



Ombuna v Ombuna & another (As Legal Representatives of the Estate of Charles Ombuna Deceased) (Environment and Land Appeal E003 of 2022) [2024] KEELC 3661 (KLR) (7 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3661 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL E003 OF 2022**

**M SILA, J
MAY 7, 2024**

BETWEEN

NICHOLAS ONYONI OMBUNA APPELLANT

AND

HELLEN OMBUNA 1ST RESPONDENT

MARY OMBUNA NYANGARA 2ND RESPONDENT

**AS LEGAL REPRESENTATIVES OF THE ESTATE OF CHARLES OMBUNA
DECEASED**

*(Being an appeal against the judgment of Hon. S.K Onjoro, Principal Magistrate,
delivered on 17 December 2021 in the case Kisii CMCC No. 730A of 2009)*

JUDGMENT

1. This suit has had quite a chequered history. It was commenced by the now deceased original respondent, Charles Ombuna, through a plaint filed on 22 December 2009 in the Chief Magistrates' Court at Kisii where he sued one Abiud Orora Onyancha as 1st defendant and the appellant as 2nd defendant. The original respondent died while this appeal was pending and he was succeeded by Hellen Ombuna and Mary Ombona Nyangara . Reference to the respondents will thus be to his successors in title and I will refer to the original deceased respondent as 'the plaintiff' for ease of reference. In his plaint, the plaintiff averred to be the registered proprietor of the land parcel Nyaribari Chache/B/B/Boburia/2781 (the suit land or parcel No. 2781) since 17 November 1989. He claimed that the defendants had entered his land, deposited building materials, and erected a fence despite them owning the land parcel Nyaribari Chache/B/B/Boburia/5045. He also made some pleadings that the registration of the appellant was acquired through fraud. In the suit he asked for an order of permanent injunction to restrain the defendants from the suit land and mesne profits from the date of interference



and costs of the suit. The defendants filed a joint statement of defence. They denied entering the suit land or depositing building materials and making a fence as claimed. They averred that the respondent had no locus to question how they got their title.

2. On 3 February 2010 counsel for the plaintiff and counsel for the defendants recorded the following consent :

“By consent the District Land Registrar and Surveyor do establish and fix the boundaries of Land No. Nyaribari Chache/B/B/Boburia/5045 and 2781.”

3. A report dated 11 May 2010 was prepared and filed. It was prepared by one Charles Osongi. That report stated that both parties were claiming the same land on the ground though one party alleged it to be the parcel No. 2781 and the other party asserted that it was the parcel No. 5045. The report further stated that on the Registry Index Map the two plots were adjacent and neighbouring each other. The report’s conclusion was that the position of the parcel No. 2781 was what was claimed by both parties and the position of the parcel No. 5045 was elsewhere and that it was occupied by two storey buildings referred to as ‘black house’ which were constructed by the owner of the parcel No. 4019.
4. Parties did not agree on this report and the matter had to proceed for hearing. During the pre-trial mention held on 7 March 2011, part of what the parties agreed was that ‘the District Land Surveyor will be the expert to be called in this case as the parties had earlier agreed. In the circumstances he is ordered to go to the ground and file a comprehensive report within seven days from today. The report will therefore (sic) be open for inspection by the parties by 14/3/001 (sic) at 5 pm.’
5. Hearing commenced on 6 April 2011 when the plaintiff testified. He stated that in the year 2009 the defendants claimed that the suit land belongs to them and that they fenced it off. They also pulled down his temporary structures and constructed 5 semi-permanent rooms which they leased out to tenants. He stated that the part of his land taken measured 50 x 100 feet and they left another portion of 50 x 100 feet. He stated that they also blocked his access so he had to go through other people’s plots. He wanted them evicted.
6. PW – 2 was Charles Juma Obongi. He described himself as a Government Surveyor. He referred to the court order which he said directed him (as Government surveyor) to find out the positions of the parcels No. 5045 and 2781 and that he went to the site to execute the order culminating in the report that he filed. Under cross-examination he stated that he was not the District Surveyor but a qualified surveyor. He also stated that he did not go to the site accompanied by the Land Registrar but the Land Registrar authorized him to go. He asserted that he was a qualified surveyor and that he did a good job to the best of his ability.
7. With the above evidence the plaintiff closed his case.
8. DW – 1 was the appellant. His evidence was that he purchased the parcel No. 5045 from Abioud Orara Onyancha, the 1st defendant, through an agreement dated 15 December 2009 where he paid Kshs. 1.2 million for the land. He stated that he was shown the land in dispute as the parcel No. 5045. He put up a barbed wire fence and constructed four rooms made of iron sheets and a latrine. He denied that the parcel No. 5045 is where the parcel No. 2781 ought to be.
9. DW- 2 was Abioud Orara Onyancha the 1st defendant. His evidence was that he bought the parcel No. 5045 together with his brother in 1989 and they got title in 1992. They put beacons and fenced it. In 1997 the plaintiff built some structures intending to use it as a school but he was stopped and he removed the buildings. He decided to sell the land and he sold it to the appellant in 2009.



