



**Olwah v Ondatta (Environment and Land Appeal 11 of 2021)
[2022] KEELC 2952 (KLR) (26 January 2022) (Judgment)**

Neutral citation: [2022] KEELC 2952 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 11 OF 2021
GMA ONGONDO, J
JANUARY 26, 2022
FORMERLY MIGORI ELC APPEAL NO. 32 OF 2019**

BETWEEN

RICHARD OLWAH APPELLANT

AND

COLONEL .B.A ONDATTA RESPONDENT

*(Being an appeal from the Judgment and Decree of Hon. J.S Wesonga
(Senior Resident Magistrate, dated and delivered on the 6th day of
November 2019, in the original OYUGIS PMCC ELC NO 35 OF 2018)*

JUDGMENT

- 1) The present appeal was precipitated by the decision of the learned trial magistrate, Hon J.S Wesonga (SRM, now PM) rendered on 6th November 2019 in Oyugis PM’S Court Environment and Land Case No. 35 of 2018 where she rendered herself, *inter alia*;

“I find that this court lacks jurisdiction at the moment.....this court cannot grant the orders prayed as court has to down it’s tools.....Accordingly, the suit is dismissed with no order as to costs”
- 2) The firm of M/S Odhiambo and Company Advocates is on record for the Appellant, Richard Onyango Olwah further to a notice of change of Advocates dated 2nd October 2020 herein. Previously, the Appellant was represented by the firm of Oguttu, Ochwangi, Ochwal and Company Advocates
- 3) The Respondent, Colonel B.A Ondatta is represented by the firm of Bana and Company Advocates.



- 4) Originally, the appeal was filed at Migori Environment and Land Court. However, on 7th October 2021, upon the establishment of this court, the same was transferred to this court for hearing and determination; see Articles 6 (3) and 48 of the *Constitution of Kenya*, 2010 (the *Constitution* herein).
- 5) This being the first appeal from the trial court in the matter, I am entitled to reconsider the evidence on record a fresh and come to my own conclusions and inferences remembering that I neither saw nor heard the witnesses in the case; see *Kenya Ports Authority v Kuston (K) Ltd* [2009] 2 EA 212.
- 6) In the case of *Mwanasokoni-vs-Kenya Bus Services Limited* 1982-88 1 KAR 278, the Court of Appeal held that it must be appreciated that an appellate court will not ordinarily interfere with the findings of fact by the trial court unless-
 - a) the findings are based on no evidence at all, or on a misapprehension of evidence, or
 - b) the court is shown demonstrably to have acted on wrong principles in arriving at the findings.
- 7) The appellant herein was the plaintiff before the trial court. The gist of appellant's case as per the plaint dated 29th September 2017 and filed in court on 17th October 2017 was that he is the registered proprietor of L.R No. Central Kasipul/Kamuma/5047 measuring approximately zero decimal zero six hectares (0.06 Ha) in area (The suit property herein). That the respondent is the registered proprietor of L.R No. Central Kasipul/Kamuma/5046 measuring approximately zero decimal one zero hectares (0.10 Ha) in area (the adjoining property herein). That the suit property and the adjoining property share a common boundary and also adjoin an access road that serves eleven (11) other parcels of land, among them, LR No. Central Kasipul Kamuma/4607 (The 3rd property) whose proprietor closed and /or blocked the access road. However, part of the access road was re-opened by the District Land Registrar, Rachuonyo following the Appellant's complaint filed with the said Registrar.
- 8) The Appellant further stated that, the Respondent trespassed unto the suit property and caused the access road to be blocked claiming that it was part of the adjoining property and continued with the trespass by constructing structures thereon hence making it difficult for him to access the suit property. That in or about May 2017, the Appellant lodged another complaint with the same Land Registrar who heard the dispute and on 17th May 2017, he established that the Respondent had encroached unto the suit property as confirmed by a report dated 14th June 2017. Thus, it provoked the suit where the Appellant (PW1) called the land Registrar, Martin Osano (PW2) and surveyor George Otieno Wanjara (PW3), in support of his case.
- 9) The Respondent (DW3) was the defendant before the trial court and he testified on 26th June 2019. The summary of his case before that court was that he acquired the adjoining property long before PW1 acquired the suit property. That immediately he fenced the adjoining property with a live fence which is now mature and intact. He particularly denied that the resurvey of the suit property and adjoining property by the District surveyor was complete and or finalized. Generally, he denied the appellant's claim termed the suit frivolous, misconceived and prayed that the same be dismissed with costs.
- 10) DW3 called a private surveyor, Solomon Njoga (DW1) who produced an independent surveyor's report dated 1st February 2019 (DEXhibit 1). He also called a witness, T.O Nyakado, District Surveyor, Rachuonyo (DW2) who stated that he co-authored his report with his assistant and that the matter is complete thus, calls for survey.



