



REPUBLIC OF KENYA



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**Mukele v Okumu & 5 others (Civil Appeal 1 of 2020)  
[2022] KEELC 3008 (KLR) (22 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3008 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
CIVIL APPEAL 1 OF 2020  
AA OMOLLO, J  
JUNE 22, 2022**

**BETWEEN**

**SARA AKELO MUKELE ..... APPELLANT**

**AND**

**ISAACK NAMWAYA OKUMU ..... 1<sup>ST</sup> RESPONDENT**

**THOMAS OMUSE ATIEMI ..... 2<sup>ND</sup> RESPONDENT**

**JAMES OKONDA ETOLE ..... 3<sup>RD</sup> RESPONDENT**

**COUNTY GOVERNMENT OF BUSIA ..... 4<sup>TH</sup> RESPONDENT**

**COUNTY LAND REGISTRAR BUSIA ..... 5<sup>TH</sup> RESPONDENT**

**COUNTY SURVEYOR BUSIA ..... 6<sup>TH</sup> RESPONDENT**

*(An appeal from the Judgment of Hon. L. Ambasi, Chief  
Magistrate at Busia in the CMC ELC No. 128 of 2012)*

**JUDGMENT**

1. This appeal arises from the judgment/decreed made in Busia CMC ELC No. 128 of 2012 of Chief Magistrate's Court by Hon. L. Ambasi CM delivered on 19<sup>th</sup> December 2019 in this suit. The appellant who was the 2<sup>nd</sup> Defendant in the Lower Court raised the following grounds in their Memorandum of Appeal dated 9<sup>th</sup> January 2020;
  - i. The Honourable Chief magistrate failed to find that the plaintiff's suit as filed was incompetent as boundaries of the disputed boundaries had not been fixed and marked on the respective registers.



- ii. The Honourable Chief magistrate failed to hold that the trial court had no jurisdiction to make an order to belatedly establish its jurisdiction in handling the boundary dispute long after the suit was filed without jurisdiction.
  - iii. The Honourable Chief magistrate failed to appreciate and hold that the survey report filed by the District Land Registrar and the District Surveyor did not confer jurisdiction upon her court to try and determine the boundary dispute before her.
  - iv. The Honourable Chief magistrate failed to find that no register of the parcels involved in the boundary dispute was produced by the respondent to show that the boundaries had been fixed as a prerequisite to the filing of the plaintiff's suit.
  - v. The Honourable Chief magistrate erred in law and fact in holding that the appellant was bound by consent order for survey of the disputed boundary as the appellant was not a party to it, nor had she been made a party to the suits.
  - vi. It is trite law that parties cannot by agreement confer upon the court, jurisdiction where there is none.
  - vii. The entire proceedings were a nullity for want of jurisdiction.
  - viii. The trial magistrate failed to appreciate that even if it had jurisdiction, it was impossible for it to determine the boundaries due to the several inconsistent measurements shown in the mutation.
  - ix. The trial magistrate decided the case against weight of evidence.
2. The Appellant prayed that the judgment be set aside and the appeal be allowed with costs.
  3. The parties agreed to dispense with the hearing of the appeal by way of written submissions. The Appellant filed her submission on 26<sup>th</sup> October 2021 and submitted that she was not a party to the suit at its commencement and at the time the consent order dated 2<sup>nd</sup> October 2015 was recorded, and hence was not party to the impugned consent. The Appellant is unhappy with the judgment entered on 19<sup>th</sup> December 2019 holding that all the parties were bound by the consent order dated 2<sup>nd</sup> October 2015. She submitted that the court lacked jurisdiction to refer the matter to Land Registrar and County Surveyor instead it ought to have struck out the suit as it conceded lack of jurisdiction. She submitted further that a consent, like a contract, binds only the persons who were privy to it and in this case, the consent was entered into between the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent. She argued that the Appellant who was not a party to the suit was not and could not have been present at the time the District Surveyor and the Land Registrar visited the suit properties to determine the boundaries between. She cited inter alia the Case of James Muchori vs Kenya Power & Lighting where reference was made to the Case of *Flora Wasike vs Destimo Wamboko* (1988) 1 KAR 625 at page 626 where Hancox JA (as he was then) stated; "It is now settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out".
  4. She contends that the question of jurisdiction is so fundamental that parties cannot consent or acquiesce to jurisdiction where the court has none. To buttress her arguments on jurisdiction the Appellant relied on the case law of *S. K. Macharia vs Kenya Commercial Bank & 2 Others* (2012) eKLR; where the Supreme Court held that "A Court's jurisdiction flows from either the constitution, or legislation or both. Thus a Court of law can only exercise jurisdiction as conferred on it by law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with



counsel that the issue as to whether a Court of law has jurisdiction is not one of mere procedural technicality; it goes to the very heart of the matter... where the Constitution exhaustively provides for the jurisdiction of a Court of law, it must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation...”

