



REPUBLIC OF KENYA



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

**Gakuo v Gitau & 2 others (Environment and Land Appeal E004 of 2021)  
[2022] KEELC 15149 (KLR) (1 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15149 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT AND LAND APPEAL E004 OF 2021**

**YM ANGIMA, J**

**DECEMBER 1, 2022**

**BETWEEN**

**STEPHEN KIMANI GAKUO ..... APPELLANT**

**AND**

**PATRICK MBURU GITAU ..... 1<sup>ST</sup> RESPONDENT**

**MICHAEL GITAU MBURU ..... 2<sup>ND</sup> RESPONDENT**

**PAUL NJUGUNA MBURU ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal against the Judgment and Decree of Hon. Charles Obulutsa (Chief Magistrate) dated and delivered on 11th March, 2021 in Nyahururu CM ELC. 98 of 2019)*

**JUDGMENT**

**A. Introduction**

1. This is an appeal against the judgement and decree of Hon Charles Obulutsa (Chief Magistrate) dated March 11, 2021 in Nyahururu CM ELC 98 of 2019 Stephen Kimani Gakuo –vs- Patrick Mburu Gitau & 2 others. By the said judgment and decree the trial court dismissed the appellant’s suit with costs to the respondents. Being aggrieved by the said judgment the appellant filed the instant appeal.

**B. Background**

2. The material on record shows that vide a plaint dated September 10, 2019 the appellant sued the respondents seeking the following reliefs:

“(a) A permanent injunction do issue restraining the defendants by themselves, their agents, servants and/or employees from blocking the main entrance, ploughing on, denying access, demolishing fences and/or in any other way



interfering with the 6 metres road of access connecting LR No Nyandarua/Kipipiri/803 to the public road heading to Wanjohi Trading Centre.

- (b) A mandatory injunction do issue compelling the defendants to remove the fence erected at the entrance of the 6 metres road of access connecting LR No Nyandaura/Kipipiri/803 and to replace the perimeter fence thereon and in default the plaintiff be allowed to do so at the defendants costs.
  - (c) Costs of this suit plus interest.
  - (d) Any other or further reliefs that this honorable court may deem fit and just to grant.”
3. The appellant pleaded that he was the registered proprietor of Title No Nyahururu/Kipipiri/803 (parcel 803) which he bought from the 1<sup>st</sup> respondent in 1982. He further pleaded that there existed a 6-metre wide access road connecting parcel 803 to the main public road heading to Wanjohi Trading Centre which access road bordered the 1<sup>st</sup> respondent’s Title No Nyandarua/Kipiriri/871 (parcel 871).
  4. The appellant pleaded that the respondent had without any lawful justification or excuse interfered with and blocked the said access road. It was pleaded, *inter alia*, that the respondents had ploughed and planted crops on the access road, uprooted the fence separating the access road and parcel 871, and fenced the entrance to the access road thus denying the appellant access thereto. It was further pleaded that despite issuance of a demand and notice of intention to sue the respondents had failed to make amends hence the suit.
  5. The record shows that the respondents filed a joint statement of defence dated October 22, 2019 denying the appellant’s claim in its entirety. The 1<sup>st</sup> respondent admitted selling parcel 803 to the appellant but denied that there was an access road between parcel 803 and parcel 871. He further pleaded that there was a separate access road at the time of sale hence if any additional access road was created then it was done without his consent hence unlawful and an infringement of his right to property.
  6. The respondents further denied having interfered with or blocked the access road available to the appellant as pleaded by the appellant and put him to strict proof thereof. Additionally, the respondents pleaded that there was a boundary dispute pending before the Land Registrar - Nyandarua over the same issue. They consequently prayed for dismissal of the appellant’s suit with costs.
  7. By its judgment dated and delivered on March 11, 2021 the trial court held that the dispute among the parties was a boundary dispute which ought to have been referred to the Land Registrar for resolution. Consequently, the court held that it had no jurisdiction to entertain the suit and as a result dismissed the appellant’s suit with costs.

### **C. The Grounds of Appeal**

8. Being aggrieved by the said judgment, the appellant filed a memorandum of appeal dated March 29, 2021 raising the following 4 grounds of appeal:
  - a. That the learned trial magistrate erred in law and in fact in finding that the appellant’s suit was a boundary dispute which ought to have been settled by the District Land Registrar.
  - b. That the learned trial magistrate erred in law and in fact in failing to find that the appellant’s suit was founded on a cause of action based on a tort



for blocking/interference with a road of access which was already provided for in the RIM and the District Land Registrar had no powers to grant the injunction sought.

