



**Ogut v Ayoro & 2 others (Environment and Land Appeal E009 of 2022)
[2023] KEELC 21070 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21070 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E009 OF 2022
SO OKONG'O, J
OCTOBER 26, 2023**

BETWEEN

JACOB OLOO OGUT APPELLANT

AND

PETER OKUMU AYORO 1ST RESPONDENT

LAND REGISTRAR, KISUMU 2ND RESPONDENT

REGIONAL SURVEYOR, KISUMU 3RD RESPONDENT

(Being an Appeal from the ruling and order of Hon. C.N.C Oruo SRM given at Winam Court on the 11th February 2022 in ELC MISC. APPLICATION NO. E17 OF 2021)

JUDGMENT

Brief Facts

1. At all material times, the Appellant was the registered owner of all that parcel of land known as Kisumu Manyatta "Ä"/5183 while the 1st Respondent was the owner of all that parcel of land known as Kisumu Manyatta "Ä"/5184. The two parcels of land were adjacent to each other and shared a common boundary. The Appellant and the 1st Respondent had a dispute over the location of the common boundary and an access road that served the two properties which the Appellant claimed to have been blocked by the 1st Respondent. The Appellant lodged a complaint with the 2nd Respondent against the 1st Respondent and sought the determination of the boundary between Kisumu Manyatta "Ä"/5183 and Kisumu Manyatta "Ä"/5184 under Section 18 of the *Land Registration Act, 2012*. The 2nd Respondent issued Summons to the Appellant and the 1st Respondent to appear before him at the disputed boundary for the determination of the dispute on 22nd October 2019. From the evidence on record, it is not clear what happened on 22nd October 2019. What followed were letters from the County Director of Surveys, Kisumu County dated 6th September 2021 and 5th October 2021



informing the parties and other affected persons of the scheduled visit to the boundary in dispute on 5th October 2021 and 19th October 2021 respectively for the purposes of marking out the alignment of the road between Kisumu Manyatta “Ä”/5183 and Kisumu Manyatta “Ä”/5184. Again, it is not clear from the record what transpired on 5th October 2021 and 19th October 2021 when the County Surveyor was supposed to visit the boundary in dispute for the purposes of opening the disputed access road between the two parcels of land. It appears however that the boundary dispute was not resolved neither did the marking of the road alignment undertaken.

The dispute before the lower court

2. The Appellant filed a miscellaneous application dated 10th November 2021 at the Senior Principal Magistrate’s Court at Winam namely, ELC Misc. Application No. E017 of 2021 seeking various reliefs. The Appellant’s application was brought by way of a Notice of Motion dated 10th November 2021 under Article 40 of the Constitution, Sections 18,19 and 100 of the Land Registration Act, Section 3 of the Environment and Land Court Act, and Sections 1A, 1B, and 63 of the Civil Procedure Act. The Notice of Motion was amended on 25th November 2021. In the amended Notice of Motion, the Appellant sought; an order compelling the 1st Respondent to determine the boundaries of Kisumu Manyatta “Ä”/5183 and Kisumu Manyatta “Ä”/5184 and to make notes in the registers of the two parcels of land that their boundaries had been fixed, a declaration that the access road passing between Kisumu Manyatta “Ä”/5183, Kisumu Manyatta “Ä”/5184 and Kisumu Manyatta “Ä”/3307 was a public access road, an order directing the 2nd and 3rd Respondents to demarcate and open the said access road, and an order directing the Officer Commanding Kondele Police Station to supervise the implementation of the foregoing orders if granted.
3. The application was brought on the grounds that Kisumu Manyatta “Ä”/5183 and Kisumu Manyatta “Ä”/5184 were adjacent to each other and shared a boundary and an access road and that the 1st Respondent had trespassed on and interfered with the access road to the Appellant’s parcel of land, Kisumu Manyatta “Ä”/5183. The Appellant averred that he had made several attempts to have the 2nd and 3rd Respondents establish the boundaries between Kisumu Manyatta “Ä”/5183 and Kisumu Manyatta “Ä”/5184 and open up the blocked access road without success. The Appellant averred that he wished to develop his land and that the development could not be approved unless the access road to Kisumu Manyatta “Ä”/5183 was established. The Appellant averred that the 1st Respondent had also frustrated the boundary establishment and road opening exercise by failing to attend the meetings that had been organised for that purpose.
4. The Appellant’s application was opposed by the 1st Respondent through a Notice of Preliminary Objection dated 24th November 2021. In the Notice of Preliminary Objection, the 1st Respondent contended that the lower court lacked jurisdiction to hear the Appellant’s application. The 1st Respondent contended that the application offended the express provisions of Sections 18 and 19 of the Land Registration Act 2012. The 1st Respondent averred that the subject of the application was a boundary dispute which fell within the jurisdiction of the Land Registrar. The 1st Respondent averred that it is an established principle of law that where there is an alternative remedy and especially where parliament has provided for an appeal procedure, it is only in exceptional circumstances that an order would be granted by the court. The 1st Respondent contended that the Appellant had not established the existence of any exceptional circumstances to warrant the filing of the application.
5. The 1st Respondent averred further that the orders that were sought by the Appellant in the lower court could only be issued in an application for judicial review or in an appeal. The 1st Respondent



