



**Wanzala v Mukhwana (Environment and Land Appeal
6 of 2019) [2022] KEELC 3171 (KLR) (8 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3171 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND APPEAL 6 OF 2019**

AA OMOLLO, J

JUNE 8, 2022

BETWEEN

BENSON WYCLIFFE WANZALA APPELLANT

AND

JARED CHIMAU MUKHWANA RESPONDENT

*(An appeal from the ruling of Hon. L. Ambasi, Chief
Magistrate at Busia in the CMC ELC No. 416 of 2012)*

JUDGMENT

1. This appeal arises from the judgment and orders made in Busia CMC ELC No. 416 of 2012 in Chief Magistrate's Court by Hon. L. Ambasi CM and delivered on 31st October 2019. The appellant who was the Defendant in the Lower Court raised the following grounds in their Memorandum of Appeal dated 20th November 2019;
 - a. The Learned Chief Magistrate erred in law and in fact in not delivering a considered judgment.
 - b. The Learned Chief Magistrate was wrong in holding that a mere mention by the Respondent that he (Respondent) had on some unspecified date in the past brought surveyors to the land, was sufficient evidence on which to make a finding that the Appellant had at any one time invaded the Respondent's land and erected structures thereon, without any document or other evidence from the local survey office to that effect.
 - c. The Learned Chief Magistrate erred in law and in fact in not finding that for the Respondent's claim to succeed against the Appellant, a formal determination of the boundaries of the two neighbouring parcels, namely Bukhayo/lupida/1760 and 1818, and consequently a specific finding by the survey office that the Appellant had actually physically entered, cultivated or occupied any part of the Respondent's title no. Bukhayo/lupida/1760, was necessary.



- d. The Learned Chief Magistrate was plainly in error when she made a finding that the Respondent had complied with Section 18 of the [Land Registration Act](#) 2012, totally ignoring the mandatory provisions of Section 18(2) of the [Act](#) which made a prior determination of a boundary by the relevant office, a precondition to the filing of any claim or proceedings in court where a boundary is in dispute.
 - e. The Learned Chief Magistrate misdirected her mind when she wrongly grounded her judgment on the concept of proof of ownership of land under Section 26(1) of the [Land Registration Act](#) 2012, in a matter where the fact of ownership of land *per se* was not in issue at all.
 - f. The judgment of the Learned Chief Magistrate was as a whole against the weight of the evidence on record and is altogether not grounded on the applicable law.
2. The Appellant prayed that the appeal be allowed and the judgment and orders made by the trial court on October 31, 2019 be set aside and in their place orders be made dismissing the Respondent’s claim in the lower court. The Appellant also asked to be granted costs of this appeal and those of the suit in the subordinate court.
 3. The hearing of the appeal was dispensed with by way of written submissions. The Appellant filed his written submissions on 27th September 2021 and submitted that the learned Chief Magistrate erred in law in ignoring the clear mandatory provisions of the law in holding that the Appellant herein had trespassed onto the Respondent’s land parcel title no. Bukhayo/lupida/1760 when the central issue for determination was a boundary dispute between the two neighbouring parcels. He relied on the following authorities; [Azzuri Limited V Pink Properties Limited](#) (2018) Eklr And [Reuben Kioko Mutyaene V Hellen Kiunga Miriti & 4 Others](#) (2021) eKLR.
 4. The Respondent filed his written submissions on 23rd November 2021 submitting that the appellant’s claim was that there was no boundary dispute between the parties but rather that he stays on his father’s land. He urged the court to uphold the trial court decision as being well founded and prayed for costs of the appeal.
 5. Since this is the first appellate court, it has a duty to analyse the evidence adduced before the trial court afresh keeping in mind it did not have the privilege of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in [Selle & another v Associated Motor Boat Co. Ltd. & others](#) (1968) EA 123 in the following terms:

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must 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 this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally ([Abdul Hammed Saif-Vs- Ali Mohamed Sholan](#) (1955), 22 E.A.C.A. 270)”
 6. I have read and considered the submissions made by the respective parties, the contents of memorandum and record of appeal together with the applicable law. The main issue for determination



is whether the dispute between the parties was of trespass as alleged by the Respondent or it remained a question of boundary encroachment. The court taking note that boundary encroachment also lead to trespass.

