



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELCA CASE NO.35 OF 2019**

**PETER ODUNGA.....APPELLANT**

**VERSUS**

**JOHN YAHUMA OTONGOLO.....RESPONDENT**

**(Being an Appeal against the Judgment of Hon. Ong'ondo (PM, as he was then) in the Principal Magistrate's court at Siaya Civil Case No. 68 of 2021)**

**JUDGEMENT**

John Yahuma Otongolo (hereinafter referred to as the Respondent) in this appeal filed a suit at the Principal Magistrates Court at Siaya against Peter Odunga Omondi, hereinafter referred to as the appellant claiming that the respondent is the registered owner of land parcel No. South Ugenya/Yiro/591 measuring 1.8Ha. That on 14<sup>th</sup> day of December 2009, the appellant without knowledge, and consent of the respondent deliberately erected a home on the said parcel of land. That despite request and reminder to the appellant to vacate, he has been totally ignored. That the appellant has turned wild and on various occasions arrested the respondent without lawful cause.

The respondent prayed for eviction order to compel the appellant to vacate from the said parcel of land No. South Ugenya/Yiro/591. That despite demands and notice of intention to sue having been given the appellant refused/or ignored the respondent hence necessitating the filing of the suit in the lower court. The respondent prayed for eviction orders and costs of the suit.

The appellant filed a statement of defence and counter claim stating that the home purported to have been put up by the appellant on LR. No. South Ugenya/Yiro/591 is actually on Lr No. South Ugenya/Yiro/589, the latter being the beneficial property of the appellant which was transmitted from his grandfather one Absalom Manas Odunga and later his father one James Omondi.

The appellant's home which is on South Ugenya/Yiro/589 has been in existence for about 5 years and the respondent has never complained or raised any objection to the said home being on the said parcel of land and was even aware of the on-going constructions by the respondent but did not object to the same only to institute suit later. That if any reminders or requests were so given which the appellant denied, then the same were inconsequential and misplaced since the appellant has no fault whatsoever and has not encroached into the respondent's land being South Ugenya/Yiro/591.

The appellant contended in the lower court that the prayer for an order of eviction was mis-guided and malicious since the appellant's home is squarely on the parcel of land known as South Ugenya/Yiro/589 and not South Ugenya/Yiro/591.

The appellant contended that there was an error at the time of aerial adjudication and/or demarcation of the appellant's parcel South Ugenya/Yiro/589 whereupon a considerable portion of the appellant's land was not properly adjudicated and included as part of the respondent's land which error is well within the knowledge of the respondent.

The appellant contended that the respondent's father was equally aware of this anomaly and did not interfere and/or interrupt or sue for the said portion of land knowing well that this portion indeed belonged to the appellant's grandfather, the registered owner thereof.

The respondent took unfair advantage of this error and continues to interfere with the appellant's parcel of land in the existence of the original boundary of trees. The appellant filed a counterclaim and averred that the parcel of land known as South Ugenya/Yiro/589 is the property of his late grandfather one Absalom Manas Odunga who upon his demise left a portion of the said land to the appellant's father one James Omondi Odunga who further upon his demise, left his share to the appellant. The parcel of land known as South Ugenya/Yiro/589 is registered in the name of his grandfather herein above. The appellant then put up home on a segment of the parcel of land known as South Ugenya/Yiro/589 between 2009 and 2010 and has been living thereat until now.

There was an error at the time of aerial adjudication or demarcation which error did not include the portion on which the appellant put up

home as belonging to the appellant's grandfather but rather heaped the said portion to the respondents parcel of land being South Ugenya/Yiro/591.

The original boundary of trees is till vastly evident on the parcel number South Ugenya/Yiro/589.

The respondent is well aware of the error which occurred at the time of adjudication and has sought to ingeniously and illegally claim the same and more specifically after the demise of his father.

The respondent even took the matter to the now disbanded Land Dispute Tribunal where it was decided that the respondent was to cover costs for survey by the County surveyor which the respondent failed to do since he knew too well that the encroachment he was claiming was unfounded.

