



**Levis v Ongor & 7 others (Environment and Land Appeal E001 of 2023)
[2023] KEELC 20698 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20698 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E001 OF 2023
AY KOROSS, J
OCTOBER 12, 2023**

BETWEEN

MIDURI OTIENO LEVIS APPELLANT

AND

JOHN OCHIENG ONGOR 1ST RESPONDENT

GEORGE OGWINDI OGANGA 2ND RESPONDENT

DOROTHY ADHIAMBO AYOO 3RD RESPONDENT

MICHEAL OKELLO JUMA 4TH RESPONDENT

WILSON OTIENO ONYANGO 5TH RESPONDENT

VITALIS ODONGO MBEKA 6TH RESPONDENT

SIAYA COUNTY SURVEYOR 7TH RESPONDENT

BONDO SUBCOUNTY LAND REGISTRAR 8TH RESPONDENT

*(Being an appeal from the judgment of PM Magistrate Hon. J. P. Nandi
given on 17/11/2022 in Bondo PM ELC Case Number E9 of 2019)*

JUDGMENT

Background to the appeal

1. The background to the dispute giving rise to this appeal, as expressed in the pleadings may briefly be stated as thus: by a plaint dated 28/02/2019 and amended on 10/08/2020, the appellant sued the respondents stating that he was the registered proprietor of land parcel no. South Sakwa/ Barkowino/2458 measuring 1 Ha (hereinafter referred to as ‘the suit property’).



2. It was the appellant's assertion that in 2018, he discovered the respondents had to his disadvantage encroached onto the suit property at various points and had developed permanent structures on it.
3. The appellant brought this to the attention of the respondents, but they failed to vacate the said portions. The matter was also raised with the area chief Bondo, the District Land Surveyor, Bondo Sub county Surveyor and the Lands office Bondo for them to confirm the actual boundaries and restore them; to no avail.
4. The appellant also claimed the 6th respondent had subdivided his land, procured illegal amendments to the map sheet, conducted illegal resurveys, interfered with the appellant's boundaries and in concert with the 1st respondent, transferred the suit property to the 3rd and 4th respondents.
5. In regard to the 7th and 8th respondents, the appellant alleged they had carried out a resurvey of the suit property without his consent, registered a fraudulent transaction on behalf of the respondents under amendment 56 in the map sheet, illegally increased the acreage of the 6th respondent's parcel of land to facilitate the fraud and concealed the fraud and illegal transaction.
6. The appellant prayed for (a) eviction, (b) restoration of boundaries in accordance with the 1st - 55th edition map, (c) revocation of the illegally acquired title nos. 6140, 6141 and 6142 which were fraudulently excised from the suit property, (d) a permanent injunction, (e) general damages for trespass, (f) mesne profits and, (g) costs and interest of the suit.
7. The 1st-5th respondents filed an undated statement of defence and counterclaim which was amended on 13/01/2021 wherein they denied the averments made in the amended plaint, put the appellant to strict proof and stated that they were the bona fide purchasers of various land parcels and had built on their respective parcels of land. In their counterclaim, they sought special damages of Ksh 96,700/- against the appellant.
8. The 5th respondent died in the course of the trial court proceedings. From the record, it is uncertain who substituted him. There was a consent order which was adopted by the court on 28/01/2022.
9. The 6th respondent who was acting in person filed his defence dated 25/09/2020. He denied the averments made in the plaint, put the appellant to strict proof and stated if any survey was done, it was done without his consent. The 7th and 8th respondents did not participate in the proceedings.
10. The appellant's case was heard and closed. The dispute between the appellant and 5th respondent had been settled whilst the other respondents failed to attend court on the hearing date.
11. In its judgment, the trial court found that even if the appellant's case was uncontroverted, he was required to prove his case to the required standard; which he had failed to discharge. It found it did not have jurisdiction to meddle into boundary disputes. Ultimately, the appellant's claim and the 1st to 5th respondents' counterclaim were dismissed with no orders as to costs.

Appeal to this court

12. Dissatisfied with the trial court's judgment, the appellant preferred an appeal on several grounds. He abandoned some of his grounds of appeal and consolidated others. They can succinctly be summarised as follows: -
 - a. The trial court erred in law in disregarding the consent between the plaintiff and 5th appellant.



- b. The trial court erred in law in departing from precedent by finding the appellant had to prove his case despite his suit being undefended.
 - c. The trial court misdirected itself by disregarding the appellant pleaded against South Sakwa/Barkowino 6140, 6141 and 6142 and erred in disregarding a survey report which established a change of the suit property's boundary.
 - d. The trial court disregarded its order issued on 9/04/2020 directing the Bondo District Surveyor to conduct a survey and failed to appreciate the 7th and 8th respondents had failed to discharge their mandate in accordance with Sections 18 and 19 of the *Land Registration Act*.
 - e. The trial court erred in law and fact by failing to award the appellant general damages for trespass.
13. The appellant prayed for the appeal to be allowed, judgment and decree be set aside, the court do direct a survey be conducted by the Bondo District Registrar and Bondo District Surveyor and establish measurements before and after the illegal survey/change in boundary and tender a report, a retrial be conducted based on the findings of the report and costs of the appeal. The appeal was disposed of by written submissions. The 5th respondent did not participate in these proceedings.