contended that the orders sought by the Appellant were untenable in law. The court was urged to find that the application was fatally defective and an abuse of the court process.

6. The 2nd Respondent opposed the application through a replying affidavit sworn by a land registrar, Nelson Ogeto on 26th November 2021. The 2nd Respondent averred that the mandate of the 2nd Respondent was limited to land registration and titling and that opening of access roads was not within the 2nd Respondent's mandate. The 2nd Respondent averred that the opening of access roads was within the mandate of the Director of Surveys. The 2nd Respondent averred that the 2nd Respondent also handles disputes over boundaries. The 2nd Respondent averred that due to COVID 19 pandemic, its service delivery had been affected.
7. The Notice of Preliminary Objection was argued by way of written submissions. In a ruling delivered on 11th February 2022, the lower court upheld the objection and dismissed the Appellant's application in the lower court with costs to the 1st Respondent. The lower court agreed with the 1st Respondent that the Appellant's application was premature. The lower court found that the dispute between the Appellant and the 1st Respondent was a boundary dispute and that the 2nd Respondent should have been given an opportunity to determine the same in the first instance. The lower court held that the Appellant's application was brought contrary to the doctrine of exhaustion in that the Appellant failed to exhaust all the remedies that were available to him before coming to court.

The appeal

8. The Appellant was dissatisfied with the said decision of the lower court that was made by Hon. C.N.C Oruo SRM and filed the present appeal on 9th March 2022. In his Memorandum of Appeal dated 24th February 2022, the Appellant challenged the decision of the lower court on the following grounds;
 1. The trial magistrate erred in fact and law in upholding the 1st Respondent's objection to the Appellant's application and thus dismissing the Appellant's application with costs to the 1st Respondent.
 2. The Trial Magistrate completely misunderstood the gist of the application before him which was purely for the opening of a road and thus concentrating on the boundary dispute with the result that the Appellant's application was dismissed.
 3. The Trial Magistrate erred in law and in fact by failing to appreciate the totality of the evidence before him and the submission made on behalf of the Appellant thus reaching a conclusion that was contrary to the evidence on record.
 4. The Trial Magistrate erred in law and in fact in failing to put into consideration the evidence in the form of a replying affidavit by the 2nd Respondent in which the 2nd Respondent averred that he was only concerned with the land registration and titling and not the opening of access roads.
 5. The Learned Trial Magistrate erred in law and in fact in failing to note that the Appellant's application was not opposed by the 2nd and 3rd Respondents.
9. The Appellant prayed that the appeal be allowed, the ruling of the lower court be set aside and the Appellant be awarded the costs of the appeal.
10. The appeal was argued by way of written submissions. The Appellant filed his submissions on 26th June 2023 while the 1st Respondent filed his submissions on 5th July 2023. I have considered the application that was filed by the Appellant in the lower court and the response thereto by the 1st



and 2nd Respondents. I have also considered the ruling by the lower court and the grounds of appeal put forward by the Appellant. Finally, I have considered the submissions by the parties and the various authorities cited in support thereof. The lower court application was determined on the basis of a preliminary objection. What I need to determine in this appeal is whether the lower court erred in dismissing the Appellant's application on the basis of the said objection. In my view, the 1st Respondent's objection was twofold. The first limb of the objection was based on the doctrine of exhaustion. The 1st Respondent argued that the dispute that was brought to the lower court by the Appellant was over the boundary of the Appellant's and the 1st Respondent's pieces of land and that the jurisdiction to determine a dispute over boundaries is conferred upon the Land Registrar in the first instance. The 1st Respondent argued that it was after the Land Registrar had made a determination that a suit could be brought to court. The second limb of the application was that the orders sought by the Appellant amounted to a review of administrative action and as such could only be granted by this court. The lower court found that the suit was filed prematurely and that the dispute should have been referred to the Land Registrar in the first instance. The lower court did not render itself on the issue of whether it could grant orders of judicial review of administrative action.

