



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Owuor v Ooko (Environment and Land Appeal 78 of 2021)
[2022] KEELC 14452 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14452 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL 78 OF 2021
A OMBWAYO, J
OCTOBER 27, 2022**

BETWEEN

CAREN AKINYI OWUOR APPELLANT

AND

FRED OOKO RESPONDENT

*(Being an appeal from the judgment of the trial court in Kisumu CMCC ELC
CASE No 60 of 2017 delivered on 27th October 2021 by the Hon.S.N Telewa SRM)*

JUDGMENT

1. The appellant, Caren Akinyi Owuor, being dissatisfied with the judgment of the lower court in Kisumu CMCC ELC No 60 of 2017 delivered on the October 27, 2021 by the Hon SN Telewa (SRM) filed this appeal *vide* a memorandum of appeal on the following grounds:
 - a. That the learned trial magistrate erred in law and in fact in dismissing the appellant's suit despite the weighty and cogent evidence being adduced before her and thus occasioning a miscarriage of justice to the appellant.
 - b. That the learned magistrate erred in law and in fact in failing to appreciate and consider the surveyor's report produced in court.
 - c. That the learned magistrate erred in law and in fact in dismissing the appellant's suit on grounds of procedural technicalities and by disregarding the surveyor's report for being produced by the surveyor and not the Lands Registrar.
 - d. That the learned magistrate erred in law and in fact in disregarding all the evidence placed before her by the appellant herein and thus arriving at an unjust decision.
 - e. That the learned trial magistrate erred in law and in fact in disregarding the appellant's written submissions and authorities attached thereof.



- f. That the learned trial magistrate erred in law and fact by disregarding the provisions of articles 48, 50 and 159(2)(d) of the Constitution of Kenya, 2010.
 - g. That the learned trial magistrate's decision albeit a discretionary one was plainly wrong.
2. On February 23, 2022, when the matter came up for mention before the deputy registrar, counsel for the appellant confirmed that he had filed and served the record of appeal on the respondent. On March 2, 2022, the matter came up for mention before the deputy registrar who confirmed that the lower court file had been availed. On May 12, 2022, the matter was mentioned before this court and the parties directed to canvass the appeal by way of written submissions.

Appellant's Case

3. Caren Akinyi Owuor, the appellant herein filed a suit *vide* a plaint dated May 6, 2016 against the respondent where she averred that she is the legal owner of land parcel No Kisumu/West Agoro/1820 after purchasing it from Fred Ooko.
4. She stated that the respondent encroached upon her parcel of land and commenced construction which actions she stated constituted trespass.
5. She averred that her claim is for orders that the provincial land survey determines the boundary on the suit property and a permanent injunction restraining the respondent from trespassing onto the property be issued. She prayed that judgement be entered against the respondent for orders that;
 - a. A permanent order injunction restraining the defendant, his agents, servants, assigns, relatives and those working under him from entering, erecting any further illegal structures, fencing, constructing and in any way other manner interfering with the plaintiff's parcel of land No Kisumu/West Agoro/1820 and eviction order do issue forthwith.
 - b. Costs of this and interest.
6. The respondent filed his statement of defence on October 12, 2015 where he denied the allegations in the plaint. The matter came up for hearing before the trial court and judgement was delivered dismissing the appellant's case.
7. Aggrieved by the decision of the lower court, the appellant appealed to this court *vide* a memorandum of appeal on the grounds that were earlier set out in this opinion.

Appellant's Submissions

8. The appellant filed her submissions on May 19, 2022 and identified two issues for determination.
9. On whether the instant matter constitutes a boundary dispute under section 18(3) of the Land Registration Act 2012; it was submitted that as per the pleadings the case was on encroachment and trespass and not a boundary dispute and therefore the court should not have set out and determined issues that were never pleaded. Reliance was placed on the cases of Elizabeth O Odhiambo v South Nyanza Sugar Co Ltd [2019] eKLR, Fredrick Nganga Thuo v Peter Mungai Njuho [2017] eKLR and Nelly Atieno Oluoch v Damaris A Nyamwalo & 2 Others [2021] eKLR.
10. On whether the appellant proved encroachment into her parcel of land by the respondent; it was submitted that the evidence on record demonstrated that the respondent had encroached into the appellant's parcel by approximately three meters but the court disregarded the said evidence and held that the extent of encroachment was not shown and that the appellant had not proved her case. Reliance was placed on the case of Fredrick Nganga Thuo vs Peter Mungai Njuho [2017] eKLR.



Respondent's Submissions

11. The respondent filed his submissions on July 4, 2022 and identified one issue for determination.
12. On whether the appellant has demonstrated her case; it was submitted that it is not in dispute that the appellant is the registered owner of LR No Kisumu/ West Agoro/1820 while the respondent is the registered owner of land parcel No Kisumu/West Agoro/1673 which are adjacent to each other. It was further submitted that the land registrar did not take part in the survey that was conducted by the regional surveyor as the parties had set out in their consent entered into on December 11, 2017.
13. It was also submitted that the district surveyor's report dated June 18, 2019 indicated that in a general boundary survey, there is an accuracy limit of plus/minus 5 meters and therefore the 3 meters encroachment is within limit in the case. He relied on the cases of *Azzuri Limited v Pink Properties Limited [2018] eKLR*, *Willis Ocholla vs Mary Ndege [2016] eKLR* and *Estate Sonrisa Ltd & another v Samuel Kamau Macharia & 2 Others [2020] eKLR*.