Appellant's submissions.

14. Mr Lawi Ogutu, his counsel, filed his written submissions dated 29/05/ 2022. The year's dating is erroneous; it was obviously 2023. On the 1st ground, counsel submitted the trial court disregarded the consent between the appellant and 5th respondent; the consent partially proved the appellant's case.
15. On the 2nd ground, counsel submitted because the respondents except the 5th respondent had failed to tender evidence, it followed that the appellant had proved his claim. He relied on the persuasive decision of Janet Kaphiphe Ouma & Another v. Marie Stopes International (Kenya) HCCC No. 68 of 2007 where the court stated: -

“The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Section 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence.”

16. On the 3rd ground, counsel submitted the appellant's amended plaint sought revocation of title nos. South Sakwa/Barkowino/6140, 6141 and 6142. It was counsel's submission that the 3rd, 4th and 6th respondents' titles were under challenge because they had acquired them fraudulently, by misrepresentation, illegally, unprocedurally or through a corrupt scheme.
17. According to counsel, the appellant had produced greencards and mutation forms which demonstrated the suit property had been illegally hived off to create new parcel nos. and an access road. Counsel cited the Court of Appeal case of Vijay Morjaria vs. Nansingh Madhusingh Darbar & another [2000] eKLR which stated: -

“It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”



18. On the 4th ground, counsel submitted the appellant had prior to filing suit, made efforts to resolve the dispute in accordance with Section 18 and 19 of the [Land Registration Act](#) to no avail. Counsel blamed the trial court for not citing the 7th and 8th respondents for contempt of court for failing to file a report. Counsel urged the court to order a resurvey.
19. On the 5th ground, counsel submitted the appellant should have been awarded general damages. To this end, counsel cited Viewpark Towers Limited vs. John Mithamo Njika & 7 others [2014] eKLR where the court held that where trespass was proved, a party was entitled to nominal damages.

1st-4th respondents' submissions

20. Their counsel, Mr Rakewa, filed written submissions dated 12/06/2023. On the 1st ground, counsel submitted the consent was unconscionable, unduly influenced and the trial court could not enforce a nullity.
21. On the 2nd ground, counsel concurred with the trial court and asserted the trial court did not depart from precedent. Counsel asserted even if the suit was undefended, the appellant was called upon to discharge the burden of prove to the required standards.
22. On the 3rd ground and in concurring with the trial court, counsel submitted the appellant did not prove his case and therefore, his prayer for revocation of titles could not stand.
23. On the 4th ground, counsel submitted onus was on the appellant to tender the survey report and nothing could have been easier than for him to cite the 7th and 8th respondents for contempt of court if at all they had disobeyed a court order.
24. It was counsel's submission the appellant had introduced new evidence on appeal by seeking an order that a survey exercise be conducted. On the 5th ground, counsel submitted in the absence of proving trespass, the appellant was not entitled to damages.

7th and 8th respondents' submissions

25. They were represented by the Office of the Attorney General (AG) which filed its written submissions dated 12/06/2023. It did not address itself on the grounds of appeal but framed two issues for determination; (a) the implication of non-service of summons, and (b) whether the trial court had jurisdiction to entertain the suit.
26. On the 1st issue, counsel submitted that contrary to the provisions of Order 5 of the Civil Procedure Rules and more specifically Order 5 Rule 9 (4), the 7th and 8th respondents had not been served with pleadings and proceedings should be set aside. Counsel outlined the import of service by citing the case of Patrick Omondi Opiyo T/A Dallas Pub vs. Shaban Keah & another [2018] eKLR where it was stated:

“service of summons accords the sued party the opportunity to be heard before any orders are issued against him/her. That is the essence of the rules of natural justice which all legal systems applaud.”



27. On the 2nd issue, counsel submitted the trial court was bereft of jurisdiction to entertain a boundary dispute and relied on *Azzuri Properties vs. Pink Properties Limited* [2018] eKLR where the Court of Appeal held: -

“From this analysis of the law, it should be clear from the above that, we are in agreement with the learned Judge’s conclusion that the dispute ought to have been heard by the Land Registrar as stated in the statute. Jurisdiction is everything.”

28. Counsel submitted that in the interests of justice, a retrial should suffice and a survey report would ultimately resolve the dispute to conclusion.

