



REPUBLIC OF KENYA



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**Orwa v Odoyo & 2 others (Environment and Land Appeal E035 of 2023)
[2024] KEELC 6836 (KLR) (16 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6836 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E035 OF 2023
GMA ONGONDO, J
OCTOBER 16, 2024**

BETWEEN

PATRICK MIDENYI ORWA APPELLANT

AND

PAULVET OKEYO ODOYO 1ST RESPONDENT

JAMES ODONGO OLEL 2ND RESPONDENT

THE HON ATTORNEY GENERAL 3RD RESPONDENT

*(An appeal arising from the judgment in Mbita Principal Magistrate's Court
Environment and Land Case number 2 of 2019 by Hon. N. Moseti, PM on 7th June 2023)*

JUDGMENT

1. The instant appeal radiates from the judgment of the trial court (Hon. N. Moseti (PM) rendered on 7th June 2023 in favour of the plaintiff (the 1st respondent herein) thus;
 - a. An order is hereby issued to the County Land Registrar and District Land Surveyor Mbita to resurvey Land parcel No. Kasgunga/Kamreri/5393 measuring 8.09 Ha (the suit land herein) and place fresh beacons distinguishing the boundary between the said land with Land parcel No. Kasgunga/Kamreri/3848 (I think the trial court meant Land parcel No. Kasgunga/Kamreri/3484, the other parcel of land herein).
 - b. An order issued directing the 1st and 2nd defendants to vacate any portion of the suit land within 30 days from the date of ascertaining of boundary aforesaid in (a) above failing to which the plaintiff shall be at liberty to move the court to have the defendants evicted.



- c. An order of permanent injunction is hereby issued restraining the defendants to carry out any further developments and/or any destructive activities in the suit land averse to the plaintiff's rights and interest.
 - d. The plaintiff is awarded costs and interest of this suit.
2. The appellant was dissatisfied at the judgment hence, through P. D. Onyango and Company Advocates, lodged the appeal by way of memorandum of appeal dated 29th June 2023 based on eleven grounds including;
 - a. That the Learned trial magistrate erred in law and fact by hearing and making a determination on the matter when the court did not have jurisdiction.
 - b. That the Learned trial magistrate erred in law and fact by failing to find that the dispute between the suit land and the other parcel of land was a boundary dispute and could not be determined by the court at the first instance.
 - c. That the Learned trial magistrate erred in law and fact by shifting the burden of proof to the appellant which was against the known principles of law.
 - d. That the Learned trial magistrate erred in law and fact by making a finding that the acquisition of an extra 10.9 Ha in respect of the other parcel of land was irregular and illegal and therefore null and void when there was no evidence to support the finding.
 - e. That the Learned trial magistrate erred in law and fact by making a finding that the acquisition of an extra 10.9 Ha in respect of the other parcel of land was irregular and illegal and therefore null and void when there was no such prayer in the plaint.
 3. The 1st respondent's counsel, G. S. Okoth and Company Advocates, filed a supplementary record of appeal dated 14th March 2024 and attached thereto a Survey Report dated 22nd September 2020, Survey Maps for Map Sheet Numbers 14 and 18 for the years 2009, 2018 and 2020 as well as well as an aerial map.
 4. The appeal was heard by written submissions pursuant to this court's directions issued on 8th April 2024
 5. By the submissions dated 24th May 2024, P D Onyango learned counsel for the appellant submitted that the trial court lacked jurisdiction to deal with the matter in the first instance, since it is a boundary dispute. That the respondent did not prove that the appellant had trespassed onto his land. That although the 1st respondent was alleging fraud as against the appellant, the same was not proven. To fortify the submissions, reliance was placed on various authoritative pronouncements including the case of *Kenya Broadcasting Corporation v Housing Finance Company of Kenya Limited and 2 others* (2019) eKLR.
 6. The 1st respondent through G S Okoth and Company Advocates, filed submissions dated 15th June 2024 making reference to the eleven grounds of appeal and identified issues for determination including whether the dispute relates to boundary and whether this court has jurisdiction over the same. As regards grounds 1 and 2 of appeal, counsel submitted that there was no boundary issue which was not raised at the earliest opportunity at the trial court. Further, reference was made to Section 18 (2) of the *Land Registration Act* 2016 (2012) and *Black's Dictionary* 9th Edition at page 21 on the definition of the term 'Boundary' as well as going by the parties' respective pleadings at pages 26 to 134 of the Record of Appeal, Land Adjudication Appeal 101 of 1994 that the appellant claimed two acres over plot 949, the respondents' submissions dated 20th March 2023 in the trial court duly adopted



