



**Njoki v Karinga (Environment and Land Appeal 7 of 2019)  
[2022] KEELC 3906 (KLR) (16 August 2022) (Judgment)**

Neutral citation: [2022] KEELC 3906 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL 7 OF 2019**

**BM EBOSO, J  
AUGUST 16, 2022**

**BETWEEN**

**JACINTA NJOKI ..... APPELLANT**

**AND**

**RUTH WAMAITHA KARINGA ..... RESPONDENT**

*(Being an Appeal arising from the Judgment of Hon M W Wanjala (SRM) delivered at Thika Chief Magistrate Court on January 22, 2019 in Thika CMCC No 1003 of 2004)*

**JUDGMENT**

**Background**

1. This appeal challenges the judgment rendered on January 22, 2019 by Hon M W Wanjala, SRM, in Thika CMCC No 1003 of 2004. I will outline a brief background to the appeal before disposing the grounds set out in the memorandum of appeal dated January 29, 2019 and the issues that fall for determination in the appeal.
2. Vide a plaint dated October 7, 2004, Ruth Wamaitha Karinga [the respondent] instituted Thika CMCC No 1003 of 2004. She contended that she was the registered proprietor of land parcel number Ruiru/Ruiru East Block 2/3237 [the suit property] and that Jacinta Njoki [the appellant] had in January 2001 illegally entered the said land and had commenced erection of permanent structures on the land. She sought, among other reliefs, eviction orders. Further, she sought general damages for illegal occupation or trespass. Lastly, she sought costs of the suit and interest.
3. The appellant filed a statement of defence dated October 14, 2004 in which she generally denied the respondent's claim in its entirety.
4. During trial, the respondent testified as PW1 and closed her case. Her evidence was that she was the registered proprietor of the suit property, measuring approximately one acre. She added that the



appellant had in January 2001 entered the suit property and commenced construction of permanent structures on it. She objected to the appellant's actions to no avail. She reported the matter to the local Chief, the local Police and to M/s Nyakinyua Investments Company, the land buying company that originally owned the land.

5. Upon closure of the respondent's case, counsel for the appellant applied for an adjournment on the ground that the appellant was indisposed. Counsel for the respondent objected to the plea for an adjournment. Declining the plea for adjournment, the trial court rendered itself thus:

“This is an old case. It is affected by the CJ's directive requiring such old cases to be disposed off by the end of the year. It is unfortunate that the defendant is said to be unwell today, but the court's hands as regards granting an adjournment are tied. No medical documents have been availed in court to support the application for adjournment. The application for adjournment is therefore declined.”

6. Subsequent to the trial court's rejection of the appellant's plea for an adjournment, her counsel orally applied to the trial court to adopt the appellant's filed witness statement and admit her filed bundle of documents as her evidence. Without reference to the respondent, the trial court granted the plea and made additional orders in the following terms:

“Defence case marked as closed. The witness statement of the defendant dated October 18, 16 as well as the documents adopted as they are [sic]. It appears to me that both the plaintiff and the defendant, with their own respective titles, are claiming the same plot on the ground. It would be necessary for a surveyor to file a report on the position of these plots before a judgment is entered in this case. In the premises, I do order that the District Surveyor Thika visits the site to ascertain the ground position and occupation of parcel Ruiru Ruiru East Block 2/3237 and Ruiru Ruiru East Block 2/3430 and file a report in court within the next 7 days. This order be extracted and served upon the said surveyor by the plaintiff before COB today. Mention on December 3, 18 for brief submissions on the report and for further orders. Parties to share the surveyor's costs equally.”

7. The matter was subsequently listed for mention before Hon C A Otieno PM on December 3, 2018. On that day, counsel for the respondent informed the court that the surveyor's report was not ready. Hon C A Otieno nonetheless proceeded to set down the matter for judgment on December 13, 2018, without making any order relating to the awaited surveyor's report.
8. The original record of the trial court does not bear any other subsequent proceedings in the file. The file, however, bears the impugned judgment, expressed as having been rendered by Hon M W Wanjala on January 22, 2019 in the absence of both parties. Further, the original file of the trial court bears a letter dated December 5, 2018 from the Thika District Survey Office to the Thika Chief Magistrate, in which the District Surveyor stated that surveyors from his office had visited parcel numbers Ruiru/Ruiru East Block 2/3237 and Ruiru/Ruiru East Block 2/3430 and had made findings to the effect that: (i) the two parcels of land “were in position on the ground and tallied with the survey map”; and (ii) parcel number 3430 was not occupied while parcel number 3237 was developed.
9. It does emerge that the trial court proceeded to render the impugned judgment on January 22, 2019. The trial court found that the respondent had proved her case to the effect that the appellant had encroached on her land, parcel number Ruiru/Ruiru East Block 2/3237. The trial court ordered the appellant to vacate the land within 30 days, failure to which she was to be evicted. The trial court rejected the respondent's plea for damages on the ground that she had failed to prove it. Costs of the suit were awarded to the respondent.