11. I am of the view that the Appellant's claim before the lower court was not for the determination of a boundary dispute. The Appellant sought orders to compel the 2nd and 3rd Respondents to exercise statutory duties. The Appellant did not require the lower court to determine the boundaries between Kisumu Manyatta "Ä"/5183 and Kisumu Manyatta "Ä"/5184. The Appellant did not also require the lower court to determine whether or not there was an access road between Kisumu Manyatta "Ä"/5183 and Kisumu Manyatta "Ä"/5184. What the Appellant required from the court was for the 2nd and 3rd Respondents to be compelled to go and demarcate an access road that was in the mutation that gave rise to the two parcels of land and the Registry Index Map. Due to the foregoing, I am in agreement with the Appellant that the lower court erred in its finding that the Appellant had brought his application to the court prematurely as it had other remedies available to him. There was evidence before the court that the Appellant had already invoked the jurisdiction of the Land Registrar and the County Surveyor to determine the boundaries between Kisumu Manyatta "Ä"/5183 and Kisumu Manyatta "Ä"/5184 and also to demarcate the said access road. The Appellant's complaint was that the two officers had failed to do their work. Since the Appellant's application was dismissed on the ground that it was brought against the doctrine of exhaustion, the said dismissal was erroneous.
12. I am of the view that the only valid objection taken by the 1st Respondent was that the orders sought by the Appellant were in the nature of judicial review of administrative action. I am of the view that the lower court has no jurisdiction to issue orders of judicial review. Sections 23(1) and (2) of the [Constitution](#) provide as follows:

"23.

- (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
- (2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights."



13. Section 8(1) of the Magistrate's Court Act, 2015 provides as follows:

“8.

- (1) Subject to Article 165 (3) (b) of the Constitution and the pecuniary limitations set out in section 7(1), a magistrate's court shall have jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
- (2) The applications contemplated in subsection (1) shall only relate to the rights guaranteed in Article 25 (a) and (b) of the Constitution.”

14. Article 25(a) and (b) of the Constitution provides as follows:

- “25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited--
- (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
 - (b) freedom from slavery or servitude;”

15. From my reading of Section 8(1) and (2) of the Magistrate's Court Act, 2015 together with Article 25(a) and (b) of the Constitution, the jurisdiction of the subordinate court to determine applications for redress of denial, violation or infringement of a right or fundamental freedom in the Bill of Rights is limited to the rights and freedoms relating to freedom from torture and cruel, inhuman or degrading treatment or punishment, and freedom from slavery or servitude only. It follows therefore that the subordinate courts have no jurisdiction to review administrative action under Articles 23 and 47 of the Constitution, and Fair Administrative Action Act, 2015 save as aforesaid.

16. The orders that were sought by the Appellant in the lower court were in the nature of Mandamus in that the Appellant sought to compel the 2nd and 3rd Respondents to perform their statutory duties. The lower court had no jurisdiction to grant such orders which should have been sought through an application for judicial review under Order 53 of the Civil Procedure Rules or Article 47 of the Constitution and Fair Administrative Action Act 2015. Since the Appellant's application was bad in law for want of jurisdiction by the lower court to grant the orders sought, the same should have been struck out rather than dismissed.

Conclusion

17. It is my finding that the lower court was right in disallowing the Appellant's application. The reason given for the dismissal of the application was however wrong. The Application was bad in law for want of jurisdiction by the lower court to grant the orders sought rather than for breach of the doctrine of exhaustion. Since the lower court has no jurisdiction to grant the reliefs that had been sought by the Appellant in his application, it would serve no purpose reinstating the application. I will therefore dismiss the Appellant's appeal. I will however order that each party bears his own costs of the appeal and the lower court suit. It is so ordered.

DELIVERED AND DATED AT KISUMU ON THIS 26TH DAY OF OCTOBER 2023

S. OKONG'O



JUDGE

**JUDGMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM IN THE PRESENCE OF:**

Mr. Okoth for the Appellant

Ms. Mabalau h/b for Mr. Abande for the 1st Respondent for 2nd and 3rd Respondents

Ms. J.Omondi-Court Assistant