- by the respondents and the sub county surveyor's report dated 22nd September 2020 captured in the record of appeal at pages 123 to 125 of the record of appeal.
7. On grounds 3, 4, 8, 9, 10 and 11 of appeal, counsel submitted that the District Commissioner awarded the appellant 11.30 hectares without proper explanation. That title deed was issued to the appellant by the Land Registry for 11.36 hectares. Later, title issued to the appellant showed 22.2 hectares. In the circumstances, the unilateral enlargement of the land in favour of the appellant is not proved as provided for under Section 107 of the Evidence Act Chapter 80 Laws of Kenya. That thus, title deed issued to the appellant is void as stated in Section 26 of the Land Registration Act 2016 (2012).
 8. Concerning grounds 5, 6 and 7 of appeal, counsel referred to Articles 60 to 72 of the Constitution of Kenya 2010 and that the acquisition of the land of 22.2 hectares was illegal or through corruption. That the trial court was correct in making a finding that 10.9 hectares was acquired irregularly and illegally hence null and void. That therefore, the appeal be dismissed with costs to the 1st respondent.
 9. It is important to note that the instant appeal being the first one from the trial court, I have the jurisdiction to review the evidence of the trial court in order to determine whether the conclusion originally reached upon that evidence should stand. However, this is a jurisdiction which should be exercised with caution; see *Peters- v-Sunday Post* (1958) EA 424 at 429.
 10. At the trial court, the suit was instituted by the 1st respondent by way of an amended plaint dated 1st November 2021 for;
 - a. An order that a survey be done to mark the exact boundary of the suit land.
 - b. An order do issue directing the appellant and the 2nd respondent to vacate any portion of the 1st respondent's suit land that any of them occupies within 30 days from the date of the order failing which an eviction order do issue to remove them forcefully.
 - c. An order of permanent injunction restraining the appellant and the 2nd respondent by themselves, their employees, servants and or anybody deriving title or authority from them or any one of them, from entering into, cultivating or erecting any building thereon, or in any other way dealing with the said portion of the 1st respondent's said land adverse to the 1st respondent's title, rights and interest therein.
 - d. Costs of this suit and interest thereon at the rate of 14% per annum from the date of judgment to the date of payment in full.
 - e. Any further or other alternative relief as this Honourable Court deems fit to grant.
 11. In his testimony, Paulvet Okeyo Odoyo (PW1), relied on his amended witness statement dated 1st September 2021, which was adopted as part of his evidence in chief. He also relied on his list of documents dated 9th January 2019 (PExhibits 1 to 7) and a further list of documents dated 29th May 2021 which were adopted as PExhibits 8 to 23 respectively. During cross-examination, he stated that the appellant moved onto his land in 2018.
 12. PW2, Raphael Manyaki Nyapar, relied on his witness statement dated 4th September 2021, which was adopted as his evidence in chief. On cross-examination, he stated that the initial owner of the suit land was one Ongaro. That the appellant was awarded 2 acres thereof and the 1st respondent also purchased a portion.
 13. The claim was opposed by the 1st and 2nd defendants by way of a statement of defence dated 28th February 2022. They urged the Court to dismiss the suit with costs to the 1st and 2nd defendants.



14. DW1, Patrick Midenyi Orwa, the appellant herein, relied on his statement on record, which was adopted as part of his evidence. He testified, inter alia, that he owns the other parcel of land. That he began staying thereon in 1979. In cross-examination, he stated that the dispute had previously been determined by an appeal before the Minister. That although the letter from the Minister states that his land, the other parcel of land, measures 11.30 Ha in area, his title deed indicates the acreage as 22.20 Ha. He urged the court to consider the title deed as valid.
15. In the foregone, the issues for determination are as set out on the grounds of appeal which crystallize to:
- a. Whether the dispute between the suit land and the other parcel of land was a boundary dispute and could not be determined by the court at the first instance.
 - b. Whether the instant appeal is tenable.
 - c. Appropriate and just orders to issue herein.
16. It is noteworthy that the learned trial magistrate set out the parties' respective cases, identified two issues for determination, analysed them and arrived at his decision based on reasons. So, the impugned judgment was in line with Order 21 Rule 4 of the *Civil Procedure Rules, 2010*.
17. In the impugned judgment, the learned trial magistrate noted that PW1 owns the suit land. That DW1 lodged an appeal case No. 10/194 to the Minister in respect to the suit land and the other parcel of land, which was determined, vide a letter dated 17th April 2013 (PExhibit 8), that DW1's Land Parcel No. Kasungu/Kamreri/3484 measured 11.30 Ha in area. That decision was not challenged in court. The Learned trial magistrate noted that:
- “...It is a mystery how the defendant's (appellant's) land increased from 11.30 to 22.2 hectares...”
18. So, did the trial court have jurisdiction to determine the dispute between the parties in the first instance? Did the same constitute a boundary dispute?
19. In *Halsbury's Laws of England* 4th Edition Volume 9 at page 350, the term “Jurisdiction” is defined as follows;
- “The authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for decision.”
20. In *Samuel Kamau Macharia and another- v- Kenya Commercial Bank Ltd and 2 others (2012)* eKLR, the Supreme Court of the Republic of Kenya held-
- “...a court's jurisdiction flows from either *the Constitution* or legislation or both...”
21. The jurisdiction of this court is founded upon Article 162 (2) (b) of *the Constitution* of Kenya, 2010. The same is operationalized by Section 13(1) of the *Environment and Land Court Act*, 2015 (2012) and other statutory and delegated instruments.
22. In the case of *Owners of Motor Vessel “Lillian S” – v- Caltex Oil (K) Ltd* (1989) KLR 1, the Court of Appeal held-
- “...Jurisdiction is everything. Without it a court has no power to take one more step.....”



