



Osodo & another v Lenacture & Sons Building Company & another (Environment and Land Appeal E003 of 2023) [2024] KEELC 1454 (KLR) (1 February 2024) (Judgment)

Neutral citation: [2024] KEELC 1454 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E003 OF 2023**

E ASATI, J

FEBRUARY 1, 2024

BETWEEN

SIPROSA OYIERO OSODO 1ST APPELLANT

SAMSON OTONDI OCHIENG 2ND APPELLANT

AND

LENACTURE & SONS BUILDING COMPANY 1ST RESPONDENT

COUNTY GOVERNMENT OF KISUMU 2ND RESPONDENT

(Being an Appeal from the judgement of Hon. C.L. Yalwala the SPM at Maseno dated and delivered on 11th January 2023 in MASENO SPMC ELC NO.19 OF 2019; Siprosa Oyiero Osodo & Another –vs- Lenacture & Son Building Company & Another)

JUDGMENT

1. Vide the Memorandum of Appeal dated 2nd February, 2023, the appellant appealed to this court against the judgement dated 11th January, 2023 in Maseno SPMC ELC No.19 of 2019.

The ground of appeal as set out in the Memorandum of appeal are that;

- a. the learned trial Magistrate erred in law and fact in holding that the dispute between appellants are the Respondent is a boundary dispute.
- b. the learned trial Magistrate misapprehended the law and the facts of the case before him and arrived at the wrong conclusion that the dispute is a boundary dispute when the facts pointed otherwise.
- c. that learned trial Magistrate erred in law and fact in holding that the court had no jurisdiction to hear and determine the entire suit.



- d. the learned trial Magistrate erred in law and fact in striking out the entire suit in complete disregard to the constitutional principles on dispute resolution and the laws governing the resolution of issues before him.
 - e. the learned trial Magistrate erred in law and fact in striking out the entire suit thereby leaving the appellants without remedy whereas the court appreciated the existence of a dispute between the parties which is against the principles of administration of justice and dispute resolution as provided for under Article 159(2)(d) &(e).
 - f. the learned trial Magistrate erred in law and fact in failing to refer the issue of boundary dispute to the Land Registrar for hearing and determination before dealing with the rest of the appellants' claim before him.
 - g. the learned trial Magistrate erred in law and fact in failing to appreciate that the appellants' case before him was not for the resolution of a boundary dispute but the appellants' case was for determination of ownership, permanent injunction, damages for trespass and payment of damages of Kshs.30,250/=.
2. The appellants seek for orders that the appeal be allowed and costs of the appeal be awarded to them, the judgement in the Senior Principal Magistrate's Court sitting at Maseno SPMC ELC No.19 of 2019 be set aside, the appellants' suit before the trial court be allowed and the relief sought therein be granted and that the costs of the appellants' suit before the subordinate court be awarded to the appellant.
 3. The background of the appeal is that the appellants filed a suit against the Respondent namely Maseno SPMC ELC No.19 of 2019 (the suit). The Plaintiff's case in the suit was that the 1st appellant was the registered owner and the 2nd appellant the equitable owner of the parcel of land known as Kisumu/Seme Kaila/1919 which is a resultant parcel of a sub-division of land known as Kisumu/Seme Kaila/794. That in the month of February, 2019 the Respondent trespassed onto the appellants' land by interfering with the access road by alleging that the same was part of Gulkabege – Ombo Lung'a access road and constructed the said road thereby causing damage to the 2nd appellant's property including a house, fence and trees valued at Kshs.30,250/-. The appellants sought for an order of permanent injunction, damages and costs.
 4. The suit was heard before the trial court which in its judgement dated 11th January, 2023 found that the dispute between the parties was a boundary dispute and struck out the suit for lack of jurisdiction and awarded costs of the suit to the Respondent.
 5. Aggrieved by the judgement, the appellants filed the present appeal.
 6. Pursuant to directions taken on 7th July, 2023, the appeal was canvassed by way of written submission.
 7. It was submitted on behalf of the appellant that the claim that was before the trial court was not a boundary dispute. Counsel relied on the case of George Gitari Kamwere & Another –vs- Harmit Singh Choda & Others (2005)eKLR and submitted that the issue of boundary dispute is not borne out by the pleadings. That the appellants' case was that the Respondent invaded their land.
That since the dispute before court was not a boundary dispute, the trial court had the jurisdiction to hear and determine the suit. Counsel relied further on the case of Meukar Limited –vs- Ratilal Ghela Samat Shah & 2 Others [2019]eKLR and submitted that where issues are so intertwined, the court is not completely divested of the jurisdiction to hear and determine the suit.
 8. On grounds 4 and 5 of the appeal, counsel submitted that by striking out the suit, the court left the appellants without a remedy even after appreciating that there was a dispute between them. That



this approach vitiated the duty of the court under article 159(2)(d) and (e) of the Constitution which requires that in exercise of judicial authority, the court must protect and promote the purpose and principles of the Constitution which include the principles of dispute resolution. Counsel further relied on the case of *Munyali –vs- Musyoka* (Environment & Land Appeal No.19 of 2021 [2022]KEELC 3247 (KLR)(26 July 2022 (Judgement) where the court referred the matter to the Land Registrar for determination of the boundary dispute instead of striking out the suit.

