



**Okello v Odeny (Environment and Land Appeal E004 of 2023)
[2024] KEELC 5159 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5159 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E004 OF 2023**

**SO OKONG'O, J
JULY 11, 2024**

BETWEEN

CHARLES AUMA OKELLO APPELLANT

AND

PAUL OUGO ODENY RESPONDENT

*(Being an appeal from the judgment and decree of Hon. S.O. TEMU (SPM)
delivered on 26th January 2023 in Nyando PMC ELC No. 43 of 2020)*

JUDGMENT

Background

1. The Appellant filed a suit against the Respondent in the Principal Magistrate's Court at Nyando namely, PMC ELC No. 43 of 2020 (hereinafter referred to only as "the lower court") seeking an order that the Respondent be compelled to remove and/or demolish a house he had constructed to the extent to which it had encroached into the Appellant's parcel of land known as Kisumu/Agoro West/1493 (hereinafter referred to as "the suit property"). In his plaint dated 7th September 2020, the Appellant averred that he was the registered proprietor of the suit property which bordered, Kisumu/Agoro West/ 1467 to the East, Katito-Pap Onditi tarmac road to the South, Kisumu/Agoro West/ 1465 to the West, and Kisumu/Agoro West/ 1597 and Kisumu/Agoro West/ 2237 to the North.
2. The Appellant averred that the Respondent had constructed a house which was occupied by the area Assistant Chief which house had overlapped onto the suit property on the northern portion thereof. The Appellant averred that the North Western end of the suit property was covered by the Respondent's said house. The Respondent filed a defence in the lower court dated 29th September 2020 in which he denied the Appellant's claim in its entirety. The Respondent averred that he owned a parcel of land known as Kisumu/Agoro West/ 1834 which had not encroached on the suit property.



3. On 11th May 2021, the court ordered that the parties do conduct a joint survey of the suit property to determine its location and measurements on the ground. The parties were unable to conduct a joint survey. Each conducted its own survey using private surveyors. The Appellant's survey report made by Kolmans Geomatic Consultants was filed in court on 2nd July 2021. The Respondent filed a survey report prepared by Peter Magare on 23rd July 2021. The Appellant had earlier filed in court as part of the documents he wished to rely on a survey report prepared by P.K.Rugutt, the then Surveyor for Nyando, Nyakach & Muhoroni Sub-Counties (hereinafter referred to only as "the District Surveyor") dated 31st August 2020. All these survey reports were produced in evidence at the trial.
4. In the District Surveyor's report dated 31st August 2020 on the survey that he conducted on the suit property on 4th August 2020 before the filing of the lower court suit, he found that there was a brick house standing on the Northern edge of the suit property and that one of the corners of the suit property at the North Western edge could not be established because it was inside the said brick house. The District Surveyor stated that the said brick house was the area Assistant Chief's office. The District Surveyor stated that the encroachment suggested a boundary dispute and recommended that a boundary dispute be lodged at the Land Registry to resolve the dispute. According to the District Surveyor's sketch map of the area, the said brick house which housed the office of the Assistant Chief was at the intersection of, and covered portions of land parcels, Kisumu/ Agoro West/1493, 1465, 1597 and 2237. According to the attendance register, this survey was conducted in the presence of among others, the Appellant and the Respondent. According to the Survey report prepared by the Appellant's private surveyor dated 23rd June 2021, there was a brick house standing on the Northern edge of the suit property. The surveyor stated that the northern corner of the suit property could not be established because of the brick house.
5. According to the Respondent's survey report that concerned Kisumu/Agoro West/ 1834 (hereinafter referred to only as "Plot No. 1834"), the surveyor stated that Plot No. 1834 bordered land parcels Kisumu/Agoro West/ 1597 and 1592. The surveyor stated that Plot No. 1834 did not share a boundary with the suit property and as such the issue of the plot encroaching on the suit property could not arise. The surveyor drew a sketch map showing the location of the suit property and Plot No. 1834.
6. At the trial before the lower court, the Appellant told the court that the Respondent had extended his house by 10 meters into the suit property. He told the court that the Respondent encroached on the suit property while he was in Nairobi. On his part, the Respondent told the court that he owned Plot No. 1834 while the Appellant owned Plot No. 1493 (the suit property). He stated that Plot No. 1834 had not encroached on the suit property since the two did not share a boundary. On cross-examination, the Respondent told the court that he had a brick house on Plot No. 1834 which was being used by the area chief as his office. He stated that the said house did not encroach on the suit property. He stated that there were two parcels of land between Plot No. 1834 and the suit property.
7. After the close of evidence, the court visited the site of the suit property and observed that the suit property was far from the parcel of land owned by the Respondent and that there were two parcels of land between them. The lower court considered the pleadings and the evidence tendered by the parties and delivered a judgment on the matter on 26th January 2023. The lower court found that the dispute between the parties was a boundary dispute and should have been referred to the Land Registrar for determination under the provisions of the [Land Registration Act](#) 2012 before being brought to court. The lower court dismissed the Appellant's suit with costs to the Respondent.