10. DW – 3 was Nicodemus Anyoni Angasa. He was a witness to the agreement between the appellant and the 1st defendant.
11. DW – 4 was one John Ongora. He also verified the sale transaction between the appellant and the 1st defendant.
12. DW- 5 was Jackson Omoke. He is the owner of the land parcel Nyaribari Chache/B/B/Boburia/4019 which he said he bought in 1972. He denied that the plot he owns, where he developed ‘black house,’ is the same land as the parcel No. 5045.
13. With the above evidence, the defence closed its case.
14. Judgment in the matter was pronounced by Hon. P.L. Shinyada, Resident Magistrate, on 27 July 2011. He found that the plaintiff had proved his case and was entitled to the order of permanent injunction against the defendants. He mainly relied on the ‘surveyors report’ and the evidence of PW-2 to find in favour of the plaintiff. Aggrieved, the defendants filed an appeal, but later withdrew it, and instead filed an application dated 6 December 2011 for review of the judgment. The application for review was based on the ground that the defendants had discovered that the person who prepared the report was an impostor as he was not the District Surveyor, nor was he even a surveyor; instead he was a cartographer. This was said to have been discovered after the judgment when the appellant wrote to the Ministry of Lands to inquire about the status of Charles Juma Osongi. He got a reply dated 24 November 2011 advising that Charles Juma Osongi was not a qualified surveyor but a Cartographic Assistant Grade I. The application for review as not successful and was dismissed in a ruling delivered on 21 March 2013 by Hon. R.B.N Maloba Senior Resident Magistrate, mainly on the reasoning that the applicant had earlier preferred an appeal thus the avenue for review was not available. She however appreciated that throughout the case the parties had thought that they were dealing with a qualified surveyor sent by the District Surveyor. Aggrieved by the ruling, the appellant filed an appeal to the High Court registered as Kisii High Court Civil Appeal No. 79 of 2011. Judgment in that appeal was delivered by Onyango J on 23 February 2018. In her judgment, the judge found that there was discovery of new and important matter i.e that the report was actually not prepared by a qualified surveyor and that the court relied on a report of an unqualified person. She found that this tainted the judgment and led to a miscarriage of justice. She allowed the appeal and made the following orders :
 - a. The judgment and consequential decree dated 27 July 2011 be and is hereby reviewed and/or set aside.
 - b. The defence case be re-opened to allow the appellant (2nd defendant) to lead further evidence in response to the Surveyor’s Report dated 11 May 2010.
 - c. The respondent shall bear the costs of this appeal.
15. The judgment of 27 July 2011 having been set aside the parties went back to the trial court to comply with the above directions of the superior court i.e re-open the defence case to allow them lead further evidence in response to the ‘surveyor’s report’ of 11 May 2010.
16. Directions were taken on 22 August 2018 that ‘the matter proceeds from where it had reached’ and a date for defence hearing given. The matter proceeded on 14 October 2019 before Hon. S.K Onjoro, Senior Resident Magistrate with one Omare Onyinkwa Mathius testifying in presence of the original respondent but in absence of his counsel. He stated that he held a power of attorney from the appellant who was in the United States of America. His evidence was more or less to castigate the report of 11 May 2010 as having been made by an unqualified person.