Analysis and determination

29. As this is a 1st appeal, it is my duty to analyse and reassess the evidence on record and reach my own conclusions in the matter but giving allowance I did not hear the parties. See *Selle -vs- Associated Motor Boat Co.* [1968] EA 123.

30. Having evaluated the grounds of appeal and submissions, this court has noted the appellant and respondents have introduced new evidence on appeal without leave.

31. The plea that a resurvey be conducted on the suit property, non- sustainability of the consent order between the appellant and 5th respondent and non-service of pleadings upon the 7th and 8th respondents were never pleaded, canvassed, raised or succinctly made an issue before the trial to enable the trial court exercise its mind upon them. For these reasons, these lines of arguments will be disregarded. I place reliance on the Court of Appeal decision of *Kenya Hotels Ltd vs. Oriental Commercial Bank Ltd* (Formerly known as *The Delphis Bank Limited*) [2019] eKLR which stated: -

“As this Court in *Republic V. Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others Ex-Parte Tom Mbaluto* [2018] eKLR emphasised, submissions must be founded on the issues before the court and the evidence on record regarding the issue. A party is not at liberty to change the nature of his case surreptitiously at the submissions stage. I may add that the philosophy behind the appellate system, which save in exceptional cases, restricts the appellate court to consider only those issues that were canvassed before (and perhaps determined) by the trial court. See *North Staffordshire Railway Co. V. Edge* [1920] AC 254). Of course if a matter is raised at the trial and the trial court does not determine it, it may be made the subject of an appeal.”

32. I will now sequentially determine the grounds of appeal.

33. Before the trial court, Mr. Lawi Ogutu and M/s. Ombuya Owenga & Co. Advocates’ who appeared for the estate of the 5th respondent entered a consent on the following terms: -

- “1. That the legal representative of the Estate of Wilson Otieno Onyango the 5th defendant herein concede to the plaintiff’s claim for an order for restoration of the plaintiffs (sic) boundaries as they appeared and measured in the 1st edition map to the 55th edition before the illegal interference of his boundary vide amendment 56 depicted in all maps subsequent to the 56th edition.
2. That the said legal representatives offers (sic) an alternative parcel of land known as South Sakwa Sakwa Barkowino/4942 being compensation equivalent to the portion of the suit parcel encroached by their late husband.



3. That the court administrator to aid in the registration of the parcel South Sakwa Sakwa/Barkowino/4942 to the plaintiff.
 4. That this consent to discharge the Legal representation (sic) from any costs or liability in the instant suit.
 5. That this consent be adopted as the order of the court.”
34. The said consent was presented to the trial court on 28/11/2022 and on the instant date it was adopted as an order of the court. The consent order has not been reviewed or set aside. The import of the consent was that it settled the dispute between the appellant and 5th respondent.
35. It appears by oversight, the trial court did not consider the consent in rendering the impugned judgment. It proceeded as though the appellant’s claim and the 5th respondents defence and counterclaim were still subsisting. It is my finding this ground of appeal succeeds.
36. Both Mr.Lawi Ogutu and Mr. Rakewa were in agreement the trial court did not err when it found in the absence of the 1st to 4th respondents’ testimony, their pleadings remained mere statements and the appellant’s evidence was uncontroverted and unchallenged. Indeed, that is the position of law and the trial court did not err.
37. The point of departure between the two counsels was that Mr. Lawi Ogutu contended the appellant was not required to prove his case and therefore the trial court erred in finding the appellant was called upon to discharge the burden of proof while Mr. Rakewa acceded to the trial court’s findings; the appellant was still under a duty to prove his case to the required standards.
38. What is the position of law? It is trite law he who alleges proves. This settled principle of law is lent credence by Sections 107, 108, 109 and 110 of the Evidence Act more particularly Section 107 which provides as follows: -
- “ 107.
- (1) 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.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
39. I am in consonance with Mr. Rakewa that the trial court did not err. The decisions that were relied upon by the trial court did not display it departed from judicial precedents. In fact, the decision of Janet Kaphiphe Ouma & Another v. Marie Stopes International (Kenya) (Supra) which was relied upon by the appellant’s counsel to augment his position was also cited with approval by the trial court. I need not say more, this ground fails.
40. By the provisions of Order 2 rule 4 (1) of the Civil Procedure Rules, fraud has to be specifically pleaded. In its judgment, the trial court stated the appellant had not pleaded land parcels no. 6140, 6141 and 6142 were excised from the suit property and that the appellant had only sought prayers on their fraudulent excision. Further, the trial court stated the size of the suit property had never been reduced in the register.