The appeal

8. The Appellant was aggrieved with the decision of the lower court and filed this appeal on 9th February 2023. In his Memorandum of Appeal, the Appellant challenged the lower court's judgment on the following main grounds;
 1. That the Learned Magistrate erred in law and fact by avoiding to determine the dispute that was before him and erroneously referring the dispute to the Land Registrar.
 2. That the Learned Magistrate erred in law and fact by ignoring the material dispute before him and failing to determine whether the Respondent had encroached on and had continued to trespass on the suit property.
 3. That the Learned Magistrate erred in law and fact by awarding costs to the Respondent who had encroached and/or trespassed on the suit property. The Appellant averred that the Learned Magistrate had exercised his discretion capriciously.
 4. That the Learned Magistrate erred in law and fact by ignoring the evidence on record and playing the litigant role on behalf of the Respondent in his judgment.
9. The Appellant prayed that the appeal be allowed and an order be issued for the eviction of the Respondent from the portion of the suit property that he had encroached on. The Appellant also prayed for the costs of the appeal and of the lower court suit, and any further reliefs the court may deem fit to grant in the circumstances of the appeal.

Analysis and determination

10. The Appeal was argued by way of written submissions. The Appellant filed submissions dated 20th February 2024 while the Respondent filed submissions dated 4th December 2023. I have considered the pleadings and the proceedings of the lower court, the judgment of the court, the grounds of appeal put forward by the Appellant, and the submissions by the advocates for the parties. This being a first appeal, the court must consider and re-evaluate the evidence on record and draw its own conclusions on the issues that were raised for determination before the lower court. The court has to bear in mind however that it did not have the advantage of seeing and hearing the witnesses who testified before the lower court. In *Kenya Ports Authority v. Kuston (Kenya) Limited* [2009] 2EA 212 the Court of Appeal held among others that:

On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

11. The appellate court will also not interfere with the findings of fact by the trial court unless they were not based on evidence at all or they were based on a misapprehension of the evidence, or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, *Peter v. Sunday Post Ltd.* [1958] E.A 424 and *Makube v. Nyamuro*[1983] KLR 403.



12. In *Phoenix of E. A. Assurance Company Limited v. S.M. Thiga T/A Newspaper Service* [2019] eKLR, the Court of Appeal sated as follows:

In common English parlance, Jurisdiction denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae.”

13. Order 2 Rule 4 of the *Civil Procedure Rules* provides as follows:

4.

- (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality —
- (a) which he alleges makes any claim or defence of the opposite party not maintainable;
- (b) which, if not specifically pleaded, might take the opposite party by surprise; or
- (c) which raises issues of fact not arising out of the preceding pleading.
- (2) Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.”

(emphasis added)

14. In *Independent Electoral and Boundaries Commission & Another v. Stephen Mutinda Mule & 3 others* [2014]eKLR, the Court of Appeal cited with approval the Malawi Supreme Court of Appeal case of *Malawi Railways Ltd. v. Nyasulu* [1998]MWSC 3 where the judges quoted an article by Sir Jack Jacob entitled “*The present importance of pleadings*” published in 1960 Current Legal problems, at P.174 where the author stated as follows:

As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings ... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered



to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

15. Earlier in this judgment, I have set out the pleadings by the parties before the lower court. The Appellant’s case in the lower court was straightforward. The Appellant claimed that he was the registered owner of the suit property and that the Respondent had constructed a house on the northwestern edge of the suit property part of which house had encroached on the suit property. The Appellant sought an order for the demolition of the portion of the Respondent’s house that he claimed to have encroached on the suit property. The Appellant did not mention the land on which the said house was constructed and whether the land was owned by the Respondent or not. The Appellant did not also claim that there was a dispute as to the boundary between the suit property owned by the Appellant and the parcel of land on which the Respondent was said to have constructed the said house.
16. The Respondent’s defence was equally straightforward. The Respondent denied that he had constructed a house that had overlapped on the northwestern edge of the suit property. The Respondent denied having encroached on the suit property. On a without prejudice basis, the Respondent averred that he owned Plot No. 1834 which did not encroach on the suit property. The Respondent did not plead that the house complained of by the Appellant was his and that it was constructed by the Respondent on Plot No. 1834 which he claimed to own. The Respondent did not also claim that there was a dispute over the boundary of Plot No. 1834 and the suit property. The Respondent did not raise an objection to the suit based on the jurisdiction of the lower court to determine the Appellant’s claim.
17. At the trial, the Appellant’s evidence was consistent with his pleadings. He maintained that the Respondent had constructed a house that had extended to his land. The Appellant produced survey reports that showed that there was indeed a house that had been constructed on the northwestern part of the suit property that had extended to the suit property. The sketch map attached to the survey report by the District Surveyor dated 31st August 2020 that was produced in evidence by the Plaintiff showed where the contested house was situated and that it had encroached on the suit property. From that report which was the only one prepared following a survey conducted in the presence of both parties, the said house was put up at the common boundary of Kisumu/ Agoro West/1493, 1465, 1597 and 2237. Plot No. 1834 said to have been owned by the Respondent is not in the picture. In fact, all the surveyors were unanimous that Plot No. 1834 did not share a boundary with the suit property. Whoever put up the said house could only have encroached if he did, from either Kisumu/ Agoro West/1465, 1597 or 2237 according to the survey reports by the District Surveyor and the Respondent’s surveyor, Peter Magare. In his evidence, the Respondent admitted that the house the Plaintiff was complaining about was put up by him and that the same was on Plot No. 1834 which did not share a boundary with the suit property. The lower court went to the site and confirmed that Plot No. 1834 was indeed two plots away from the suit property. The court did not however confirm whether the disputed house was on Plot No. 1834 or on any of the Plots that shared a boundary with the suit property.
18. I agree with the Appellant that the dispute before the lower court was not a boundary dispute. The suit property and Plot No. 1834 from the evidence that was placed before the lower court by both parties did not share a boundary. There could not therefore be a dispute over the boundaries of the two parcels of land. That brings the question, what boundary dispute did the lower court want the Land Registrar to determine under Section 18 of the [Land Registration Act](#) 2012 as between the Appellant and the Respondent? There was none. The Appellant’s complaint was over an encroachment of his property by a building that the Respondent claimed to belong to him. The dispute was not over a boundary



of two or more parcels of land. None of the parties raised a boundary dispute before the lower court. None of the parties called upon the court to decline jurisdiction.

19. What the lower court was called to determine was whether the building that the Appellant claimed to have overlapped on the suit property had indeed overlapped as claimed and if so, whether the building belonged to or was put up by the Respondent. The burden of proof was upon the Appellant and he had put evidence before the court on the basis of which the court could say whether he had proved his case or not against the Respondent. This was a pure case of trespass which the Land Registrar had no jurisdiction to determine.

Conclusion

20. For the foregoing reasons, it is my finding that the lower court erred when it failed to determine the dispute that was before it and referred it to the Land Registrar for determination. I find merit in the Appellant's appeal. The appeal is allowed. The judgment of the lower court delivered on 26th January 2023 is set aside in its entirety. The lower court costs if already paid to the Respondent shall be refunded forthwith to the Appellant. The lower court suit shall be heard a fresh at Nyando Law Court before another Magistrate who shall determine the issues that I have highlighted in this judgment. The Appellant shall have the costs of the Appeal. The Deputy Registrar of this court shall return the lower court file to Nyando Law Courts together with a certified copy of this judgment.

DELIVERED AND DATED AT KISUMU ON THIS 11TH DAY OF JULY 2024

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Ochieng h/b for Mr. Obiero for the Appellant

Mr. Odaa for the Respondent

Ms. J. Omondi-Court Assistant

