



**Oimo v Ngere (Environment and Land Appeal E048 of 2022)
[2024] KEELC 1744 (KLR) (8 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 1744 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E048 OF 2022
GMA ONGONDO, J
APRIL 8, 2024**

BETWEEN

MICHAEL OYUGI OIMO APPELLANT

AND

JOHN AMENYA NGERE RESPONDENT

*(Being an appeal from the judgment and decree of Hon. J. S. Wesonga
Principal Magistrate, delivered on 16th May 2022 in Homa Bay Chief
Magistrate’s Court Environment and Land Case No. E022 of 2020)*

JUDGMENT

1. This appeal arises from the trial court’s judgment delivered on the 16th May 2022 by the Honourable J. S. Wesonga, Principal Magistrate, in Homabay Chief Magistrate’s Court Environment and Land Case No. E022 of 2020 where she issued the orders infra:
 - a. That the plaintiff is the registered absolute owner of Lambwe West “B”/1245 measuring approximately 11.0 ha (The suit land herein).
 - b. That the defendants, their agents and/or servants are in trespass in the suit land.
 - c. A permanent injunction restraining the defendants from trespassing on the suit land.
 - d. An order directing the defendants to vacate the suit land and failure to, eviction shall be undertaken in accordance with Section 152 B of the *Land Act*, 2016 (2012).
 - e. General damages for trespass Kshs. 150,000/=
 - f. Costs and interests of this suit



2. The appellant who was the 5th defendant in the suit was aggrieved thereby and through the firm of G.S. Okoth and Company Advocates, mounted this appeal by way of a memorandum of appeal dated 4th October 2022 and filed herein on 5th October 2022. The Appeal is anchored on grounds 1 to 7 as set out on the face thereof and the same include:
 - a. The learned trial Magistrate misdirected herself on several matters of law and fact.
 - b. The learned Magistrate erred in law of practice and procedure as provided for by the Civil Procedure Act and Rules, in that:
 - i. She failed to clearly identify the common act or transactions done by each or all of the defendants that entitled the plaintiff to relief from each or all of the defendants as provided by Order 1 rule 3 of the Civil Procedure Rules.
 - ii. She failed to notice that the plaintiff's witness statement was vague and general and did not specify the actions of each defendant and thus the court could not apportion the liability of each of the joint defendants.
 - iii. She proceeded to hear the case without or before ascertaining that each of the defendants were served or were properly served so that the pleadings were closed against each defendant and without holding a pretrial conference.
 - iv. She failed to properly analyse the defence of the appellant (5th defendant) and thereby reached an erroneous conclusion.
 - v. She flouted the provisions of Order 21 rule 3(1) of the Civil Procedure Rules by purporting to deliver a judgment in the absence of all parties without any written notice of judgment to the parties or their advocates.
 - c. The learned magistrate erred in law in making a finding that a tort of trespass to land had been committed.
 - d. The learned trial magistrate erred in law in failing to note that the instant dispute being a boundary dispute mixed with a dispute concerning the identification of the lands on the ground the issues should have been resolved first under Section 18 of the Land Registration Act and consequently a court of law had no jurisdiction to hear the dispute.
3. Wherefore, the appellant prays that:
 - a. This Honourable Court to quash the decision of the trial magistrate, set aside and or reverse the said decision and allow this appeal.
 - b. A proper survey be carried out by one government surveyor and assisted by an independent private surveyor so as to identify whether land parcel number Lambwe West 'B'/1428 is in survey map sheet number 35 or 42 and the origin of land parcel number Lambwe West 'B'/1245.
4. The appeal was heard by way of written submissions pursuant to this court's directions of 18th April 2023.
5. The appellant's counsel filed submissions dated 27th October 2023 and stated that the evidence adduced and proved by documents, shows that there is doubt as to the exact position of the parcels of land belonging to the appellant and the respondent. That as such, a proper survey ought to have been carried out and boundaries fixed so that the trial court could acquire jurisdiction to hear the dispute.