5. The Appellant submits that the Court ought to have struck out the claim instead of referring the matter to the Land Registrar. In support of this argument, they put reliance in the decision of *George Kamau Macharia vs Dexka Limited* (2019) eKLR where J. G. Kamei Judge held thus “From the above provisions of the law (Sections 18 and 19 of *Land Registration Act*, 2012), it is manifestly clear that the above section gives the mandate to the Land Registrar to resolve boundary disputes of land with general boundaries. Registry Index Map (RIM) only indicates approximate boundaries and the approximate situation on the ground. Even if this Court was to hear and determine this matter it will still require the input of the Land Registrar. The frames of section 18(2) of the *Land Registration Act* placed this matter before the Land Registrar who has the technical advice and resources of the District Surveyor to determine and ascertain the boundaries. It is trite law that where the law has given a legal obligation to a department of Government, it is important for the Court to let that department proceed to meet its legal obligations. In this case, the office of the Land Registrar is mandated to deal with the general boundary dispute first before the same is escalated to the Court. It is the view of this Court that the dispute is prematurely before the Court”.
6. The Respondent filed his submissions on 25<sup>th</sup> November 2021 and submitted that the appellant seems determined to do things at her own leisure despite prejudice being suffered by the respondent and as the consent order remained unchallenged. He submitted that the appellant in filing and serving of her memorandum of appeal out of time and without leave did not comply with Order 42 Rule 6(1) of the Civil Procedure Rules which renders it null and void ab initio. He said that the appellant’s conduct in this matter amounts to an abuse of the process of the court and is guilty of laches which is prejudicial to him who being a senior citizen and suffering from various ailments. He went on to say that the appellant hurried compilation of the records of appeal dated 16<sup>th</sup> July 2021 and filed in court on the 21<sup>st</sup> July 2021 was an afterthought and contrary to Order 42 Rule 11 of the *Civil Procedure Rules* which required that the same be done within 30 days and set down for directions under Section 79B of the *Civil Procedure Act*. Further, no certificate of delay herein was filed in court to justify the said delay which was unreasonable. He further submitted that the appellant’s inaction was deliberate as she seems to have found comfort in prosecuting its appeal at her own leisure therefore causing inordinate delay given that she obtained a stay of execution and as such were in their comfort zone.
7. In answer to the question of jurisdiction raised by the Appellant, the 1<sup>st</sup> Respondent stated that none of the parties raised the issue of jurisdiction. He added that the Chief Magistrate’s Court had jurisdiction to entertain the suit before her. He concluded that the trial Court was right in arriving at the decision she did and urged this Court to uphold the said decision by dismissing this appeal with costs to them.
8. The duty of the court in a first appeal such as this one was stated in *Selle & another -vs- Associated Motor Boat Co. Ltd. & others* (1968) EA 123 in the following terms:

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of 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 neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact



if it appears either that he has 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 demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif-Vs- Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270)”

9. A brief background of the appeal is that the 1<sup>st</sup> Respondent filed a suit against the Appellant and five others claiming that they had trespassed onto his land being L.R. Bukhayo/Mundika/9128 and put up a structures. He sought orders inter alia of eviction against the defendants together with a demolition order for all the structures owned by the defendants, an order of permanent injunction and costs of the suit and interest. The Appellant filed her defence in which she denied encroaching onto the Respondent’s land. The trial court in its judgment quoted the decision in *Andrew Marigwa vs. Josephat Ondieki*, Kisii ELC No. 1163 of 2016, where the court stated that it lacked the technical ability to deal with the dispute, hence the reference to the Land Registrar and the county surveyor and the court finalized the case on the basis of the report that was filed thereof. The trial magistrate in her judgment said that it is trite law that parties who subject themselves to a consent order are bound by the same unless it is established that the same was entered into by fraud or for such other reasons that are similar to vitiating a contract. She proceeded to enter judgment as per the consent order and in terms of the County Surveyors Report which was filed in court in December 2015.
10. This Court has read the Memorandum and perused the Record of Appeal together with the written submissions and therefore frame the following issues to aid in the determination of this appeal;
  - a. Whether the trial court had jurisdiction;
  - b. Whether or not the Appellant is bound by the consent order issued on 2/10/2015;
  - c. Whether the appeal is merited;
  - d. What orders should the Court make.
11. The record show that the 1<sup>st</sup> Respondent’s suit was initiated against the 2<sup>nd</sup> Respondent vide the plaint dated 23/4/2012. The 2<sup>nd</sup> Respondent contested the claim by filing a defence. When 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent appeared before the trial court on 1/10/2015, they entered into a consent recorded on the following terms;
  - a. That by consent the District Surveyor and the Land Registrar do visit Land parcel No. Bukhayo/Mundika/9123, 9127, 6350, 6351 and 6111 to determine the boundaries between the plaintiff and the defendant.
  - b. That the District Surveyor and the Land Registrar do file their reports into court within 30 days from today date.
  - c. That each party be at liberty to appoint a private surveyor to oversee the exercise.
12. It is a well established principle of law that jurisdiction is everything and where a court of law finds that it does not possess jurisdiction, it must down its tools immediately. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae. Hence this Court is bound by status and the stand taken by the Court of Appeal in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd.* (1989):