17. Shortly an application dated 25 October 2019 was filed. It not only sought to have recalled Mr. Mathius for cross-examination by counsel (since he was absent when he testified on 14 October 2019) but also for an order to direct the District Land Registrar and Surveyor Kisii to visit the land parcels No. 2781 ad 5045 and prepare a report for presentation to court. The court only allowed the prayer to recall the witness so that he can be cross-examined by counsel but declined the prayer to have the land visited by the District Land Registrar and Surveyor, the court reasoning that the order made by the judge in the appeal was that the case was only re-opened to allow the defendants lead further evidence on the ‘survey report.’ Mr. Mathius was thereafter cross-examined on 1 March 2021 and the hearing closed. Counsel filed their final submissions and judgment was delivered on 17 December 2021 again in favour of the plaintiff. The trial court reasoned that the report of 11 May 2010 was clear that the defendants had trespassed into the plaintiff’s land. The court further reasoned that the defendants did not furnish the court with an alternative report to disagree with its contents. The court found that the appellant (as 2nd defendant) had indeed trespassed into the plaintiff’s land parcel No. 2781 and issued an order of permanent injunction against him as prayed. The prayer for mesne profits was however not allowed. The court did not find any claim sustained against the 1st defendant and dismissed the case against him with no orders as to costs.
18. Aggrieved, the 2nd defendant preferred this appeal against this judgment on the following grounds (slightly paraphrased for brevity) :
1. The trial Magistrate erred by failing to hold that the respondent’s suit was subject to the provisions of Section 18 (2) of the *Land Registration Act*, 2012.
 2. The judgment did not comply with the provisions of Order 21 Rule 4 and 5 of the Civil Procedure Rules, 2010.
 3. The trial Magistrate failed to hold that Charles Juma Osongi was an imposer and not a surveyor as purported.
 4. The trial Magistrate erred by relying on a surveyor’s report which had been discredited and had no probative value as it was compiled by an unqualified person.
 5. The trial Magistrate failed to properly analyse the evidence which would have shown that the respondent’s case was unmerited and liable to be dismissed.
 6. The judgment was against the weight of evidence.
19. The appellant seeks orders to have the judgment of the trial court substituted with an order that the suit of the respondent is dismissed with costs.
20. I directed counsel to file written submissions to argue the appeal and I have seen the submissions of Mr. Nyamurongi, learned counsel for the appellant, and Mr. Ochwangi, learned counsel for the respondents. In his submissions, Mr. Nyamurongi inter alia urged that a court ought not to entertain a boundary dispute unless the boundaries are determined by the Land Registrar as prescribed in Section 18 (2) of the *Land Registration Act*, 2012. He submitted that the boundary dispute has never been determined by the Land Registrar and on this score alone the suit ought to have been dismissed.
21. In my view, it is apparent that the parties, after seeing each other’s pleadings, were of opinion that there needed to be a finding by the District Land Registrar and District Surveyor on the issue of the positioning on the ground of the two parcels of land in question, that is the land parcel No. 2781 and No. 5045. That is why they entered into the consent of 3 February 2010 that the District Land



Registrar and Surveyor do establish and fix the boundaries of the two parcels of land. It turns out that the person who went to do the survey was neither the District Land Registrar nor the District Surveyor. It was certainly done by an impostor who passed himself off as a qualified surveyor from the District Survey office when he was not. Everybody at that time thought that he was a qualified surveyor until it emerged later, after the first judgment, that he was not. By mistake, they thought that their consent had been executed when in fact it had not.

22. What this means is that the consent of the parties of 3 February 2010 was in reality never effectuated. In my view, the court misdirected itself in proceeding with the trial as if there was a survey report pursuant to the consent of the parties of 3 February 2010 when there was not. What the court needed to do was first make sure that the consent of the parties is executed then proceed with the case. This was a consent of the parties and it bound both plaintiff and defendants. It was also wrong for the appellant (as defendant) to put hurdles to prevent the implementation of this order since it was a consent that he was party to. It will be seen that he opposed the application by the plaintiff dated 25 October 2019 which inter alia sought the prayer to have the District Land Registrar and District Surveyor proceed to the ground to undertake the survey and he succeeded in convincing the court not to give effect to this order. The parties were alive to the fact that the case could not be decided without the report of the District Land Registrar and Surveyor and the court needed to give effect to their consent but failed to do so.
23. I agree with Mr. Nyamurongi that the report that was produced could not be relied on by the court to enter judgment since the report needed to be one of the District Land Registrar and District Surveyor. However, the trial was a mistrial and a sham, for failure to ensure that the consent of the parties, that there first there be a report of the District Land Registrar and District Surveyor, which would be relied on by both parties, before the matter can proceed. The court could not shut its eyes on this consent which was critical and could not purport to hold that there was a survey report on record as envisaged by the parties when there was actually no report.
24. My holding therefore is that there was an error on the part of the trial court in proceeding to pronounce judgment without first making sure that the consent of the parties, for a report of the District Land Registrar and Surveyor to be on record, is complied with.
25. The best thing to do with this matter is to set aside the judgment and refer the case back to the Magistrates' Court with direction that the court ensures that the consent of the parties of 3 February 2010 is complied with by the District Land Registrar and District Surveyor going to the ground, undertaking the survey exercise, and filing a report to court. It is after this report is prepared and presented to the trial court that the court can then proceed to pronounce itself properly on the matter.
26. The appellant has succeeded in setting aside the judgment but not on the reasons given and has certainly not convinced this court that the respondent's case was for dismissal as he wished in the Memorandum of Appeal. I allow the appeal on my finding that a critical step agreed by the parties in the trial court was not complied with and this was akin to a mistrial. I will therefore make no orders as to costs.
27. For the avoidance of doubt, this case is remitted back to the Magistrates' Court for a fresh determination after the consent of 3 February 2010 is complied with and a report of the District Land Registrar and Surveyor is filed.
28. Judgment accordingly.

DATED AND DELIVERED THIS 7 DAY OF MAY 2024

JUSTICE MUNYAO SILA



JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :-

Ms. Kebungo for the appellant instructed by M/s Nyamurongi & Company Advocates

N/A on part of Mr. Ochwangi for the respondents

Court Assistant – David Ochieng’