The appellant prayed for orders that there be a declaration that the appellant is a bonafide beneficiary of the parcel of land known as South Ugenya/Yiro/589. The appellant further prayed for a permanent injunction restraining the respondent from disposing, cultivating, encroaching and/or in any manner whatsoever interfering with the appellant's continued use, stay, possession and enjoyment of the said land. Moreover, he prayed for an order for specific performance directing the plaintiff to cover survey costs by the Ukwala County Surveyor to determine the boundary between South Ugenya/Yiro/589 and South Ugenya/Yiro/591. He lastly prayed for the costs occasioned by this suit and interest thereon.

When the matter was before the learned magistrate for hearing the respondent testified as **PW1** that on 14<sup>th</sup> December 2009, the appellant constructed on his land Parcel South Ugenya/Yiro/591 and yet the land was given to the respondent by his father. He produced the original title deed. On 22<sup>nd</sup> June 2010, the Assistant Chief of Yiro West and Assistant Chief Pangula, the latter who was acting with some elders, established a boundary and planted some plants as boundary. The Chief gave the respondent the portion he had constructed. The respondent has been in court all those years yet he has title.

Jared Ouma Okoth a surveyor testified as PW2 that the two disputed plots measured as follows, South Ugenya/Yiro/591- 1.8 Ha translating to 4.5 acres and South Ugenya/Yiro/589 measuring 1.2Ha, 3 acres. The surveyor found out that there was encroachment. He visited the land and found that boundaries were not tampered. The boundary making the combined parcels was true. The map indicated an access road that was boundary between them. There was permanent structure on parcel No. South Ugenya/Yiro/591 belonging to Peter Omondi. There was a clear physical boundary M1-M2. Boundary was centre of the dispute. The access road existed on the ground. The disputed area 0.4ha was 1 acre. He concluded that according to the map, the appellant erected building in No. South Ugenya/Yiro/591 that belongs to the respondent.

The appellant testified and called two witnesses. The appellant adopted his statement as evidence in chief. He asserted that he stays in No. South Ugenya/Yiro/589 whereas the respondent stayed in No. South Ugenya/Yiro/591 and that the status of the parcels of land on ground has been as it is as far back as in 1974. DW2 Jacob Otieno Odongo of Yiro stated that Parcel number No. South Ugenya/Yiro/589 belonged to his father Absolom whereas No. South Ugenya/Yiro/591 belonged to the respondent. DW3, Eunice Atieno Omondi relied on her statement and further asserted that she was the mother of the respondent and the appellant were neighbours. She was married in 1970 and given the portion No. South Ugenya/Yiro/589. There was a boundary dispute between the father in law and the respondent. The matter went before a tribunal that decided that a surveyor be engaged to draw the boundaries.

The Interested Party on his part testified that the respondent's parcel was No. South Ugenya/Yiro/591 whereas the interested parties land was No. South Ugenya/Yiro/589. The dispute in the parcels of land started in 1980 until 2003 when the tribunal made a decision.

After considering the evidence on record, the trial court found that the main issue for determination by the court was whether the defendant's structure stands on parcel No. South Ugenya/Yiro/591 which belongs to the respondent.

The court found that the plaintiff exhibited his title deed for parcel No. South Ugenya/Yiro/591 in his name and a search dated 14/5/2015 clearly showed that the respondent was registered as the absolute owner of the parcel in question measuring 1.8ha. According to the trial court, the appellant never challenged or disputed these figures or provide contrary evidence to show that his portion had reduced. The appellant did not contest the plaintiff's ownership of No. South Ugenya/Yiro/591. The court found that in his conclusion, PW2 stated that the appellant had erected his house on parcel no. No. South Ugenya/Yiro/591 instead of his own parcel no. No. South Ugenya/Yiro/ 589.