9. It was submitted on behalf of the 1st Respondent that although the appellant raised 7 issues for determination, the 1st Respondent merges all of them into one main issue namely; Jurisdiction. That PW3 the Kisumu County Land Surveyor, an expert witness, testified that the dispute was a boundary dispute and the trial court was therefore well guided to strike out the suit for want of jurisdiction. That under section 18(2) of the Land Registration Act the court is prohibited from entertaining any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided for in the Act. That section 19 of the same Act vests the duty to fix boundaries in the Land Registrar. That where dispute resolution mechanisms are provided for under statute, a party ought to exhaust them before moving to court and that to hold otherwise would be to erode public confidence with such organs. That section 18, 19 and 20 of the Land Registration Act are clear on such matters and the steps one is required to take in the process.
10. Counsel submitted further that the suit was filed pre-maturely as there was no evidence that the Registrar and Surveyor ever visited the suit land and carried out the necessary survey on the property for the boundaries to be termed as fixed. That the bottom line of the issue is that the exact boundary position between the suit land and the road reserve has not been ascertained and/or determined and/or demarcated to date either as required under the law or at all.
11. Counsel relied on the case of *Sasomum Holding Company Limited –vs- Kenya National Highways Authority* [2022]eKLR, *Bethwell Allan Omondi Okal –vs- Telkom Ltd & 9 Others* [2017]eKLR and *Samuel Kamau Macharia & Another –vs- Kenya Commercial Bank Ltd & Others* (2012)eKLR and Counsel concluded that the trial court did not err in its findings or judgement and prayed that the appeal be dismissed for lack of merit.
12. It was submitted on behalf of the 2nd Respondent that there was a boundary dispute between land parcel NO. KISUMU/SEME KAILA/1919 and the Gulkabege – Ombo Lung’a access road. That the County Land Surveyor confirmed in his testimony that the dispute was a boundary dispute.
That section 18 of the Land Registration Act prohibited the court from hearing and determining the matter as it was a boundary dispute.
Counsel relied on the case of *Willis Ochola –vs- Mary Ndege* (2016)eKLR, *Samuel Kamau Macharia and another –vs- Kenya Commercial Bank Limited & 2 Others* [2012]eKLR and *Owners of the Motor Vessel “Lilian S” –vs- Caltex Oil (Kenya) Ltd* (1989)KLR to support the submissions and prayed that the appeal be dismissed with costs for lack of merit.

Issues for Determination

13. From the pleadings filed, the evidence adduced and the submissions made, the following emerge as the issues for determination herein;
 - a. whether or not the trial court erred in holding that that it had no jurisdiction as the dispute before it was a boundary dispute.
 - b. whether or not the trial court was justified in striking out the suit.



- c. whether or not the appeal has merit.
- d. what orders to make on costs?

Analysis and Determination

14. The first issue for determination is whether or not the trial court erred in holding that it had no jurisdiction in the matter as the dispute before it was a boundary dispute.

The record shows that the appellants' claim as contained in the plaint dated 16th October 2019 was that in the year 2019, the 1st Respondent interfered with the Gulkabege – Ombo Lung'a access road thereby encroaching onto the suit land and causing damages to the appellants' property on the suit land. That the actions of the Defendants amounted to trespass. The appellants further pleaded that a surveyor did survey and recommend that the 1st Respondent adopts points pegged out by the surveyor in order to avoid encroaching on the suit parcel of land. The appellants further pleaded that the Respondents ignored the recommendations and proceeded to construct the road. The appellants therefore, among other relief, sought for an order of injunction restraining the Respondents from interfering with the suit land and damages for trespass.

15. The record further shows that the appellants testified before the trial court. The 2nd appellant stated on cross-examination that her land borders the access road. From the evidence of both appellants, it's clear that the suit land borders the road of access which was being constructed. PW3, the Surveyor testified that the road is owned by the County Government of Kisumu. Although at first he testified that it was not a boundary dispute and stated that;

“the report refers to pegs I placed on the road. Had the road contractor complied with the margins of the road, there would not be a dispute. It was not a boundary dispute, the contractor just did an arbitrary placement of the road.”

He added that;

“the area is not a fixed survey area as it is a general boundary. That is why I used PID. I cannot explain now the extent the road encroached onto the land parcel.”

And on re-examination, he concluded that;

“technically, I consider it or it can be termed as boundary dispute between the road and the lands.

16. Taking the Surveyor's evidence into account, the trial court found that no evidence had been led by the appellants to establish that the Land Registrar undertook the action of fixing the boundary subsequent to the survey by the County Surveyor, Kisumu County to define the position of the subject boundary and/or made note in the register to that effect. The court further found that because this had not been done, it had no jurisdiction pursuant to the provisions of section 18(2) of the [Land Registration Act](#). The court made an order striking out the suit with costs.
17. Though the appellants fault the court for this finding and decision, they had the burden to prove on a balance of probabilities that the provisions of section 18, 19 and 20 of the [Land Registration Act](#) had been complied with in order for the court to have jurisdiction to entertain the matter. The Surveyor testified that it was a boundary dispute between the road and the lands. He testified further that although he had placed pegs to demarcate the extent the contractor could work up to, he was unable to tell the extent of the encroachment onto the suit land.



18. No report of the Land Registrar was produced. There was no evidence that a note had been made on the register that the boundary had been fixed.

The record shows that the trial court analysed the process of fixing of the boundary as provided for in Section 18, 19 and 20 of the Act and concluded that the same had not been done in respect of the boundary the subject of the suit.

The appellants may have suffered damage for which they may be entitled to redress, but they ought to follow the mechanisms provided by law.

Being a boundary dispute, clearly the court had no jurisdiction under the provisions of section 18(2) of the *Land Registration Act*.

The trial court was therefore justified to find as it did that it had no jurisdiction and to proceed to strike out the suit.

It was submitted in this appeal on behalf of the appellant that having found that it had no jurisdiction, the trial court ought to have referred the matter to the Land Registrar instead of striking it out. My view is that the trial court would have had no jurisdiction to refer the matter.

19. For the foregoing reasons, the court finds that the appeal lacks merit. Appeal is dismissed with costs.

Orders accordingly.

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

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Okoth for the Plaintiffs.

Reuben for the Defendant.

