



REPUBLIC OF KENYA



**KENYA LAW**  
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**Misasa v Ouma (Land Case Appeal E26 of 2022)  
[2023] KEELC 16200 (KLR) (7 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16200 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
LAND CASE APPEAL E26 OF 2022  
GMA ONGONDO, J  
MARCH 7, 2023**

**BETWEEN**

**YASHON OGWENO MISASA ..... APPELLANT**

**AND**

**HARRISON OTIENO OUMA ..... RESPONDENT**

*(An appeal from the judgment of Hon. Nicodemus N. Moseki (SRM, now PM) in Mbita SRM's Court Land and Environment case number 7 of 2016 rendered on 6th July 2022)*

**JUDGMENT**

1. This appeal was ignited by the judgment of the trial court (N. Moseki, PM) where the learned magistrate reasoned in part;

“There is no evidence to show that the plaintiff engaged the Land Registrar who had initial jurisdiction to determine this matter before filing this suit. Consequently, I hereby find that this court lacks jurisdiction to determine this suit since the herein was filed prematurely without having exhausted the mechanisms provided by law.

On the second issue, having found that this court lacks jurisdiction to hear this matter, I order that this suit be and is hereby dismissed with costs to the defendant.”

2. The appeal being the first one from the trial court, I am obliged to revisit the evidence on record, evaluate it and reach my own conclusion. However, it must be borne in mind that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they are founded on no evidence at all, or on a misapprehension of it, or the court is shown demonstrably to have acted on wrong principles in reaching the findings; see *Mwanasokoni v Kenya Bus Services Limited* [1982-880] 1KAR 278.



3. At the trial court, the appellant who was the plaintiff alleged that the respondent/defendant unlawfully entered into the suit land reference number Rusinga/Kaswanga-Wanyama/54 on diverse dates since 2013. He claimed that respondent started fencing the suit land and constructing a building thereon. Therefore, he sought; a to d
4. By a statement of defence dated October 5, 2016, the respondent denied the appellant's claim and prayed that the suit be dismissed with costs to the respondent. At paragraphs 7 and 8 of the defence, he raised a preliminary objection on jurisdiction of the trial court over the suit.
5. By consent of the parties, the trial court recorded the following orders on the respective dates;
  - a. On March 14, 2018 that Land Surveyor, Mbita was to determine the boundaries of the suit land and the other land reference number Rusinga/Kaswanga-Wanyama/35.
  - b. On November 7, 2018, that the Land Registrar Homa Bay County included in the boundary determination exercise.
  - c. On September 4, 2019, the matter was referred to mediation before the Mediation Registrar at Kisumu for further orders on September 25, 2019.
  - d. On October 14, 2020 that the hearing of the suit at the suit land on December 9, 2020 in the presence of the County Surveyor and Land Registrar.
6. In his evidence, PW1 relied on his statement dated May 26, 2016 that the suit land borders the other land. PW2 and PW3 in their respective statements dated March 9, 2016, referred to the other land. PW4 Charles Bosire Mombinya, a surveyor based at Mbita relied upon his report (PExhibit 7) that owners of the suit land two other parcels of land should apply to the Land Registrar for road opening and boundary identification.
7. The Respondent (DW1) relied on his statement dated March 2, 2018 and DExhibits 3 and 4 in his testimony that the Land Registrar determined the access road among the parcels of land adjacent to the suit land. DW2 and DW3 relied on their respective statements dated March 2, 2018 herein.
8. One Patrick Opiyo Odero, a Land surveyor (DW4) told the court in part that a map is not an authority on boundaries. He relied on his report (DExhibit 5) in the matter.
9. On that score, the trial court reached the findings as stated at paragraph 1 hereinabove.
10. Being aggrieved by the trial court's judgment and through the firm of G.S Okoth and Company Advocates, the appellant originated the appeal by way of a memorandum of appeal dated and filed herein on.....founded upon the grounds infra;
  - a. The Learned trial Magistrate misdirected himself on several matters of law and fact, in that:
    - i. He proceeded to hear the case and take evidence from witness when he had no jurisdiction to hear the case having decided that the dispute was a boundary dispute.
    - ii. He failed to stay the proceedings until the boundary issue was decided if that all he felt that the same was a boundary dispute.
  - b. The Learned trial Magistrate erred in law of evidence in finding that the instant suit is a boundary dispute whereas the issue of boundary between Land Parcel No. Rusinga/Kaswanga/Wanyama/35 and Land Parcel Nos. Rusinga/Kaswanga /Wanyama/42 to 59 had been resolved by the Land Registrar and Surveyor in the year 2014 and which evidence was on record.