The court observed that the appellant in his defence stated that parcel No. South Ugenya/Yiro/589 was transmitted to him as the beneficiary and that due to an error a considerable portion which measurements are not given was heaped into No. South Ugenya/Yiro/591 thus making it look like he had encroached on plaintiff's no. No. South Ugenya/Yiro/591. The court found that the defendant should have addressed the issue to the right persons and not the plaintiff as the plaintiff did not do the adjudication.

The court observed further that the appellant did not show why he constructed his structure on parcel no 591, belonging to the respondent. The surveyor's report is very clear that the appellants 1.2 ha end at the access road which marks the boundary with 591. That is where he ought to have constructed his house and not beyond the road.

The trial court found that the appellants acts smack of impunity and interference with the respondent's rights of ownership of land parcel no. 591 and that the court is decorated with authority to restrain this chaotic conduct. All rights over South Ugenya/Yiro/591 exclusively vest in the respondent.

Regarding the appellants counterclaim, the court found that the appellant only asked the court to declare that parcel no. South Ugenya/Yiro/589 belonged to him and that the respondent be restrained from encroaching it. The claim was however not proved as the appellant did not adduce any other evidence apart from the verbal allegations. No document of ownership or certificate of search was tendered to show ownership. However, as the respondent is not claiming any part thereof of disputed the defendant's ownership of South Ugenya/Yiro/589, the court had no reason to dispute his ownership.

The trial court entered judgment for the respondent and ordered the appellant to voluntarily remove the permanent structure erected beyond the access road marking the boundary between SOUTH UGENYA/YIRO/589 and SOUTH UGENYA/YIRO/591 into and standing on parcel SOUTH UGENYA/YIRO/591 within 45 days from the date of the judgment and is appellant was permanently restrained from occupying and/or being on parcel no. SOUTH UGENYA/YIRO/591 or on any portion thereof in default the court ordered that the respondent was at liberty to proceed to legally evict the respondent from his aforesaid parcel at the cost of the appellant.

The appellant has come to this court on appeal on the following grounds:

- 1. That the trial Magistrate erred in law in proceeding with the suit, when the court had no jurisdiction.**
- 2. That the learned trial Magistrate misdirected himself in law and in fact by not taking into account, that the said land parcel issue fell under Ukwala Land Registry and should have been heard by Ukwala Law Court.**
- 3. That the trial Magistrate erred in law and fact by coming to his decision when the Land Registrar of Ukwala didn't testify, since it fell under Siaya Land Registry.**
- 4. That the trial Magistrate erred in law and fact by failing to appreciate that the said suit had been previously determined by the Land Dispute Tribunal at Ukwala.**

On the issue of Jurisdiction, the appellant argues that the court lacked Jurisdiction to entertain the dispute but has not come up clearly in his argument on whether he is referring to pecuniary Jurisdiction or geographical Jurisdiction and therefore I do find that the issue of Jurisdiction was raised as an afterthought in the appeal and that the matter before the trial court was based on trespass and therefore the court had jurisdiction.

The other issue raised by the Appellant is whether the respondent had capacity to sue in this matter. On this issue, the appellant did not demonstrate in the lower court and has not done so in this court that the land No. South Ugenya/Yiro/591 was not registered in the names of the Respondent. However, it is evident that Land Number Ugenya/Yiro/591 is registered in the names of the Respondent and therefore he has capacity to sue to remove any alleged trespasser on the land.

On the issue as to whether the court had Jurisdiction to hear a claim already determined by the Ukwala Land Disputes tribunal. This court finds that there is no evidence that the award of the Tribunal has been adopted by any court of law as its judgment and without the adoption of the award, I do find that the same is not enforceable and does not amount to a Judgment of the court.

I do find that the Learned Magistrate applied law on the available facts properly and did not misdirect himself as the respondent was the registered owner of the suit property and that it was evident through the report of the surveyor that the appellant has encroached on the respondent's land. I do find the appeal without merit and the same is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 28<sup>th</sup> DAY OF JANUARY, 2022.**

**ANTONY OMBWAYO**

**JUDGE**

This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020.

**ANTONY OMBWAYO**

**JUDGE**