23. Similarly, in *Republic- v-Karisa Chengo & 2 others* (2017) eKLR, the Supreme Court of the Republic of Kenya remarked;
- “...lack of jurisdiction renders a court’s decision void as opposed to it being merely voidable...”
24. Indeed, jurisdiction is everything as held in the case of *Owners of Motor Vessel “Lillian S” (supra)*. Therefore, it behoves this court to establish whether the trial court was properly seized of the matter before it.
25. Notably, one of the orders sought by the 1st respondent by way of the amended plaint dated 1st November 2021 was that a survey be done to mark the exact boundary of the suit land herein.
26. Furthermore, it is noted that the trial court ordered that a survey of the suit land be done. A Surveyor’s Report dated 22nd September 2020 was duly filed in court. In the said Report, the Surveyor observed that the map could not be used to correctly determine the boundary between the parties due to the amendment done on the other parcel of land. Thus, he sought the court’s direction on whether to use the present registered acreage as the basis for determining the boundary.
27. Therefore, it is my considered view that the Learned trial magistrate addressed the issue of boundary before hearing and determining the suit on its merits pursuant to Section 18 (2) of the *Land Registration Act* 2016 (2012). Thus, the trial court was properly seized of the matter and had jurisdiction to entertain the same.
28. The appellant laments that the Learned trial magistrate erred in law and fact by shifting the burden of proof to the appellant which was against the known principles of law thereby making a finding that the acquisition of an extra 10.9 Ha in respect of the other parcel of land was irregular and illegal and therefore null and void. That there was no such prayer in the plaint.
29. In that regard, this court subscribes to the decision in *Odd Jobs – v- Mubia* [1970] EA 476 where the Court of Appeal for East Africa held that a court may base its decision on an unpleaded issue, if it appears from the course followed at the trial that the issue has been left to the court for decision; see also *Vyas Industries – v- Diocese of Meru* [1982] KLR 114, among other authoritative pronouncements.
30. Besides, from the evidence on record, there was enhancement of the other parcel of land. It is not clear how the appellant acquired the extra 10.9 Ha in respect of that other parcel of land.
31. Section 26 (1) of the *Land Registration Act*, 2016 (2012) stipulates that:
- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. (Emphasis added)



32. Further, I subscribe to the Court of Appeal’s decision in *Munyu Maina – v- Hiram Gathiba Maina* (2013) eKLR, where it was stated thus:

“We have stated that when a registered proprietor of title is challenged, it is not sufficient to dangle the instrument of instrument as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.” (Emphasis supplied)

33. I endorse the sentiments of my brother Munyao J. in *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* [2015] eKLR, where he stated in part that:

“...It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme...Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part...” (Emphasis laid)

34. In the premises, it is my considered view that the learned trial magistrate was guided by the evidence on record and applied correct principles of law in reaching the impugned judgment. There is no reason to disturb his reasoned judgment and I affirm the same.

35. To that end, I find that the grounds of appeal are untenable.

36. Wherefore, the instant appeal originated by way of a memorandum of appeal dated 29th June 2023 is devoid of merit. The same is hereby dismissed with costs to the 1st respondent.

37. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 16TH DAY OF OCTOBER 2024

G. M. A ONGONDO

JUDGE

Present

Mr. P. D. Onyango, Learned Counsel for the appellant

Ms. P. Odhiambo holding brief for G. S. Okoth, Learned Counsel for the 1st respondent

Appellant

1st respondent

Luanga, Court Assistant

