



REPUBLIC OF KENYA



**Obel v Okiro (Environment and Land Appeal 14 of 2022)
[2022] KEELC 165 (KLR) (15 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 165 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 14 OF 2022
GMA ONGONDO, J
JUNE 15, 2022**

BETWEEN

JACK OMONDI OBEL APPELLANT

AND

ROSELIDA AOKO OKIRO RESPONDENT

JUDGMENT

1. On 16th January 2019, the appellant, Jack Omondi Obel through M/S Nyauke & Company Advocates, filed a Memorandum of Appeal dated 14th January, 2019, being an appeal from the judgment delivered and decree passed by the Honourable J.S Wesonga, Senior Resident Magistrate in Oyugis PMCC No. 137 of 2012 on the 31st December, 2018.
2. The Appeal is anchored on six (6) grounds as set out on the face of the memorandum of appeal which include; that the honourable court erred in fact by failing to appreciate the fact that the underlying issue was a boundary dispute as opposed to mere declaration and protection of title. In that regard, the appellant urged the honourable court to allow the instant appeal and set aside the decision of the trial court. That the honourable court do issue orders directing the trial court to conduct a fresh trial and that costs be awarded to the appellant.
3. On 25th May, 2021, this court ordered and directed that the appeal be argued by way of written submissions.
4. Accordingly, Learned Counsel for the appellant filed submissions dated 29th April 2021 on even date. Counsel identified two (2) issues for determination, to wit, whether the appeal is meritorious and whether the appellant is deserving of the orders sought in its memorandum of appeal.
5. In discussing the issues, learned counsel submitted, inter alia, that the cause of action arose as a boundary dispute between land parcel numbers C.Karachuonyo/Kogwero Kawuor/368 (the suit land herein) and C.Karachuonyo/Kogwero Kowuor/362 (the other land). That the appellant erected a



- permanent house on the other land in 2011, his ancestral land. The respondent, however, accused the appellant of constructing the house on the suit land. That the honourable trial magistrate restricted her judgment to Sections 24, 25 and 26 of the [Land Registration Act](#), 2016 (2012) and found in favour of the respondent herein.
6. Learned counsel submitted that the learned trial magistrate ignored the fact that there were two contradictory surveyors' reports. That the issue was a boundary dispute. Thus, the trial court was devoid of jurisdiction pursuant to Section 18(2) of the [Land Registration Act](#) (supra). Counsel cited Article 159 (2) of [the Constitution](#) of Kenya, 2010 in the submissions.
 7. Originally, this appeal was lodged at Migori Environment and Land Court. On 14th February 2022, Kullow J sitting at Migori Environment and Land Court directed that the appeal be transferred to this court as the same emanates from Oyugis Senior Principal Magistrate Courts.
 8. The respondent failed to file any submissions herein. So, the appeal is unchallenged.
 9. On 18th May 2022, the honourable court fixed this date for judgment since the respondent's counsel was duly served as per the affidavit of service sworn on 22nd March 2022 and filed on 23rd March 2022. However, the said counsel failed to enter appearance.
 10. From the foregoing, the issues for determination are thus:
 - a. Whether the appellant has demonstrated that the appeal is tenable to warrant grant of the orders sought in the memorandum of appeal; and
 - b. Who should bear the costs of this appeal?
 11. The appellant through counsel asserted that the cause of action arose as a boundary dispute between the suit land and the other land. Thus, the trial court was devoid of jurisdiction pursuant to Section 18(2) of the [Land Registration Act](#) (supra). Learned counsel stated that the learned trial magistrate ignored the fact that there were two contradictory surveyors' reports and restricted her judgment to Sections 24, 25 and 26 of the [Land Registration Act](#) (supra), in favour of the respondent herein.
 12. I have duly perused the pleadings, court proceedings as well as the judgment of the learned trial magistrate. As discerned from the pleadings, it is my considered view that the issue of a boundary dispute does not arise. In particular, the plaint dated 19th December 2012 and filed on 20th December 2012 raises the issue of trespass by the appellant herein on the suit land, registered in the names of the respondent herein.
 13. Be that as it may, on 19th November, 2013 before the trial court, the defendant/appellant sought an order of the court directing land registrar Rachuonyo North to visit upon notice, the two parcels in issue to determine the boundary between them. The respondent herein did not object to the request. On that score, the trial court issued the necessary orders directing the parties to avail a Surveyors Report to the two parcels of land bearing in mind Section 18 (2) of the [Land Registration Act](#) (supra).
 14. A visit to the site was conducted further to the orders of the court. The report of the District Surveyor Rachuonyo South and North districts was duly filed in court by the respondent. However, the appellant disagreed with the report and sought to have the two land parcels surveyed afresh and an independent Surveyor's report filed in court. Again, the respondent herein did not oppose the request. On 11th March 2014, the learned trial magistrate ordered and directed the appellant to conduct a fresh survey in the presence of the respondent herein.
 15. At page 4 of the judgment, the learned trial magistrate noted thus: ".....according to the District Surveyor Rachuonyo South and North districts report filed pursuant to the court order issued on 19th



