



**Odero v Obonyo (Environment and Land Appeal 32 of 2020)  
[2022] KEELC 15055 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15055 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL 32 OF 2020  
A OMBWAYO, J  
NOVEMBER 24, 2022**

**BETWEEN**

**MARGARET OKUMU ODERO ..... APPELLANT**

**AND**

**HELLEN CHAO OBONYO ..... RESPONDENT**

*(Being an Appeal from the Judgment and decision of the Lower Court Hon. H.M Nyaberi Senior Principal Magistrate in Winam ELC No. 57/2018 -HELLEN CHAO OBONYO VS MARGARET OKUMU ODERO dated 17th August 2020)*

**JUDGMENT**

**Brief Facts**

1. By a plaint dated August 12, 2009, the respondent herein instituted a suit before the lower court to wit, Winam ELC No 57 of 2018 where it was averred that at all material times the respondent was the registered owner of
2. All that piece of land known as Kisumu/Wathorego/2538 measuring about 0.28 Hectares and the respondent was issued with a certificate of lease in 1999 where she took possession of the property.
3. It was alleged that in 2008, the appellant herein entered and/or trespassed in the suit parcel without the respondent's consent and started putting up a building. That the appellant has forcefully taken possession of the suit property without any justifiable cause. The respondent's claim against the appellant was for an order restraining the appellant from developing and/or interfering with the respondent's peaceful occupation and eviction against the appellant from the suit property. The respondent therefore prayed for judgment against the appellant for:



1. An order restraining the appellant either by herself, servant, or agent from interfering with the respondent's peaceful occupation and/or carrying on any development whatsoever on land parcel number Kisumu/Wathorego/2538.
  2. An order of declaration that the appellant is a trespasser and subsequent eviction from the suit property.
  3. General damages.
  4. Cost of the suit and interest.
  5. Any other relief this honourable court deems fit to grant.
4. The appellant herein filed a statement of defence dated September 1, 2009 where she stated that the respondent herein wrongfully registered the suit parcel in her name yet the suit property is within the compound of the appellant and this resulted due to misplacement of numbers as per map sheet No 11 where the appellant's title Kisumu/Wathorego/1831 was also erroneously misplaced.
  5. The appellant further averred that she has been living in the suit parcel since 1978 while the respondent was issued with the title in 1999 and failure of the respondent to register her piece of land resulted into false accusation. It was stated that the respondent did not have any legal stand to seek for an order restraining the appellant from developing her own matrimonial home where she has been in peaceful occupation and has cultivated since 1978.
  6. The appellant therefore prayed for judgment against the respondent for the suit to be dismissed with costs as it lacks merit, that the court to issue an order to the District Land Registrar to send his team to the ground to establish the truth and advise the court, an order dated August 20, 2009 be set aside and the respondent be allowed to continue with her peaceful occupation/development of the suit parcel, general damages, costs of this suit plus interests and any other relief that the court may deem fit and just to grant.
  7. The matter came up for hearing before the trial court and judgment was entered in favour of the respondent herein.

### **Grounds of Appeal**

8. Aggrieved by the decision of the lower court, the appellant herein filed a memorandum of appeal on August 26, 2021 which was based on the following grounds:
  1. That the learned trial magistrate erred in law and in fact in holding that the appellant had trespassed on the respondent's parcel No Kisumu/Wathorego/2538 when the evidence adduced pointed out that the appellant land parcel number Kisumu/Wathorego /1831 was erroneously indicated on the map as Kisumu/Wathorego/2538.
  2. That the learned trial magistrate erred in law and fact in misinterpreting the findings of the surveyor in favour of the respondent's claim when the same was supporting the appellant's assertion that the land parcel numbers had been erroneously misplaced on the map.
  3. That the learned trial magistrate erred in law and fact in totally ignoring the surveyor's report and recommendation thereby arriving at a wrong decision.
  4. That the learned trial magistrate erred in law in wholly appreciating the evidence and submission of the respondent in totally disregarding that of the appellant.



5. That the learned trial magistrate erred in law and in fact in failing to give reasons for court's decision on each issue for determination.
6. That the learned trial magistrate failed to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.
9. The appellant therefore prayed that the appeal be allowed, that judgment of the lower court Winam ELC No 57 of 2018 be set aside and substituted with an order directing the County Land Surveyor Kisumu to reorganize the map to conform with the ground position of land parcel No Kisumu/Wathorego/2538 and land parcel No Kisumu/Wathorego/1831, that cost of both the lower court and the appeal be awarded to the appellant and any other remedy this honourable court deem fit and just to grant in the circumstances.
10. The appeal was canvassed by way of written submissions as directed by this court.