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending



other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

Pursuant to the visit made and report filed by the County Land Registrar and County Surveyor, the 1<sup>st</sup> Respondent amended his plaint dated 7<sup>th</sup> November 2018 which now joined more parties including the Appellant. The matter proceeded to hearing and all the parties were heard. The trial magistrate after considering the evidence adduced and the submissions rendered entered judgment for the 1<sup>st</sup> Respondent. The Appellant has challenged the judgment on the principle of jurisdiction and whether the Appellant was bound by the consent order that sent the County Surveyor and Registrar on site.

13. In answering the question of jurisdiction this Court shall be guided by the pleadings filed by the parties. In the amended plaint the prayers sought included the following;
- a. An order of permanent injunction restraining the defendant either by himself, his agents, servants and or assigns from occupying L.R No. Bukhayo/Mundika/9128.
  - b. An order that the Bulanda Junction Bwamani Road be resurveyed and be rerouted to its rightful place and that the land belonging to the plaintiff unlawfully encroached upon by the road works be restituted to the plaintiff and or that he be compensated the same.
  - c. An order of eviction.
  - d. General damages/Mesne profit to be paid to the plaintiff for the unlawful occupation of his land by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants.
  - e. A permanent injunction against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants restraining them by themselves, their servants, agents and/or officers and barring them from encroaching onto, continuing to encroach and or occupying land parcel number Bukhayo/Mundika/9128 or any part thereof.
  - f. An order of eviction against the defendants, their servants, agents and or officers from encroaching onto L.R No. Bukhayo/Mundika/9128 and a concurrent order of demolition of all those structures owned by the defendants, servants and or agents and situate on L.R No. Bukhayo/Mundika/9128 and that costs of such demolition be borne by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendant.
14. A reading of the 1<sup>st</sup> Respondent’s claim definitely reveals that it was not purely a boundary dispute. The Black’s Law dictionary define to encroach is, “to enter by gradual steps or stealth into the possessions or rights of another; to trespass or intrude or to gain or intrude unlawfully onto another’s land, property, or authority”.
- Encroachment is, “An infringement of another’s rights. An interference with or intrusion onto another’s property”.
15. The Land Registrar’s report in my opinion was meant to assist the 1<sup>st</sup> Respondent prove his case on whether a part of his land had been taken. Although their determination ascertained the boundaries of the suit plots, the claim as presented to court bordered both on a claim for ownership and boundary dispute thus I cannot fault the magistrate for not striking out the suit. Secondly, I take a different view on the submission that section 18 and 19 of the [Land Registration Act](#) does oust the jurisdiction of Courts in entertaining boundary disputes. The Land Registrar is to be used as a point of first instance in



resolving the boundary dispute, which does not necessarily mean ousting the jurisdiction of the Court. In the Case of Andrew Marigwa vs Josephat Ondieki (2017) eKLR distinguished by the Appellants' counsel, the Court of Appeal held that the suit was premature. The higher court was categorical not that the trial court lacked jurisdiction. Consequently, my determination on the question of jurisdiction is that the matter was properly before the Chief Magistrate's court.