6. The respondent's counsel, Nancy Nyarige and Company Advocates, filed submissions dated 23rd February 2024 and identified the following issues for determination:
 - i. Whether the Learned Magistrate erred in fact and in law in failing to appreciate the evidence before her on proof of ownership.
 - ii. That the learned trial magistrate erred in law in making a finding that a tort of trespass to land had been committed.
 - iii. Whether the plaintiff is entitled to the orders that were granted by the learned Magistrate.
7. Learned counsel submitted, inter alia, that the trial magistrate appreciated the evidence before her and rightly found that the respondent is the owner of the suit land. That according to the Report by the Sub County Land Surveyor, PW3, there was trespass on the suit land by the appellant herein and others. That therefore, the respondent was entitled to the orders that were granted by the learned trial Magistrate. To fortify the submissions, counsel relied on various authorities including the case of Keiyan Group Ranch -vs- Samwel Oruta & 9 others (2021) eKLR.
8. In the foregone, the issues for determination are as captured in the grounds of appeal and boil down to:
 - a. Whether the issue at the trial court was a boundary dispute hence, the trial court lacked jurisdiction to hear and determine the same.
 - b. Depending on the outcome of (a) above, did the respondent who was the plaintiff at the trial court prove his case to the requisite standard?
 - c. What just orders can be granted in this appeal to meet the ends of justice?
9. It is noted that the instant appeal being the first one from the trial court in the matter, I am obliged to review the record of the trial court, evaluate it and arrive at own conclusions in this appeal; see Mwanasokoni-vs Kenya Bus Services Ltd (1982-88) 1KAR 278 applied in other cases, inter alia, Titus Ong'ang'a Nyachio-vs-Martin Okioma Nyauma and 3 others (2017) eKLR.
10. At the trial court, the plaintiff/respondent generated the suit by way of a plaint dated 30th November 2020 mounted by against the 5th defendant/appellant and five others, seeking the following orders;
 - a. An injunction restraining the defendants, their servants, workmen and agents from entering or causing to be erected thereon any structure or from in any way interfering with the plaintiff's use and enjoyment of the suit land.
 - b. An order of permanent injunction restraining the defendants, their servants and/or agents or any other person whatsoever from continuing to cultivate, constructing, developing, wasting and/or further erecting or in any way dealing with the suit land.
 - c. An order directed to the defendants, their agents, servants and/or assigns to remove themselves, their agents, goods or assigns and in default an order of eviction do issue.
 - d. A declaration that the defendants are trespassers on the suit land.
 - e. Damages for trespass.
 - f. Costs of this suit and interest thereon.
 - g. Any other relief the court deems fit to grant.



11. The plaintiff/respondent contended that the defendants, including the appellant herein, had trespassed upon the suit land, damaging the perimeter fence, utilizing the same and erecting structures thereon.
12. PW1, John Amenya Ngere, relied on his statement filed in court on 30th November 2020 and a further statement filed on 10th May 2021 which were adopted as part of his testimony. He testified in part that the suit land is distinct from the parcel owned by the appellant herein. That the appellant has trespassed onto the suit land, planted trees thereon and has failed to vacate the same, despite demand being issued. He produced the following documents: title deed in respect of the suit land, a court order in Misc. Civil Application No. 20 of 2019, land registrar's report and a demand letter dated 20th March 2019 (PEXhibits 1 to 4 respectively).
13. During cross-examination, PW1 stated that he purchased the suit land in the year 1997.
14. PW2, Edward Ochieng Ogola, relied on his statement dated 10th May 2021, which was adopted as his evidence-in-chief.
15. Charles Bosire, Land Surveyor (PW3) testified that he visited the suit land on 22nd October 2020 in the company of the County Land Registrar, a representative of the respondent, Area Chief and Village Elders. That the suit land is registered in the name of the respondent herein. That the same is located in Registry Index Map Sheet number 42 and the ground features tally with the map. That the suit land does not border land parcel number Lambwe West 'B'/1428. He produced a report dated 26th October 2020 (PEXhibit 3).
16. The 1st, 2nd, 3rd, 4th and 6th defendants did not enter appearance or file a statement of defence at the trial court.
17. The 5th defendant filed a statement of defence dated 4th February 2021 on 8th February 2021, denying the claim.
18. DW1, Michael Oyugi Oimo, the appellant herein, relied on his statement dated 26th March 2021 and testified that he owns land parcel title number Lambwe West 'B'/1428, having purchased the same in 2006 and registered as a proprietor thereof in 2015. That from the documents, his parcel appears to be located in Registry Index Map Sheet number 35, which is distinct from the suit land herein. That there is a mystery between Registry Index Map Sheet number 42, where the suit land is situated, and Registry Index Map Sheet number 35 where his parcel is located, and the same needs clarification by the Land Registrar. He produced in evidence; title deed in respect to L.R. No. Lambwe West 'B'/1428, a copy of the final card for L.R. No. Lambwe West 'B'/1428, objection to A/R 985, extract of Registry Index Map Sheet number 35, extract of Registry Index Map Sheet number 42 and a notice dated 13th November 2023 (DEXhibit 1 to 6 respectively).
19. Peter Otieno Obwanda (DW2) relied on his statement on record and testified that the issue herein is a boundary dispute.
20. Maurice Ochieng Onyango (DW3), relied on his statement dated 26th March 2021 and averred that the appellant's parcel is on Registry Index Map Sheet number 42 and not number 35 as indicated in the Land Registrar's Report (PEXhibit 3). However, he admitted that he had no evidence to corroborate the same.
21. DW4, Norbert Ouma Mirongo, relied on his statement on record and testified, inter alia, that the appellant is known to him and they own adjacent land parcels. That he does not know the respondent.