41. The appellant's claim was on among others fraud and illegality. He made several allegations against the respondents. Of significance was his claim against the 6th respondent where he pleaded as follows in paragraph 16 of his plaint: -
- “(i) Procuring and effecting illegal and fraudulent amendments in the map sheet vide amendment 56 as depicted in various maps after the 55th amendment.
 - (j) Fraudulently and jointly with the 1st defendant transferred the plaintiff's illegal acquired land to the names of the 3rd and 4th defendants.”
42. He went on to plead as follows against the 7th and 8th respondents under paragraph 16 of his plaint: -
- “(m) illegally registering an illegally obtained increased acreage on the 6th defendants land to facilitate fraud.”
43. In his evidence, he stated as follows: -
- “I sought for Vitalis Odongo Mbeka's greencard for parcel 5235 and its subsequent mutation form...the said parcel was of acreage 0.7 Ha the mutation form is serialized as 03962572...this was the mutation/transaction/resurvey that birthed the fraud claims...(i) the parcel 5235 under mutation/subdivision yielded parcels 6140, 6141, 6142 and an illegal access road with respective acreages of
44. The appellant pleaded fraud and illegality against the respondents more specifically the 6th, 7th and 8th respondents for fraudulently and illegally amending the map and resurveying the suit property and causing it to be transferred in favour of the 3rd and 4th respondents.
45. It was on that basis that the appellant challenged the 3rd, 4th and 6th respondent's title documents which were respectively land parcels nos. 6141, 6142 and 6140 which by Section 26 of the [Land Registration Act](#) could be challenged.
46. I have scrutinized the said mutation form that was produced as PEX. 10 which subdivided land parcel no. South Sakwa/ Barkowino 5235 and created land parcels no. 6140, 6141, and 6142 together with the access road. This parcel no. 5235 was 0.7 Ha. These subdivisions and access road were respectively 0.72, 0.19, 0.15 and 0.01 Ha thus having a total acreage of 1.07 Ha. This was obviously larger than the original parcel by 0.37 Ha. This increase in size of land parcel no. 5235 was affirmed by the surveyor's report which was produced as PEX 21.
47. In fact, the surveyor who conducted the subdivision of land parcel no. 5235 and filled the mutation form made the following remarks on it;
- “Surveyed area is more than registered area by 0.37 (Ha).
48. The mutation form was certified by the district surveyor on 10/4/2012. However, as evidenced by PEX 11, shortly before certification on 4/04/2012, the common boundary between the suit property and 5235 was amended.
49. The director of survey is empowered under Sections 15 to 17 of the [Land Registration Act](#) to allow an alteration and rectification of boundary lines or position of a boundary based on a cadastral map, subdivision plan, combination plan or any other approved plan necessitating the alteration of the boundary.



50. However, such mutilation of boundaries has to be conducted in the prescribed form, in accordance with any law relating to subdivision of land and will result in cancellation of the title nos. and new title documents with new nos. have to be issued which without doubt will reflect new acreages.
51. Did changing the boundary adhere to statutory provisions? was it fraudulently conducted? Why was the suit property's title document not cancelled? Why was the appellant not issued with a new title document with a new no. and reduced acreage? Where did the extra acreage of 0.37 Ha emanate from? The trial court did not address these pertinent issues and in my view, overlooked pertinent portions of the pleadings and evidence. I find this 3rd ground succeeds and warrants a retrial. On this basis, I need not say more on the 5th ground.
52. At the appellant's instigation, the trial court on 27/04/2020 ordered the District Surveyor to conduct a survey, determine the location and boundaries of the suit property and submit a report to court.
53. From the court record, there is no evidence the appellant ever served the District Surveyor. Even if he had served the order, there is no evidence of service on record. I agree with Mr. Rakewa that nothing could have been easier than for the appellant to cite the District Surveyor for contempt of court; which he did not.
54. Well knowing nonexistence of the report, at his own volition, he fixed the matter down for hearing. It is obnoxious and a reek of insincerity for him to turn around and blame the trial court. Did he expect the trial court which is an independent arbiter to enter into the arena of litigation and carry out the appellant's mandate of service? Nay, the appellant was the author of his own misfortune and this ground of appeal fails.
55. The appellant succeeded on some of his grounds of appeal. Important issues for determination were not considered and remained undecided. Based on the reasons given, I ultimately find that this appeal is merited. I set aside the entire judgement and decree appealed from and remit the suit for retrial. Since costs follow the event, each party shall bear their respective costs of this appeal.
56. Judgment accordingly.

DELIVERED AND DATED AT SIAYA THIS 12TH DAY OF OCTOBER 2023.

HON. A. Y. KOROSS

JUDGE

12/10/2023

Judgment delivered virtually through Microsoft Teams Video

Conferencing Platform in the Presence of:

1. Mr. Lawi Ogutu for the appellant
2. Mr. Rakewa for 1st, 2nd, 3rd and 4th respondents
3. N/A for 5th respondent
4. N/A for 6th respondent
5. N/A for 7th and 8th respondents

Court assistant: Mr. Ishmael Orwa.