## Appeal

10. Aggrieved by the judgment of the trial court, the appellant brought this appeal, advancing the following verbatim grounds:
  1. That the learned magistrate reached a wrong decision in law and in fact contrary to the weight of the evidence before him.
  2. That the learned magistrate erred in regarding the evidence tendered by the respondent which was totally contradictory and which was disapproved by the defence [sic].
  3. That the learned magistrate erred in law and in fact by denying the appellant's application for adjournment on November 22, 2018 when the appellant was indisposed and her testimony was therefore not heard.
  4. That the learned magistrate erred in law and in fact by relying on the district surveyor's report dated October 5, 2018 which evidence was never served or availed to the appellant.
  5. That the learned magistrate erred in law and in fact by relying on the district surveyor's report dated October 5, 2018 whereas he ordered for a survey report on the November 22, 2018 and therefore the report cannot be genuine [sic].
  6. That in all circumstances of the case, the finding of the learned magistrate are not maintainable in law or on the basis of the evidence adduced.
11. The appellant prayed that the appeal be allowed; the judgment of the trial court be set aside and be substituted with a judgment in her favour; and, that the respondent be ordered to bear costs of the appeal and costs of the primary suit.

## Submissions

12. The appeal was canvassed through written submissions dated December 8, 2021, filed by M/s Chege Wainaina & Company Advocates. Counsel for the appellant faulted the trial court for failing to grant the appellant an adjournment and for failing to accord her the opportunity to testify. Counsel contended that the appellant's counsel had explained that the appellant was indisposed. Counsel added that the surveyor's report which the court relied on was not availed to the appellant at the time of filing written submissions, hence the appellant did not have the benefit of 'perusing it'. It was the position of counsel that had the appellant been accorded the opportunity to peruse the report, the trajectory of the case would have changed. Counsel contended that the appellant was denied the opportunity to interrogate the surveyor's report.
13. Counsel for the appellant added that the respondent had failed to prove her case to the required standard, contending that the respondent failed to lead evidence by a surveyor to establish that indeed the appellant had occupied land parcel number Ruiru/Ruiru East Block 2/3237. Counsel argued that, in the absence of evidence by a registered surveyor, the respondent's case was not proved. Counsel urged the court to allow the appeal and grant the prayers sought in the appeal.
14. The respondent filed written submissions dated February 3, 2022 through M/s Kamiro R N Advocates. Counsel for the respondent faulted the appellant for filing a defence that consisted of mere denials and for failing to plead that she owned parcel number Ruiru/Ruiru East Block 2/3430. Counsel submitted that the contention that the appellant owned land parcel number Ruiru/Ruiru East Block 2/3430 was belatedly introduced on August 20, 2018 when the appellant filed her bundle of documents.



15. Counsel for the respondent added that the hearing date of November 22, 2018 had been given by consent of both parties and that the parties were aware that no adjournment would be entertained on the date reserved for hearing. Counsel added that the decision to call for a surveyor's report was made by the court on its own motion and both parties did not object to it. Counsel submitted that the judgment of the trial court was proper and was supported by the evidence tendered before the trial court. Counsel urged the court to dismiss the appeal.

### **Analysis & determination**

16. I have considered the entire record of the trial court; the grounds set out in the memorandum of appeal; and the parties' respective submissions in the appeal. I have also considered the relevant legal frameworks and jurisprudence. Parties did not, in any way, frame the issues that fall for determination in this appeal. Having perused the grounds of appeal and the parties' respective written submissions, the following are, in my view, the three key issues that fall for determination in the appeal: (i) Whether the trial court erred in relying on the surveyor's report without satisfying itself that the report had been served on the appellant and the appellant had been granted the opportunity to challenge the report; (ii) Whether the trial court erred in rejecting the appellant's plea for an adjournment and (iii) Whether the respondent proved her case to the required standard. Before I analyze the three issues, I will briefly outline the principle upon which this court exercises its appellate jurisdiction.
17. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Kesbar Shiani* (2013)eKLR as follows:-
- “As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”
18. The above principle was similarly outlined in *Abok James Odera t/a A J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:
- “This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority vs Kustron (Kenya) Limited* 2000 2EA 212.”
19. The first issue that falls for determination is whether the trial court erred in relying on the surveyor's report without satisfying itself that the report had been served on the appellant and that the appellant had been accorded the opportunity to challenge the report. The decision to call for a surveyor's report was made suo motto by the court on November 22, 2018. At that point, both parties had closed their respective cases. Although the appellant had in the same sitting, through her advocate, pleaded with the court to grant her an adjournment to enable her attend court to testify, the trial court rejected her plea and proceeded to mark her case as closed.
20. Upon ordering the District Surveyor to visit parcel numbers Ruiru/Ruiru East Block 2/3237 and 3430, the court listed the matter for mention on December 3, 2018 to enable the parties make brief submissions on the surveyor's report and for further orders. The record of the trial court shows that when the matter came up for mention on December 3, 2018 before Hon C A Otieno who was not