22. The Land Surveyor, PW3, was recalled pursuant to a court order made on 12th August 2021. He produced a green card in respect of the appellant's land (DExhibit 7) and a map (DExhibit 8). He stated that according to DExhibit 7, the appellant's land is on Registry Index Map Sheet number 42. That however, on the map (DExhibit 8), the land is on Registry Index Map Sheet number 35. He admitted that during registration, errors occurred when doing entries but the correct position is shown by the map. In cross-examination, he clarified that the two sheet numbers, to wit, 35 and 42, do not neighbor each other.
23. It is noteworthy that the learned trial magistrate set out the parties' respective cases, framed five issues for determination, analysed them and arrived at her decision based on reasons. So, the impugned judgment was in consonant with Order 21 Rule 4 of the *Civil Procedure Rules*, 2010.
24. In her judgment, the learned trial magistrate observed, inter alia;
- “...From the evidence on record, I have no doubt in my mind that the plaintiff is indeed the registered owner of land known as Lambwe West “B”/1245...”
25. The learned trial magistrate further observed that;
- “...I have keenly analyzed the evidence before court and the general observation is that the 5th defendant is not certain on the geographical location of L. R. No. Lambwe West “B”/ 1428. Therefore, the fulcrum of this suit around dispute relating to location of parcels of land... To this end I am convinced and I find that the 5th defendant's parcel of land is distinct from the suit land and does not even make a common boundary with it as the 5th defendant believes...”
26. The appellant contends that by purporting to deliver a judgment in the absence of all parties without any written notice of judgment to the parties or their advocates, the learned trial Magistrate flouted Order 21 Rule 3(1) of the Civil Procedure Rules, 2010 which provides that:
- (1) A judgment pronounced by the judge who wrote it shall be dated and signed by him in open court at the time of pronouncing it.
27. In the instant appeal, it is clear that the impugned judgment was delivered in open court, duly dated and signed by the learned trial magistrate. Besides, I note from the trial court's record that the date of the judgment was fixed in open court in the presence of legal representation for both the parties herein. Thus, it is my considered view that this ground of appeal is untenable.
28. The appellant laments that the trial magistrate erred in law in failing to note that the instant dispute being a boundary dispute mixed with a dispute concerning the identification of the lands on the ground. That the issues should have been resolved first under Section 18 of the [Land Registration Act](#) and consequently a court of law had no jurisdiction to hear the above dispute.
29. I must note that on 12th August 2021, the trial court directed the Land Registrar, Mbita/Homa Bay to file a comprehensive report giving the history of Lambwe West ‘B’/1428 and attach a copy of the green card in respect to that parcel. The Land Surveyor, PW3, was recalled on 24th February 2022 pursuant to the said court order. He produced a green card in respect of the appellant's land (DExhibit 7) and a map (DExhibit 8) and stated that according to DExhibit 7, the appellant's land is on Registry Index Map Sheet number 42. That however, on the map (DExhibit 8) the land is on Registry Index Map Sheet number 35. He admitted that during registration, errors occurred when doing entries but the



- correct position is shown by the map. In cross-examination, he clarified that the two sheet numbers, to wit, 35 and 42, do not neighbor each other.
30. In light of the foregoing, it is my considered view that the issue of a boundary dispute does not arise. Therefore, the trial court was seized with jurisdiction to hear and determine the suit.
 31. The plaintiff/respondent produced in evidence a title deed in respect of the suit land (PExhibit 1) showing that the same is registered in his name. Regarding trespass, PW3 testified that there was trespass on the suit land by the appellant herein and others. He produced a report in evidence, PExhibit 3, whose contents remain uncontroverted.
 32. Indeed, it is my considered view that the respondent proved on a balance of probabilities the element of trespass and as such, it was at the discretion of the trial court to assess and award damages in the circumstances. The respondent was entitled to the orders sought at the foot of the plaint.
 33. This court is guided by Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya which provides as follows:
 - i. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
 34. To this end, I find that the respondent who was the plaintiff at the trial court proved his claim to the requisite standard. The impugned judgment is faultless at law and I endorse the same.
 35. Wherefore, the instant appeal lodged by way of a memorandum of appeal dated 4th October 2022 and filed herein on 5th October 2022 is devoid of merit. The same is hereby dismissed with costs to the respondent.
 36. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 8TH DAY OF APRIL 2024.

G.M.A ONG'ONDO

JUDGE

Present

1. Odhiambo, learned counsel for the appellant
2. N. Nyarige, learned counsel for the respondent
3. Mutiva and Obunga, Court Assistants