16. The 2<sup>nd</sup> issue is whether or not the Appellant was bound by the consent order of 2<sup>nd</sup> October 2015. There is no dispute that the 1<sup>st</sup> Respondent upon discoveries revealed by the survey report that other people besides the 2<sup>nd</sup> Respondent had encroached on his Land Parcel Bukhayo/Mundika/9128 introduced the new parties mentioned in that report. The impugned order included the Appellant's land parcel number Bukhayo/Mundika/9127 to be among those that were to be surveyed. Once the Appellant joined the proceedings she had all automatic right to defend the suit and she indeed filed a statement of defence to the claim dated 7<sup>th</sup> December 2018.
17. The order complained or directed the Land Registrar and Surveyor to determine the boundaries of the plots of land whose numbers were given. Although the Appellant was not a party to the proceedings when the consent was made, she never applied to have the consent set aside. It is inferred that given she was represented by counsel, she was aware of the survey report on record which report was clearly referenced that the visit was made pursuant to a court order. The case of Flora Wasike Vs Destimo supra sets out grounds upon which a consent order may be set aside like in contracts to include on account of fraud and misrepresentation.
18. There is no misrepresentation or fraud that has been alleged on the part of the 1<sup>st</sup> Respondent. It is true that the Appellant was not privy to the making to the consent order but the order by itself does not cause any prejudice to any of the parties whose titles were mentioned. I say so because the law in section 19(1) of the Land Registration Act mandates the Registrar to notify all affected parties of their intention to ascertain and fix the boundaries. That was not a requirement that ought to have been included in the consent order. Further, the order did not direct the Registrar and County Surveyor on how to prepare the contents of their report. The Appellant is thus confusing the purpose of the order with the process in which the order was executed. In any event, after filing her defence nothing barred her from applying to have the two land officers re-visit the land or be called for cross-examination on their report.
19. Is the Appeal merited? From the evidence of parties, the Appellant purchased her land parcel No. 9127 from Fredrick Onyango. It is Mr. Onyango from the documents on record who sub-divided his initial land number 6350 to create the two suit parcels 9127 and 9128. There was need to ascertain whether the boundaries placed during the sub-division had been interfered with or not. Thus, it was incumbent upon the 1<sup>st</sup> Respondent to prove that the Appellant's parcel of land 9127 indeed encroached into his. In proving his claim, the 1<sup>st</sup> Respondent relied on the report by the County Surveyor (he did not know parcel No. 9127 had encroached until the survey report was filed and its then joined Appellant to this Case). At page 2 of Mr. Kamadi's report he dropped a statement thus, "elsewhere plot No. 9127 has encroached on plot No. 9128 by 7 meters."
20. The report annexed a sketch map drawn headed "regarding court order implementation". Although the two plots share a boundary, the surveyor did not put any marks signifying the area of encroachment. The report does not give the ground measurements for parcel No. 9127 to demonstrate that it does not conform with the size on the title. On the report under the head – methodology, the County Surveyor stated that they discovered an existing 10m road going to Bwamani and passing on the upper side of parcel numbers 9127, 9128 and 6351 reflected on RIM sheet 3. No mention of measurements taken at



all. Therefore his conclusion that parcel No. 9127 had encroached was not supported by any evidence provided in the report.

21. The Appellant in contesting the suit stated that she bought the land in vacant possession and developed it under the watch of the 1<sup>st</sup> Respondent without him raising objection on the issue of boundaries. The Appellant went further to invite the evidence of an expert when she produced the survey report from Geo-surveys Limited that confirmed she had not encroached. Since this was part of the Appellant's evidence in defence to the claim, she did not need to invite all the parties to the suit during the visit by her surveyor. The trial court erred in relying wholly on the County Surveyor's report without evaluating it and also rejecting the evidence offered by the Appellant without evaluation. Had she done so, she may have reached a different conclusion. She also failed to evaluate the other documents produced as exhibits including the mutation form that created the titles 9127 and 9128 which subdivision exercise was undertaken by the person who owned the initial parcel of land No. 6350 and who is the same person who sold to the Appellant. The 1<sup>st</sup> Respondent's parcel also originated from the said Fredrick Onyango title number 6350.
22. In conclusion, I find that the 1<sup>st</sup> Respondent did not prove a case against the Appellant in the Court below. Therefore I make an order substituting the judgement entered in favour of the 1<sup>st</sup> Respondent against the Appellant with an order of dismissal of the 1<sup>st</sup> Respondent's suit as against the Appellant. The appellant is awarded the costs of this appeal and costs of the suit in the court below.

**DATED, SIGNED AND DELIVERED AT BUSIA THIS 22ND DAY OF JUNE 2022.**

**A. OMOLLO**

**JUDGE**