the trial magistrate, counsel for the respondent informed the court that the surveyor's report was not ready. The learned magistrate nonetheless directed that Judgment would be rendered on December 13, 2018. She said nothing about submissions relating to the surveyor's report. There is no record of any other sitting that was held to enable the parties make submissions on the surveyor's report. There is similarly no record of any sitting of the court indicating that the surveyor's report was subsequently admitted as evidence by the trial court and that parties to the suit had confirmed receipt of copies of the surveyor's report. Similarly, there is no record of any sitting held on December 13, 2018. Further, the sitting of January 22, 2019 [the day when the impugned Judgment was rendered] was not minuted in the proceedings of the trial court.

21. The totality of the foregoing is that it is true, from the record of the trial court, that the appellant was not served with the surveyor's report and was not granted the opportunity to challenge the report, despite the fact that the trial court had on November 22, 2018 appreciated the need for the parties to be accorded the opportunity to interrogate and/or challenge the report through submissions. The above omission on the part of the trial court violated the right to a fair hearing as envisaged under article 50 (1) of the *Constitution*.
22. Our courts have umpteen times emphasized the centrality of the right to a fair hearing in our legal system. In *Judicial Service Commission v Gladys Boss Shollei & another* [2014] eKLR the Court of Appeal emphasized this right in the following words:

“The right to a fair hearing under article 50(1) of the *Constitution* encompasses several aspects. These include, the individual being informed of the case against her/him; the individual being given an opportunity to present her/his side of the story or challenge the case against her/him; and the individual having the benefit of a public hearing before a court or other independent and impartial body.”
23. In light of the foregoing, it is the finding of this court that the trial court made a fundamental error in relying on the surveyor's report without satisfying itself that the report had been served on the parties to the suit and that the parties to the suit had been accorded the opportunity to challenge the report. Put differently, this court finds merit in ground number 4 of the grounds in the memorandum of appeal.
24. The second issue is whether the trial court erred in rejecting the appellant's plea for an adjournment, sought on the ground that the appellant was indisposed and hence unable to attend court. While rejecting the appellant's plea, the trial court rendered itself thus:

“This is an old case. It is affected by the CJ's directive requiring such old cases to be disposed off by the end of the year. It is unfortunate that the defendant is said to be unwell today, but the court's hands as regards granting an adjournment are tied.”
25. Was the trial court's hands really tied? I do not think so. The Chief Justice's circular urging disposal of old cases on priority basis was a policy guideline that did not divest from the trial court its decisional independence and judicial discretion. The trial court retained the judicial power to consider the merits of the plea for an adjournment and either allow or reject it based on the circumstances of the case. It was, in my view, an error on part of the trial court when it failed to properly exercise its mandate and instead contended that its hands were tied by the Chief Justice's policy guidelines. That is my finding on the second issue.
26. The two issues which have been disposed focussed on the procedure which the trial court employed in arriving at the impugned Judgment. It has emerged that fundamental errors were committed by



the trial court. Due to the fundamental errors, the impugned judgment cannot stand. The errors were committed by the trial court.

27. Secondly, it is noted that the dispute before the trial court relates to the exact boundaries of parcel numbers Ruiru/Ruiru East Block 2/3237 and 3430. The dispute requires a prior determination of boundaries by the Land Registrar within the framework of section 18 of the [Land Registration Act](#). Upon prior determination of boundaries by the Land Registrar, the trial court will be expected to exercise jurisdiction and dispose the dispute.
28. In view of the foregoing, it is necessary that upon setting aside the impugned judgment, the dispute be remitted back to the trial court for disposal in tandem with the requirements of Section 18 of the [Land Registration Act](#). For this reason, I will refrain from rendering myself on the third issue in this appeal, to avoid exposing the parties to prejudice should they ultimately go for fresh hearing before the trial court.
29. In the end this appeal is allowed and disposed as follows:
  - a. The judgment rendered on January 22, 2019 in Thika CMCC No 1003 of 2004 is wholly set aside and the dispute is remitted back to the magistrates court for disposal by a magistrate other than the one who rendered the impugned Judgment.
  - b. The trial court shall ensure compliance with the requirements of section 18 of the [Land Registration Act](#) in relation to prior determination of the relevant boundaries by the Land Registrar before the magistrate exercises jurisdiction.
  - c. Parties shall bear their respective costs of this appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 16TH DAY OF AUGUST 2022**

**B M EBOSO**

**JUDGE**

**Court Assistant: Ms Lucy Muthoni**