Analysis and Determination

14. After considering the pleadings, the evidence on record and the submissions filed by both parties, the following issue arises for determination:
 - a. Whether the learned magistrate erred in law and fact in finding that the matter was a boundary issue and ought to have been determined by the land registrar.
15. The trial magistrate held that the land surveyor visited the land in the absence of the land registrar and yet a boundary dispute has to be determined by a land registrar. It is on that basis that the trial magistrate further held that plaintiff had failed to prove her case on a balance of probabilities and dismissed the suit.
16. The appellant in her submissions submitted that the matter was not a boundary dispute under section 18 of the *Land Registration Act*. The appellant further submitted that the Surveyor in his report indicated that the boundaries of both parcels of land exist and therefore the trial court's finding that the instant matter is a boundary dispute was beyond the confines of the parties pleadings.
17. As pointed out before, the respondent in his submissions stated that the surveyors report dated June 18, 2019 indicated that general boundary surveys have an accuracy limit of 5 meters and therefore he was within the three meters margin of error allowed in the survey exercise.
18. The appellant at paragraph 7 of her plaint filed on May 31, 2016 averred as follows:

“7. The plaintiff's claim against the defendant is for a orders directing the provincial land survey or determine the boundary in parcel No and a permanent injunction order restraining the defendant from trespassing onto the plaintiff's legally owned parcel of land No Kisumu/West Agoro/1820 and eviction order be issued”
19. It is my view therefore that the dispute between the appellant and the respondent as per the plaint, was a boundary dispute.
20. On July 26, 2018, the parties entered into a consent order that was issued on July 3, 2018 where it was ordered that the Regional Surveyor Nyanza do visit and determine the common boundary between parcel No's Kisumu/West Agoro/1820 and 1673 and a report be filed within sixty days.



21. The surveyors report was filed on December 8, 2020 where the regional surveyor observed that the boundaries of the parcels exist and that Land parcel No Kisumu/West Agoro/1673 has encroached into land parcel Kisumu/West Agoro/1820 by approximately three meters.
22. The learned trial magistrate in her judgement made reference to section 18(2) and 19 of the [Land Registration Act](#). Section 18(2) of the [Land Registration Act](#) provides as follows:
 - (2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.
23. Section 19 of the [Land Registration Act](#) provides as follows:
 19. (1) If the registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the registrar, the registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.
 - (2) The registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.
 - (3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.
24. Further, the court in the case of [Benard Otieno Alosi & Another v Kepha Omulo Opap & 3 Others \(2017\) eKLR](#) held as follows:

“It is evident that the law recognizes that the court lacks the technical ability to determine disputes relating to boundaries and that explains why the land registrar and the surveyor are given that mandate expressly under the law since they are the ones who possess the technical ability to do so.”
25. In the present matter, the regional land surveyor found that the respondent had trespassed on the appellant’s portion of land which trespass the respondent acknowledges. As indicated before, the regional surveyor stated as follows in his report:

“It was also observed that the boundary separating the two parcels of land i.e the line gdc, was originally a straight line separating the parcels Kisumu/West Agoro/190 and 1573 from which the parcels in the suit were created respectively. The proprietor of parcel Kisumu/West Agoro/1673 when pointing out his boundaries extended beyond this boundary into parcel Kisumu/West Agoro/1820 by approximately three(3) meters. This encroachment is shown shaded on the attached sketch”
26. From the regional surveyor’s report, it is clear that the boundary between the two parcels had been fixed and therefore the provisions of section 18 of the [Land Registration Act](#) would not apply in the



present matter. This was as held in the case of [Fredrick Nganga Thuo v Peter Mungai Njuho \[2017\] eKLR](#) where the court stated as follows:

It is not in doubt that the two parcels of land are registered and each piece has its own distinct title deed with measurements.

There is also a surveyor's report dated April 12, 2017, which shows that L K Ngetich, the County Surveyor, Kiambu went to the ground to re-state the boundary between Kikuyu/ Kikuyu Block 1/819 and 820. From the above letter, it shows that the boundary for the two parcels of land had been fixed.

Section 18(2) of the [Land Registration Act](#) applies where the boundaries have not been fixed. However, in this instant case, the respective parcels of land have their boundaries clearly demarcated and fixed as per the letter of L K Ngetich, the county surveyor. The registrar would have jurisdiction where the boundaries have not been fixed. In the instant case, the boundaries have been fixed and therefore the court has jurisdiction.”

In conclusion therefore, the judgment delivered by the trial court in ELC CMCC No 60 of 2017 dismissing the appellant's case is hereby set aside and the orders sought in the plaint granted thus a permanent order injunction restraining the defendant, his agents, servants, assigns, relatives and those working under him from entering, erecting any further illegal structures, fencing, constructing and in any way other manner interfering with the plaintiff's parcel of land No Kisumu/West Agoro/1820 is granted and an order of eviction of the respondents from the appellant portion of land do issue forthwith. Costs of this appeal to the appellant.

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF OCTOBER 2022

A O OMBWAYO

JUDGE