- 11) The trial court’s findings were as captured at paragraph 1 hereinabove. In arriving at the said findings, the learned trial magistrate observed;
- “.....the Land Registrar failed to exercise his powers as provided by law and.....it was his duty to resolve the dispute at first hand using the available resources and technical advice and which he did not do.”
- 12) The learned trial magistrate further observed thus;
- “In this case, reference of the dispute to the court without the land registrar determining the boundaries between the plaintiff and the defendant’s parcels of land and opening the access road to the plaintiff’s land is against the statute. The law has given a legal obligation to the department of lands thus, it is important for this court to allow the land registrar to proceed to meet his legal obligations before the dispute can be escalated to court.....”
- 13) The appellant was aggrieved by the decision of the trial court. On that score, he commenced this appeal by way of memorandum of appeal dated 5th March 2020 and lodged herein on 6th March 2020 founded on seven (7) grounds which include;
- a) The Learned Magistrate erred in fact and in law in finding and holding that same was not seized and/or vested with the requisite jurisdiction to entertain and/or adjudicate upon the subject dispute, owing to the fact that the disputed boundary and the Road of Access, had not been determined by the Land Registrar, beforehand, notwithstanding the documentary evidence, which were tendered and/or availed to the Honourable court.
 - b) In finding and holding that the existence and/or delineations of the Road of Access had not been determined and/or demarcated by the land Registrar in accordance with the Provisions of the Land Registrations Act, No 3 of 2012, the Learned Magistrate, misconceived and/or misapprehended the import, tenor and content of exhibits page 8, page and page10, whose contents bespoke prior visitation and determination of the existence of the Road of Access.
- 14) In that regard, the appellant proposed for the orders infra;
- a) The Appeal herein be allowed and the Judgment and Decree of the Subordinate Court (The Trail Magistrate) dated and delivered on the 6th November 2019, and in particular, the limb relating to want of Jurisdiction, be set aside, quashed and/or varied.
 - b) The Honourable Court be pleased to substitute in lieu of Decision dated 6th November 2019, an Order finding and holding that the Subordinate court was seized of Jurisdiction to entertain and/or adjudicate upon the subject dispute.
 - c) The Honourable court be pleased to substitute in lieu of the decision of the Subordinate court, an Order allowing the Appellant’s suit in terms of the Plaint dated the 10th day of September 2017 *vide* Oyugis ELC Case No 852 of 2017.
 - d) Costs of this Appeal and Costs incurred in the subordinate Court be borne by the Respondent.
 - e) Such further and/or Relief(s) as the court may deem Necessary, Just and Expedient.
- 15) On 2nd March 2021, the court ordered and directed that the appeal be argued by way of written submissions. The orders were extended on 19th October 2021 and 30th November 2021 in the spirit of Articles 48, 50 (1) as read with 25 (c) of the Constitution, See also Philip Keipto Chemwolo and another-



vs-Augustine Kubende (1986) eKLR and James Kanyiita Nderitu and another-vs-Marios Philotas Gbikas and another (2016) eKLR.