### **Appellant's Submissions**

11. The appellant filed her submissions on May 24, 2022 and submitted the surveyor's report indicated that the map position of land parcel number Kisumu/Wathorego/2538 is occupied on the ground by the title deed holder Kisumu/Wathorego/1831 yet the said parcels are far much apart on the map and they do not share a common boundary. That there is conformity on map shape and ground shape and only the parcel numbers are displaced and that the map and ground position do not conform.
12. It was stated that the surveyor's report recommended that the two parcels on the map should be reorganized so as to conform with the ground position of each individual title deed holder and the finding and recommendation was to the effect that the error was on the map and once the map is corrected the position of the two parcels of land will remain the same on the ground.
13. It was submitted that instead of the trial magistrate adopting the findings and recommendation of the surveyor's report and issuing an order for rectification of the map to reflect what is on the ground, she came up with her own interpretation of the surveyor's report thereby arriving erroneously at a wrong decision that the appellant had trespassed on the respondent's parcel of land Kisumu/Wathorego/2538 and ordered the appellant to be evicted from the said parcel of land.
14. The appellant therefore prayed that the appeal be allowed as prayed for.

### **Respondent's Submissions**

15. The respondent filed her submission on June 6, 2022 where she submitted that as per exhibit on page 39, the same indicates that Kisumu/Wathorego/1831 measures 0.13 Ha whereas Kisumu/Wathorego/2538 as per exhibit on page 17 measures 0.28 Ha. It was stated that the surveyors report was as per the finding on the ground which clearly showed that the appellant had trespassed into the respondent's parcel of land and has refused to vacate.
16. It was the respondent's submission that the trial magistrate made the right decision and therefore prayed that the suit be dismissed with costs to the respondent.

### **Analysis and Determination**

17. I have carefully considered the memorandum of appeal, the evidence and the submissions filed by the parties and I am of the view that the main issue for determination is whether the learned trial magistrate erred in law and in fact in holding that the appellant had trespassed on the respondent's parcel of land



- number Kisumu/Wathorego/2538 when the evidence adduced pointed out that land parcel number Kisumu/Wathorego/1831 was erroneously indicated on the map.
18. The respondent herein during hearing at the trial court testified that she bought the suit parcel from Richard Otieno Ombewa and pursuant to the sale agreement dated January 18, 1999, it is clear that the respondent bought the suit property at Kshs 65,000/-. I have also seen a copy of the title deed and the same indicates that land parcel number 2538 was registered in the name of the respondent. Pursuant to a search conducted in May 2009, the same shows that the respondent herein was the registered proprietor of land parcel number Kisumu/Wathorego/2538. A copy of the green card also shows that the land parcel number Kisumu/Wathorego/2538 is registered in the name of the respondent. During hearing of the defence case, DW1 produced a copy of the green card which showed that land parcel number Kisumu/Wathorego/1831 was registered in the name of the appellant and a title deed had been issued to her.
  19. It is very clear that what is in dispute herein is two different parcels of land that is Kisumu/Wathorego/2538 and 1831 that belong to the respondent and appellant respectively which parcels of land are located on the same place on the ground while the map indicates that the parcels are located on different areas.
  20. The surveyor's report indicates that the position of the map and the ground do not correspond, that the map shows that land parcel number Kisumu/Wathorego/2538 is occupied on the ground by the title deed holder of parcel number 1831, that the map position of Kisumu/Wathorego/1831 is occupied on the ground by the title deed holder of land parcel number Kisumu/Wathorego/1836 and that parcel number Kisumu/Wathorego/1831 and 1836 are neighboring each other on the map and they share a common boundary.
  21. The surveyor's report also indicated that parcel number Kisumu/Wathorego/1831 and 2538 are far apart on the map and they do not share a common boundary and that there is conformity on the map shape and ground shape and only the parcel numbers are displaced.
  22. The learned trial magistrate stated that the findings of the District Surveyor that the map and ground positions of the suit parcels do not conform to the extent that the appellant has occupied land parcel number Kisumu/Wathorego/2538 belonging to the respondent and that land parcel number Kisumu/Wathorego/1831 and 2538 are far apart as evidence in the defence exhibit 5 and neither of the parties is claiming land parcel number Kisumu/Wathorego/1831. It was further stated that if the Surveyor had supported his report with measurements for each plot, the issue of conformity would have been clearly brought out and therefore the issue of non conformity is far fetched as the report is inadequate in terms of measurements of each plot.
  23. The surveyor gave a recommendation that parcel numbers Kisumu/Wathorego/1831, 1836 and 2538 on the map should be re-organized so as to conform with the ground position of each individual title holder. This court is of the view that the trial magistrate clearly established that the appellant herein had trespassed on the respondent's parcel of land as the map places the appellant on the vacant plot and not where she is currently occupying. I agree with the trial magistrate that there is confusion on the position on the ground for the suit properties and the said confusion has been brought about by the fact of non conformity with their respective position on the ground and if corrected, then the appellant will not have trespassed.
  24. This court therefore dismisses this appeal with costs and upholds the decision of the trial court and directs as follows:



1. That land parcel number Kisumu/Wathorego/1831, 1836 and 2538 on the map be re-organized so as to conform to the ground position of each individual title holder.
2. That the Surveyor and the Land Registrar do ascertain the measurement of land parcel numbers Kisumu/Wathorego/1831 and 2538 in order to solve the issue of conformity the map and ground position.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 24<sup>TH</sup> DAY OF NOVEMBER 2022**

**A.O OMBWAYO**

**JUDGE**