- c. That the learned trial magistrate erred in law and in fact in finding that the District Land Registrar had powers to hear and determine the dispute filed by the appellant who was not in any way seeking for fixing or establishing of a boundary.
- d. That the learned trial magistrate erred in law and in fact in ignoring and not considering the appellant's evidence, documents, pleadings and submissions in dismissing the case.

9. As a result, the appellant sought the following reliefs:

- a. That the appeal be allowed and the judgment delivered on the March 11, 2021 be set aside in its entirety.
- b. That judgment be entered as prayed in the lower court in favour of the plaintiff as against the defendants.
- c. That costs of the appeal be awarded to the appellant.

#### **D. Directions on Submissions**

10. When the appeal was listed for directions, it was directed that it shall be canvassed through written submissions. The parties were consequently given timelines within which to file and exchange their respective submissions. The record shows that the appellant's submissions were filed on September 26, 2022 whereas the respondent's submissions were filed on September 22, 2022.

#### **E. The Issues for Determination**

11. Although the appellant raised 4 grounds of appeal in his memorandum of appeal, the court is of the opinion that the resolution of the following 3 issues would effectively determine the appeal:
- a. Whether the trial court erred in law and in fact in holding that the dispute amongst the parties was a boundary dispute hence it had no jurisdiction to entertain the suit.
  - b. Whether the Appellant is entitled to the reliefs sought in the appeal.
  - c. Who shall bear costs of the appeal.

#### **F. The Applicable Legal Principles**

12. This court as a first appellate court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of *Selle & another -vs- Associated Motor Boat Co Ltd & others* [1968] EA 123 at p 126 as follows:

“.....Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that 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 on the demeanor of a witness is inconsistent with the evidence in the case generally.”

13. Similarly, in the case of *Peters –vs- Sunday Post Ltd* [1958] EA 424 Sir Kenneth O’ Connor, P rendered the applicable principles as follows:

“.....it is strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion.....”

14. In the same case, Sir Kenneth O’Connor quoted Viscount Simon, LC in *Watt –vs- Thomas* [1947] AC 424 at page 429 – 430 as follows:

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

## G. Analysis and Determination

### a. Whether the trial court erred in law and in fact in holding that the dispute was a boundary dispute hence it had no jurisdiction to entertain the suit

15. The court has considered the material and submissions on record on this issue. The appellant submitted that the dispute amongst the parties had nothing to do with a boundary dispute but it was all about the respondents’ unlawful and wrongful blockage of an access road. The appellant cited the cases of *Alfred Nyangweso Akunga –vs- Joshua Hamisi Ondimu* [2018] eKLR; *George Mbugua Kirori –vs- Peter Nyaga Kairu* [2018] eKLR: and *Wilfred Keli Ndolo –vs- Gatakae Amboka & another* [2019] eKLR in support of his appeal.



16. The respondents, on the other hand, submitted that the trial court was right in its decision in that the dispute at hand was purely a boundary dispute amongst the parties or at least a dispute as to the boundaries of the access road. The respondents therefore contended that resolution of a boundary dispute was the preserve of the Land Registrar hence the trial court had no jurisdiction to entertain the suit. The respondents cited the cases of *Maria T Chebiego –vs- Kimutai Kangogo Sawe & 18 others* [2020] eKLR; *Azzuri Limited –vs- Pink Properties [Ltd 2018]* eKLR; and *Reuben Kioko Mutyaene – vs- Hellen Kiunga Miriti & 4 others* [2021] eKLR in opposition to the appeal.
17. The crux of the appeal is whether the dispute before the trial court was a boundary dispute within the meaning of section 18 of the *Land Registration Act, 2012* or a dispute concerning alleged blockage of an access road. Section 18 of the said Act stipulates as follows:
- “(1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.
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.
3. Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:
- Provided that where all the boundaries are defined under section 19 (3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act, cap 299.”
18. It is evident from the appellant’s plaint that his claim before the trial court was based upon the respondent’s alleged blockage or closure of an access road which would have allowed him easy access to Wanjohi Trading Centre. The reliefs sought in the plaint also make it clear that the suit had everything to do with the 6-metre access road which the respondents were claimed to have blocked or interfered with. There was no dispute as to the location of the boundaries of the appellant’s parcel 803 or the 1<sup>st</sup> respondent’s parcel 817.
19. There was no allegation by the respondents that they were uncertain of the location or the boundaries of the 6 metre access road the appellant was complaining about. Their defence was that there was no 6 metre access road as claimed by the appellant or at all. It was the 1<sup>st</sup> respondent’s further defence that if any such access road was created then it was created unlawfully without his consent and in violation of his proprietary rights. There was no dispute as to the location, acreage, dimensions or boundaries of either parcel 803 or parcel 871.
20. The court has further considered the material on record on what steps were taken by the appellant in a bid to resolve the dispute administratively. The court has noted that the closure of the access road was reported to the Chief of Wanjohi Location who wrote a letter dated March 27, 2010 which was produced as an exhibit. The said letter referred to the alleged closure of an access road by the 1<sup>st</sup> respondent and not a boundary dispute. Similarly, there is a letter dated April 19, 2020 from the District Surveyor, Nyandarua South District to the OCS – Kipipiri Police Station which also referred to the existence of a road of access which separated parcel 803 and parcel 871. The court is thus of the



opinion that the trial court erred in fact and in law in holding that the dispute amongst the parties was a boundary dispute within the meaning of section 18 of the [Land Registration Act, 2012](#).