- 16) Accordingly, on 4th November 2021, learned counsel for the appellant duly filed in court a six (6)-paged submissions of even date making reference to the impugned judgment of the trial court, invited the court to scrutinize the five (5) prayers sought at page 188 of the record of appeal and revisit the seven (7) grounds of appeal. At paragraph 2 of the submissions, counsel opined, *inter alia*;
- “.....However, there are bound to be overlaps on the most of the grounds so that in the result some of the grounds are bound to be argued jointly and particularly on the limb appealed against for want or lack of jurisdiction.”
- 17) Counsel further submitted by making reference to the twin issues framed in the impugned judgment and made a departure from page 9 at paragraph 3 thereof and also referred to the appellant’s evidence at pages 20 to 23 of the record of appeal. That the learned trial magistrate having fully and completely rendered herself on the suit, had no business of bringing into question the boundary dispute which was neither prayed for nor canvassed in the suit. That the case was purely on road of access and not boundary hence she erred in law and fact by invoking sections 18 (2) and 19 (1) of the Land Registration Act, 2016 (2012) (The LRA herein). That the learned trial magistrate had jurisdiction to hear and determine the suit but had no jurisdiction to dismiss the appellant’s suit in the circumstances.
- 18) To fortify the submissions, counsel relied upon Articles 40 (2), 60 (10 (a) and (b) and 159 (d) of the Constitution, sections 18 (2) and 19 (1) of the LRA and Black’s Law Dictionary 8th Edition at pages 14 and 198. Further reliance was made to authoritative pronouncements, *inter alia*, Owners of Motor Vessel “Lillian S” v Caltex Oil (K) Ltd [1989] KLR 1, Barclays Bank of Kenya Ltd v Neny Ndungu Kinuthia Terracraft (K) Ltd Court of Appeal at Nairobi Civil Appeal No. 223 of 2016 and Enock Kirao Mubanzi-vs-Hamid Abdalla Mbarak Malindi ELCC No.58 of 2012.
- 19) On 21st January 2022, learned counsel for the Respondent filed submissions dated 14th January 2022, wherein he termed the present appeal devoid of merit and that the same should be dismissed with costs. In a nutshell, counsel stated the trial court’s findings as pointed out at paragraph 1 hereinabove, the Appellant’s suit generated by way of a plaint dated 29th September 2017, the Respondent’s statement of defence, alongside the testimonies of PW1, PW2, PW3, DW1 and DW2. Counsel framed four (4) issues for determination including whether the trial court had jurisdiction to determine the boundary dispute and made reference to sections 18, 19 and 20 of the LRA of as well as , section 13 (2) of the Environment and Land Court Act, 2015 (2011).
- 20) Counsel submitted that it is the mandate of the Land Registrar and Surveyor to determine boundaries inclusive of roads of access. The authoritative pronouncements relied thereupon include; Nyanchama Kimaiti v Samwel Guto Onguso and Another [2014] eKLR and Jane Wanjiku Mureithi v County Land Registrar, Nyeri and 4 others [2018] eKLR.
- 21) In the foregone, it is the considered view of this court that grounds 1 to 7 of appeal referred to in paragraph 13 hereinabove, be and are hereby compressed to whether:
- a) The trial court had jurisdiction over the instant dispute.
 - b) Depending on the outcome on issue (a) above, is the judgment of the trial court erroneous and unlawful as discerned on the grounds of appeal herein?
 - c) The orders to be rendered in this appeal to meet the best ends of justice.



- 22) On the first issue, *Halsbury's Laws of England* (4th Edition) Volume 9 at page 350 defines the term "Jurisdiction" as;
- "....the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for decision....."
- 23) Indeed, jurisdiction denotes whether the adjudicatory body has the power to entertain the proceedings; see the Supreme Court of the *Republic of Kenya decision in Benson Ambuti Adegga and 2 others v Kibos Distillers Ltd and 5 others* [2020] eKLR.
- 24) In the case of *Republic v Karisa Chengo and 2 others* [2017] eKLR, the Supreme Court of the Republic of Kenya reasoned;
- ".....Lack of jurisdiction renders a court's decision void as opposed to it being merely voidable."
- 25) It is established law that where there is a clear procedure of redress of any particular grievance, the same to be adhered to since there are good reasons for such special procedures; see *Speaker of National Assembly v Karume* 1992 KLR 21 and *Geoffrey Muthiga Kabiru and 2 others v Samuel Munga Henry and 1756 others* [20150] eKLR.
- 26) In that regard, Section 18 (1) and (2) of the *LRA* makes provision for boundaries and the same reads ;
1. "Except where in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.
 2. The court shall not entertain any action or any other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section."
- 27) So, the Land Registrar and Surveyor are the persons that have the technical ability and the resources as well as mandated under sections 18, 19 and 20 of the *LRA* to deal with disputes concerning boundaries of registered land; see *Andrew Marigwa-vs-Josephat Kebati* (2017) eKLR and *Registered Trustees, Legio Maria Africa Church Mission-vs-Simeon Nyamweya Obwocha* 2018 eKLR, Kimaiti and Mureithi cases (*supra*).
- 28) PW1 referred to the surveyor's report dated 14th June 2017 in his testimony. At the tail end of his cross examination, he stated;
- ".....I am not aware whether the surveyors report dated 14/6/2017 says that the report what is on the ground doesn't tally with the map. It is true that the surveyor recommend for re-survey."
- 29) PW2 told the court that the surveyor has his own report. That the Land Registrar makes report with the input of a land surveyor.