- c. The Learned trial Magistrate erred in law if evidence in deciding the case against the weight of evidence in failing to note that the evidence of the plaintiff and his witness, more particularly PW4, Charles Bosire, the surveyor established a clear case of trespass since the boundary separating the two parcels was a public road earlier fixed in 2014.
  - d. Alternatively, the Learned trial Magistrate erred in law in dismissing the suit instead of striking out the suit for want of jurisdiction so that the recommendations of the surveyor can be implemented first and thereafter a suit for the trespass can be purchased.
11. On that basis, the appellant prays to quash the decision of the trial Magistrate, set aside and/or vary the order and allow the appeal with costs.
  12. The appeal was admitted on October 5, 2022. The same was heard by way of written submissions pursuant to this court's orders and directions of November 15, 2022.
  13. By the submissions January 20, 2023 and filed on January 24, 2023, learned counsel for the appellant made reference to sections 18 (2) and 19 (2) of the Land Registration Act, 2016 (2012) and DExhibit 5, among others. That the appellant and the respondent do not share a common land boundary. So, counsel implored the court to allow the appeal with cost to the appellant.
  14. In his submissions dated February 14, 2023 and filed on February 15, 2023, the respondent through the firm of Rodi Orege and Company Advocates set out in brief the facts of the case and that suit land and the other land are adjacent to each other. Counsel cited, inter alia, Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd and 2 others [2012] eKLR and Independent Electoral and Boundaries Commission and another v Stephen Mutinda Mule & 3 others [2014] KLR and urged the court to dismiss the appeal with costs to the respondent.
  15. In the foregone, the key issues for determination are premised upon the grounds of appeal which hereby crystallize to whether
    - a. The trial court was seized of jurisdiction to entertain the suit.
    - b. The appellant deserves the orders sought in the memorandum of appeal.
  16. As pertains to the first issue, Halsbury's Laws of England (4<sup>th</sup> Edition) Volume 9 at page 350, defines the term "Jurisdiction" thus;
 

".....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....."
  17. The appellant alleged that the respondent unlawfully entered the suit land as stated in paragraphs 3 and 4 of the plaint. He sought eviction of the respondent from the suit land as per prayer (a) therein.
  18. In his response to the appellant's claim, the respondent raised a preliminary objection to the suit on a point of law to wit jurisdiction as stated in paragraph 4 hereinabove.
  19. Notably, the trial court set out the parties' respective pleadings, evidence of witnesses (PW1 to PW4 DW1 and DW2) as well as framed two issues for determination including whether the trial court had jurisdiction over the suit and discussed them before arriving at the impugned judgment based on reasons; see order 21 rule 4 of the Civil Procedure Rules, 2010.



20. In the case of *Owners of Motor Vessel Lilian "S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1, the Court of Appeal observed in part;

“Jurisdiction is everything. Without it, a court has no power to take one more step.”

21. During cross examination, PW4 stated that he did not measure the extent of encroachment of the appellant’s fence put up by the appellant in the suit land. That the map is not an authority on boundaries.

22. DW1 testified that the Land Registrar determined the access road as stated in paragraph 7 hereinabove. However, there is no report to demonstrate any determination of the boundaries of the suit land and the other land herein as stipulated under section 18 (2) (supra).

23. In reaching the impugned judgment, the learned magistrate observed as follows;

“...It is apparent from the surveyor’s report that was generated by PW4 by an order of this court as well as DEXH 5 that the dispute between the plaintiff and the defendant resolves around a boundary dispute between Land Parcel Numbers Rusinga/Kaswanga/Wanyama/35 and Rusinga/Kaswanga/Wanyama/54...”

24. Section 18 (2) of the *LRA*, 2016 [2012] reads;

“The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section”

25. It is settled that a court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law; see of *Samwel Kamau Macharia* case (supra).

26. In the case of *Speaker of the National Assembly v James Njenga Karume* (1992) eKLR, the Court of Appeal noted that where there is a clear procedure for the redress of a particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. That is the position in the instant circumstances where section 18 (2) (Supra) is applicable.

27. In conclusion, it is this court’s finding that the learned trial magistrate correctly held that he had no jurisdiction to entertain the suit. So, I proceed to uphold his finding hence the orders herein are not available to the appellant.

28. A fortiori, this appeal is untenable and the same is hereby dismissed with costs to the respondent.

29. It is so ordered.

**DATED AND DELIVERED AT HOMA BAY THIS 7<sup>TH</sup> DAY OF MARCH 2023.**

**G.M. A ONG’ONDO**

**JUDGE**

**PRESENT**

1. Ms P. Odhiambo instructed by Mr. G.S Okoth, learned counsel for the appellant

2. Fiona, court assistant

