterclaim was defective as it was not accompanied with a Verifying Affidavit. Relying on the decision of the Court of Appeal in Civil Appeal No.(Application) 228 of 2013 where it was held inter alia that Article 159 of the Constitution and the oxygen principles which command doing of substantial justice were never meant to overthrow or destroy rules of procedure and create a free for all anarchical administration of justice. the court then proceeded to strike out the counterclaim.
25. Counsel submitted that the trial court had jurisdiction under the provisions of Section 9(a)(i) of the Magistrates Courts' Act and Section 13(2) of the Environment and Land Act, to entertain uncertain boundaries of land for which survey had been completed under Section 18(3) of the Land Registration Act. That the court erred by ignoring the evidence tendered by the Appellant's surveyor which determined that the beacons were inconsistent with the survey plans. That the trial court thus erred in dismissing the Appellant amended counter-claim dated 15<sup>th</sup> February, 2021
26. Counsel further submitted that the trial court erred by irregularly striking out the Appellant's counterclaim. That Article 159 of the Constitution urges the court to try as much as possible to sustain causes of action in court rather than striking out pleadings for technical reasons and curable defects. That under Order 2 Rule 14, shall be no technical objections to any pleadings for want of form and that the court is enjoined under Section 3A and 3B of the Civil Procedure Act to act to dispense substantive justice. Counsel relied on the case of Joseph Okoto – v- Edwin Dickson Wasuna [2013] eKLR and Jefitha Muchai Mwai – v- Peter Wangio Thuku [2015] eKLR to submit that the omission of not filing the Verifying Affidavit is not fatal to the counterclaim as the same amounts to a mere procedural technicality.
27. From the foregoing I find that the trial court considered the appellant's counter claim and his evidence in support thereof. The court found that the counter claim was raising a boundary dispute for which the court had no jurisdiction under the provisions of section 18(2) of the Land Registration Act. I find no evidence on record that dispute of the exact boundary between the suit land and the appellant's land had been determined under sections 18 and 19 of the Land Registration Act. It cannot there be said that the counterclaim was struck out on mere technicality.
28. I find that the appeal lacks merit and dismiss it. Costs to the 1<sup>st</sup> Respondent.  
Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 26<sup>TH</sup> DAY OF OCTOBER, 2023 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI**

**JUDGE.**

In the presence of:

Maureen: Court Assistant.

Koki Mbulu for the Appellant

No appearance for the Respondents.

