



**Opiyo & another v Odhiambo & another; County Government of  
Kisumu & another (Interested Parties) (Environment and Land Appeal  
E029 of 2022) [2024] KEELC 390 (KLR) (1 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 390 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E029 OF 2022**

**E ASATI, J  
FEBRUARY 1, 2024**

**BETWEEN**

**PAMELA AGOLA OPIYO ..... 1<sup>ST</sup> APPELLANT**

**PAMELA AGOLA OPIYO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**GABRIEL BEN ODHIAMBO ..... 1<sup>ST</sup> RESPONDENT**

**GABRIEL BEN ODHIAMBO ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**COUNTY GOVERNMENT OF KISUMU ..... INTERESTED PARTY**

**COUNTY GOVERNMENT OF KISUMU ..... INTERESTED PARTY**

*(Being an appeal from the ruling of the SPM dated 13.  
4. 2021 in KISUMU SPMC ELC NO. E40 OF 2020)*

**JUDGMENT**

1. The appellant is the Plaintiff in an ongoing case namely Kisumu CMC ELC NO.E40 of 2020 (the suit). The appellant sued the Respondent in the suit vide the Plaint dated 25<sup>th</sup> November, 2020. The record shows that together with the Plaint, the appellant filed an application of even date brought under Certificate of Urgency seeking for an order of interlocutory injunction restraining the Respondent from using, disposing of, interfering with peaceful possession of the applicant and/or in any way dealing with land parcel Plot UNS“B”/77 Mamboleo area (the suit land) pending hearing and determination of the suit and an order to the Kisumu County Surveyor to conduct a survey on the suit land to determine the extent of the boundaries in relation to the neighbouring land parcel and prepare a report in that regard to be tabled before the court.



2. The application was opposed vide the grounds contained in the Replying Affidavit of Gabriel Ben Odhiambo Anam the Respondent and the annexure thereto.
3. The record shows that the application was heard by the trial court which vide its ruling delivered on April 13, 2021 dismissed the application with costs to the Respondents.
4. Aggrieved by the Ruling, the Appellant filed this appeal vide the Memorandum of Appeal dated April 30, 2021 and filed in court on the same date, on the grounds that:-
  - a. the learned trial Magistrate erred in fact in finding that the matters herein fell under the jurisdiction of the Land Registrar and yet the same is not registered land/plots as per the [Land Act](#).
  - b. the learned Magistrate erred in law and fact by failure to appreciate the evidence/report that was presented by the City Land Surveyor, County Government of Kisumu that the parcels herein did not share a common boundary and in fact 66 metres apart separated by four (4) plots in between them
  - c. the learned Magistrate erred in fact and law in finding that the plots herein are recognizable under the Land Act other than the [County Governments Act](#) and the [Constitution of Kenya](#).
  - d. the learned Magistrate erred in law and in fact in employing the wrong principles in law in arriving at the decision.
  - e. the learned trial Magistrate erred in law and in fact in arriving at his decision by bringing in extraneous issues that had been abandoned by the Appellant.
5. The Appellant sought for order that the appeal be allowed the Ruling and orders of the trial court be set aside and in its place an order be made allowing the application dated November 25, 2020 as presented. The Appellant also sought for costs of the appeal.
6. The appeal was canvassed by way of written submissions. Written submissions dated September 17, 2023 were filed on behalf of the Appellant by the firm of Juliet Dima & Associates Advocates. Written submissions dated October 5, 2023 were filed by the firm of Ayoo-see Associates on behalf of the 1<sup>st</sup> respondent.

#### **Issues for Determination**

7. The grounds of appeal form the issues for determination.

#### **Analysis and Determination**

8. Counsel for the Appellant argued grounds (a), (b) and (c) of the appeal together. Counsel submitted that the trial court stated that boundary dispute falls within the jurisdiction of the Land Registrar, pursuant to the provision of section 18 of the [Land Registration Act](#) 2012. That during the hearing of the application, Counsel for the Appellant abandoned prayers 4 and 5 of the application which were seeking orders for survey of the parcels of land in dispute yet the trial court in its ruling dealt with the prayers 4 and 5 only and ignored the other prayers in the application. That the trial Magistrate rendered himself wrongly for reasons that the suit property known as UNS”B”/77 Mamboleo and UNX “B”/72B Mamboleo are unsurveyed and therefore Land Registrar has no jurisdiction over the determination of boundaries by a reading of section 19 of the Land Registration Act. That the land boundary issue had been determined by the Interested Party herein.



9. The issue raised by grounds (a), (b) and (c) of the appeal is whether or not the dispute before the trial court was a boundary dispute or not and whether therefore the court had jurisdiction to entertain it or not.
10. The trial court had found that the dispute was a boundary dispute under section 18 and 19 for which the first part of call is the Land Registrar. That it is upon determination by the Land Registrar, that the court is seized with jurisdiction to adopt the findings of the Land Registrar as an order of the court.
11. The appellant faults the trial court for this finding and contends that the suit land and the Respondents land do not share a common boundary.
12. The Respondents' position in the application was that plot No.UNS“B”/77 Mamboleo belonging to the appellant had nothing to do with him because he is the proprietor of a different parcel being plot No.UNS/728 Mamboleo which he had fenced, put a metal gate and on which he was running poultry farming. The Respondent denied the acts of trespass complained of by the appellant in the application.
13. The record shows that during the hearing of application, the applicant abandoned prayer 4 and 5 of the application. That left only pray 3 of the application as the substantive prayer for the trial court determination. Prayer 3 of the application was a prayer for an order of an interlocutory injunction restraining the Respondent and his agents from interfering with land parcel No.Plot UNS“B”/77 Mamboleo pending hearing and determination of the suit.
14. Although the trial court appeared to have dismissed the application on the grounds that the matter before him was a boundary dispute, the ruling shows that the trial court discussed the facts of the case against the principles for grant of interlocutory injunction. The court relied on the case of Giella –vs- Casman Brown and observed;  

“On the assessment of the material by both parties it is clear that the erection of the fence, the gate and the structures are already done and the only issues for consideration is whether the survey or need to carry out the survey and establish the actual boundaries of the parcels herein.”
15. The grounds upon which the application had been made were inter alia that the Defendant had trespassed onto the suit land and constructed structures/houses and erected fences and a gate around the said land. The Applicant deposed in the Supporting Affidavit that this was done in the year 2015. The application was filed in the year 2020.
16. From the applicant's pleadings the actions that the applicant was seeking to stop had already taken place. The Respondent had entered the land about five (5) years earlier and erected houses, a gate and fenced it. A temporary injunction serves the purpose of restraining actions which are about to take place. It is not an eviction order.
17. Further, in the circumstances of the present case, it was imperative upon the applicant to produce evidence that the activities complained of are actually on the suit land and not on the Respondent's land nearby. There was no evidence to that effect.
18. Grounds (d) and (e) of the appeal raise the issue of the land sale agreement, that the trial court failed to acknowledge the agreement. I find that the substance of the appeal is whether or not the applicant proved the ground for grant of an order of temporary injunction.



19. Having analysed the entire record and the submissions made, the court finds that the appellant did not satisfy the grounds for grant of an order of temporary injunction. The trial court was therefore justified to dismiss the application.

In the premises, court finds that the appeal lacks, merit, the same is hereby dismissed. Costs to the Respondent.

Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 1<sup>ST</sup> DAY OF FEBRUARY, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

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**E. ASATI,**

**JUDGE.**

**In the presence of:**

Maureen: Court Assistant.

Jeji holding brief for J. Dima for the Appellant.

No appearance for the Respondent.