November, 2013, the findings are: that the defendant has constructed a permanent house and a permanent toilet all inside land number 368 without consent of the plaintiff.....”

“.....whereas the report by Solomon Njoga an independent surveyor filed pursuant to an order made on 11th March, 2014 the observations are:... if we go by ground position, the permanent house and toilet are in the plaintiff area but if we go per map distance, the permanent house and toilet are safely in the defendant’s area...”

16. I am therefore, of the view that although the issue of boundaries did not arise from the pleadings as filed, the learned trial magistrate still addressed it and dispensed with it before hearing and determining the suit on its merits. The Surveyors’ Reports so filed in court comprehensively addressed the issue of boundaries and the trial magistrate rightly framed the issues for determination and applied the relevant sections of the law, being Sections 24, 25 and 26 of the *Land Registration Act* (supra).
17. The appellant complained that the learned trial magistrate ignored the fact that there were two contradictory surveyors’ reports. The appellant also contends that the trial court ought to have moved to the locus in quo or conduct a third report from an independent surveyor.
18. Clearly, surveyors’ reports are opinion evidence. The law on opinion of an expert witness is well established; See Sections 48 to 54 of the *Evidence Act*, Chapter 80 Laws of Kenya.
19. In *Shah and Another vs. Shah and Others* [2003] 1 EA 290 Ombija, J. expressed himself in part:

“The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so...If there is a conflict of expert opinion, with experts appearing for both parties, resolution of conflicting evidence or the acceptance of the evidence of one expert in preference to the opinion of the other, is the responsibility of the court...”
20. It is thus, my considered view that it would have been superfluous for the trial court to move to the locus in quo or order for a third survey to be conducted by an independent surveyor. I am satisfied that the learned trial magistrate rightly exercised the discretion of the court in considering the opinion evidence.
21. The rule of evidence is clear that “He who alleges must prove”. This is grounded in law under Section 107 of the *Evidence Act* (supra).
22. On that account, did the respondent discharge this duty before the trial court and has the appellant done so before this court? In *Kirugi and Another v Kabiya & 3 Others* [1987] KLR 347, the Court of Appeal held thus,

“The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.”
23. Considering the totality of the evidence availed in this case, and applying the legal principles as noted in the trial court’s judgment above, it is clear that the respondent who was the plaintiff before the trial court proved her case to the requisite standard. Further, the grounds of appeal are quite untenable. It is the finding of this court that the learned trial magistrate’s judgment is sound at law. I hereby uphold the same.
24. In the result, the instant appeal is hereby dismissed with costs.



25. Orders accordingly.

G.M.A ONG'ONDO

JUDGE

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 15TH DAY OF JUNE 2022.

G.M.A ONG'ONDO

JUDGE