- 30) PW3, George Otieno Wanjara stated that he conducted general but not fixed survey and he generated his report dated 29th May 2019-PExhibit 10 which does not show that the Respondent encroached unto the suit property. In examination in chief, he stated in part;
- “.....Resurveying will be done after an access road is opened. A Resurvey will make sure that what is on the ground tallies with what is on the map.”
- 31) DW1, Solomon Njoga, a private surveyor prepared and produced a report (DExhibit 1). He concluded that a resurvey would resolve the dispute.
- 32) DW2 was T.O Nyakado. He testified that re-surveying recommended.
- 33) The Respondent (DW1) stated that the surveyors stated that the instant dispute is very complex. He had no objection to them resurveying. “The report by land surveyor dated 29/5/2019 is more advising. It is suggesting a resurvey.
- 34) The trial court carefully considered the testimonies of PW1 to PW3 and DW1 to DW2 before she arrived at here informed decision. Clearly, the boundary dispute in this matter was not determined as discerned in the said decision, paragraphs 10, 11 and 12 of the plaint and ground 2 of the appeal.
- 35) The last paragraph of the report dated 14th June 2017 reads:
- “In view of the aforementioned, I wish to advise the applicant to file an application in Court to obtain orders to enable me go back on the disputed ground with a team of surveyors:-
- 1) Re-survey all the disputed plots
 - 2) Fix a boundary between the applicant’s parcel and that of parcel Kamuma/5046.
 - 3) Open the access road leading to the applicant’s parcel.”(Emphasis added)
- 36) The reports relied upon by the parties herein are all borne in mind. Sections 48 to 54 of the *Evidence Act* chapter 80 Laws of Kenya make provision for evidence from expert witnesses. However, as a general rule expert evidence is not binding on the court which is at liberty to accept or reject it depending on the facts and circumstances as noted in the case of *CD Desouza v BR Sharma* [1953] 26 KLR 41 at 42.
- 37) The appellant complained in ground 5 of the appeal that the learned trial court dismissed the suit in lieu of striking it out. The ground succeeds by dint of the trial court’s determination of the issue of the court’s jurisdiction.
- 38) For clarity, the last paragraph of the trial court’s judgment that “the suit is dismissed with no orders as to costs.” is hereby substituted with the words “the suit is struck out with no orders to costs”.
- 39) In *Owners of Motor Vessel “Lillian S” case* (*supra*), Nyarangi JA, was emphatic that jurisdiction is everything. That without it, a court has no power to make one more step.
- 40) In the foregone, did the learned trial magistrate correctly analyze the facts and the law? Indeed, she correctly applied herself to the law by relying on sections 18 (2) and 19 (2) of the *LRA*, cited Nyanchama Kimaiti case (*supra*) and the case of *George Kamau Macharia-vs-Dexka Ltd* [2019] eKLR. Nonetheless, the trial court’s analysis of issues of encroachment or trespass on the access road was somewhat superfluous in view of the determination of the issue of jurisdiction because she had no power to take one more step; see *Owners of Motor Vessel Lillian “S” case* (*supra*).



- 41) It is therefore, my considered view that the learned trial magistrate's reasoning is faultless save for the aspect of dismissal of the suit.
- 42) Accordingly, the trial court's decision rendered on 6th November 2019 is hereby substantially upheld. I proceed to dismiss this appeal initiated by way of a memorandum of appeal dated 15th November 2019 and duly lodged herein on 5th March 2020 with no orders as to costs.

DATED AND DELIVERED AT HOMA BAY THIS 26TH JANUARY 2022

G M A ONG'ONDO

JUDGE

In the presence of:

- i) Ms Obwanda holding brief for Mr. Bana, learned Counsel for the Respondent.
- ii) Okello, court assistant.

G M A ONG'ONDO

JUDGE