7. A brief background of the appeal is that the Respondent who was the plaintiff in the lower court brought a suit against the Appellant (defendant therein) seeking an order of eviction against the defendant, his agents, his servants and or any person under him from L.R. NO. Bukhayo/lupida/1760 and an order of permanent injunction against the aforesaid person in respect of the suit land therein. The Respondent claimed that the Appellant had without any lawful excuse invaded his land by putting up structures and cultivating it.
8. The Appellant filed a defence and denied the Respondent's allegations. He stated that he resides and cultivates his family land parcel no. Bukhayo/lupida/1818 and the issue therein was basically a boundary dispute which should be determined as per Section 18(2) of the [Land Registration Act](#) thus the claim therein was premature. The matter proceeded for hearing with the Respondent and Appellant relying on their sole evidence.
9. The trial court in its judgment placed reliance on the provisions of Section 26(1) of the [Land Registration Act](#) and stated that the Respondent had proved his case on a balance of probabilities that he was the owner of land Bukhayo/Lupida/1760. Further the trial magistrate stated that the respondent had testified that he had brought surveyors to the land after his father had died. She gave judgment in favour of the Respondent
10. During the pendency of the suit, the Respondent filed an application dated 7th November 2014 to have the Busia County Land Registrar and Land Surveyor visit L.R. Bukhayo/lupida/1760 and 1818 and mark the boundaries between them. The typed proceedings do not tell what happened with the said application but premised on the evidence adduced by the parties, it is apparent that the Land Registrar and Surveyor never visited the two land parcels to determine the boundary issue. By virtue of making such an application, an inference is drawn that the Respondent was aware either from his own knowledge or based on the defence filed that his parcel of land number 1760 shared a common boundary with the Appellant's land parcel number 1818.
11. The Respondent in his evidence stated that he is the registered owner of L.r. Bukhayo/lupida/1760 which according to him the Appellant had invaded and started cultivating. During cross-examination he said that the lands office visited when the defendant entered his land in 2012 but he did not call the lands people as witnesses neither did he file any report of any finding made pursuant to the said visit. The only documents produced in support of his claim was a certificate of official search for his land and death certificate of his late father. The Appellant in his evidence stated that he resides on L.R. Bukhayo/lupida/1818 and the two parcels of land share a common boundary. He further stated that the matter ought to have been referred to the Lands Department for the confirmation of the physical limits of the two neighbouring parcels. During cross-examination, he stated that his land L.R. 1818 shares a common boundary with L.R. 1760 though he did not have a map to prove. He also denied having a house on the Respondent's land. He produced a copy of title of L.r. Bukhayo/lupida/1818, copy of search certificate for L.R. 1818 and death certificate for his father David who is the registered owner.
12. The burden to prove that the Appellant had built structures on the land parcel number 1760 rested upon the Respondent. In this instance, the Respondent alleged that the Appellant had trespassed on to his parcel of land which allegation the Appellant countered that he was cultivating on his land parcel number 1818 which according to him shared a common boundary with parcel number 1760. The Respondent was required to demonstrate that the structures and cultivation were being done on 1760



and not 1818. This proof could only be by way of a survey report who is an expert in the field. No wonder the law recognised this by including the provisions of section 18 in the [Land Registration Act](#).

13. Section 18 of the [Land Registration Act](#) states as follows;

- (1)
- (2) 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.
- (3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary;

14. The above quoted section states in mandatory terms that boundary issues shall first be determined by the Land Registrar first. The Appellant who brought up the issue in paragraph 4 of his statement of defence that the dispute before the court was premature as it should have first been determined by the Land Registrar. At some point the Respondent seemed to agree that the Land Registrar should visit the suit land by filing the application dated 7th November 2014 which application was not prosecuted. From the evidence on record, it is possible that the two land parcels being L.R. 1760 and L.R. 1818 may be sharing a common boundary. There was no area map produced to ascertain this fact save for the assertions made by the Appellant. However, the Respondent did not deny this fact. Equally, the Respondent failed to offer evidence to prove that the Appellant's structures are on parcel No. 1760 and not 1818. In the absence of evidence to confirm trespass or any encroachment, the trial magistrate erred in making a finding for the Respondent based on the provisions of section 26 of the [Land Registration Act](#) when there was no challenge to ownership or validity of title Bukhayo/Lupida/1760.

15. The upshot of the foregoing is that the appeal is successful and the judgment delivered by the CM's court on 31st October 2019 is set aside and in its place an order dismissing the Respondent's suit for want of proof is made. The Appellant is awarded the costs of this appeal and cost of the suit in the subordinate court.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 8TH DAY OF JUNE 2022.

A. OMOLLO

JUDGE