21. In the case of *Alfred Nyangweso Akunga –vs- Joshua Hamisi Ondimu* (supra) the Court of Appeal whilst considering a matter whose facts are fairly similar to the dispute amongst the parties herein held, *inter alia*, that:

“(15) We have perused the plaint that was filed by the respondent in the lower court, and the statement of defence that was filed by the appellant. Nowhere do we find any reference to a boundary dispute nor did any of the parties refer such a dispute to the Land Registrar. From the pleadings and the evidence, it is apparent to us that the dispute between the appellant and the respondent concerned the existence of an access road passing through the appellant’s property leading to the respondent’s property, and the alleged illegal closure of the access road by the appellant. Indeed, it was not disputed that the appellant’s plot and the respondent’s property were not adjoining plots as there are two plots in between them.

(16) Furthermore, the relief sought by the respondent was not determination of the boundaries, but resolution of the dispute concerning the existence and closure of the alleged access road, hence the prayer for a permanent injunction restraining the appellant from interfering with the alleged access road through construction of any permanent building or other structure. In our view, the dispute between the parties was not a boundary dispute and section 21(4) was not applicable. We therefore reject the ground of appeal that the trial court had no jurisdiction to determine the dispute between the appellant and the respondent.”

22. Whereas the authorities cited by the respondents represent a correct statement of the law, they are only applicable to cases where the dispute amongst the parties is a boundary dispute within the meaning of section 18 of the [Land Registration Act, 2012](#). The court is persuaded from the material on record that the dispute amongst the parties was not a boundary dispute hence the authorities cited by the respondents are not applicable. The court is thus of the opinion that the 1<sup>st</sup> issue should be answered in the affirmative since the trial court clearly misdirected itself in law in holding that the dispute among the parties was a boundary dispute.

#### **b. Whether the appellant is entitled to the reliefs sought in the appeal**

23. The court has already found that the trial court erred in law in holding that it has no jurisdiction to entertain the appellant’s suit. The court has analyzed and re-evaluated the evidence on record in support of the appellant’s claim and the respondents’ evidence in defence of the action. Whereas the respondents disputed the existence of a 6-metre access road as claimed by the appellant, the court is satisfied on the basis of the evidence on record that there is indeed an access road between the appellant’s parcel 803 and the 1<sup>st</sup> respondent’s parcel 871. The copy of the RIM produced by the appellant clearly indicated the existence of the access road. There is also evidence on record to demonstrate that the District Land Surveyor – Nyandarua South confirmed its existence vide a letter dated April 19, 2010.
24. The court is further satisfied that there was oral and photographic evidence to demonstrate that the respondents had blocked and fenced off the entrance of the access road as claimed by the appellant. The court is thus of the opinion that there was sufficient evidence before the trial court to demonstrate



that the appellant had proved his case against the respondents to the required standard. Accordingly, the appellant is entitled to the reliefs sought in the appeal.

**c. Who shall bear costs of the appeal**

25. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to section 27 of the *Civil Procedure Act* (cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co Ltd* [1967] EA 287. The court finds no good reason why the successful litigant should be deprived of his costs. Accordingly, the appellant shall be awarded costs of the appeal.

**H. Conclusion and Disposal Order**

26. The upshot of the foregoing is that the court is satisfied that the appellant’s appeal has merit and consequently the same is hereby allowed in the following terms:
- a. The appeal be and is hereby allowed.
  - b. The judgment and decree of the trial court in Nyahururu MC ELC No 98 of 2019 – Stephen Kimani Gakuo –vs- Patrick Mburu & 2 others is hereby set aside in its entirety.
  - c. The appellant’s suit in Nyahururu MC ELC No 98 of 2019 – Stephen Kimani Gakuo –vs- Patrick Mburu & 2 is hereby allowed as prayed in terms of prayers (a) (b) & (c) thereof.
  - d. The appellant is hereby awarded costs of the appeal.

It is so decided.

**JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 1<sup>ST</sup> DAY OF DECEMBER, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

Mr. Waichungo for the Appellant

Ms. Njeri Wamithi for the Respondent

C/A - Carol

.....

**Y. M. ANGIMA**

**JUDGE**

