



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELCA CASE NO. 51 OF 2019**

*(consolidated with ELCA number 34 of 2019)*

**SAMUEL OKOTH OJWANG?.....APPELLANT**

**VERSUS**

**MAURICE ODHIAMBO KODIWO.....RESPONDENT**

*(Being an appeal arising from the Judgment of the learned Hon. T. M. OLANDO (SRM)*

*delivered on the 25<sup>th</sup> July, 2019 at SRMC SIAAYA ELC No. 11 of 2014)*

**JUDGEMENT**

Maurice Odhiambo Kodiwo, (*hereinafter referred to as the Respondent*) filed suit No. 11 of 2014 in the lower court against Samuel Okoth Ojwang (*hereinafter referred to as the appellant*) claiming that the registered proprietor of all that parcel of land known as **EAST/KAGILO/754** was the respondent such registration conducted on 19<sup>th</sup> December 1989 when he was registered as the legal and only proprietor of the said parcel of land.

A title deed for the suit property was thence issued to the respondent on 17<sup>th</sup> December 1991. However, the parcel of land was originally registered in the name of one Nahashon Okete and Julias Akech Odinga who are brothers and each having half share in the said suit property measuring approximately 5.2Ha. Upon the demise of Nahashon his brother Julius (deceased) who is the respondent's uncle succeeded the said suit property and thereafter transferred the same to the respondent herein above who is a nephew. The respondent put up home on the said parcel of land known as **EAST/KAGILO/754** and has been living thereon since such time as he acquired the same uninterrupted and enjoyment of peace and quiet. However, on 16<sup>th</sup> January 2014 appellant began putting up structures on the respondent's parcel which prompted him to report the matter to the Chief of Central Gem and the Assistant chief of Kagilo Sub-location. Both Government officials visited the site and advised the appellant to move out of the respondents but as parcel as soon as the two officials left the respondent continued with the constructions.

On 24<sup>th</sup> June 2014 the respondent brought the surveyor from the Saiya County Lands Office for confirmation of the boundary of his parcel and the appellant, Assistant Chief and one Village Elder were all present during the exercise. The survey results revealed that the appellant had indeed trespassed onto the respondent's parcel of land being **EAST/KAGILO/754**. The appellant did not object to the exercise on that day of the survey but two days later, he wrote a letter to the District Land Registrar opposing the work done on the suit property and served the plaintiff with a copy of the same letter but an unsigned version.

The appellant blatantly continued to put up another structure and or develop the respondents parcel of land even after his lack of ownership and confirmation of trespass was made evident to him by the boundary confirmation process.

The appellant has laid claim on the suit property yet he is well aware that he has no interest and or right attaching to the same or at all and further that he has no evidence documentary or otherwise to support his baseless claims.

The Appellant on his part denied the respondent's claim and alleged that the respondent acquired the suit parcel of land in an illegal and irregular manner. He denies having trespassed on the parcel of land **EAST/KAGILO/754**. He prayed that the suit be struck out.

When the matter was placed before the Honourable Magistrate in the Lower court for hearing on 24/4/2018 PW1, the Respondent testified that the case before court was a boundary dispute between Parcel of Land **EAST/KAGILO/754** and **EAST/KAGILO/755**. He has a title deed for **EAST/KAGILO/754** that is registered in his name whilst the appellant has title deed for **EAST/KAGILO/755** that is registered in his name. The appellant built a house on a portion of **EAST/KAGILO/754** in the year 2014. On cross examination, he states that when he

took over the land, there was no dispute. The boundary dispute was determined by the surveyor.

PW2, Jane Kairu Maina the County Surveyor Siaya testified that she visited the land twice on 12/9/2014 and 7/2/2018 and prepared a report. She established that the proprietor of 755 had encroached on **EAST/KAGILO/754** by 0.008 hectares when he constructed the houses. The survey was done in the presence of both parties. There were some boundary marks.

PW3, Beatrice Akoth adopted her statement and on cross examination she states that she reported the encroachment to the Chief.

The appellant on his part testified that parcel No. **EAST/KAGILO/ 755** belonged to Joka Obado family whilst **EAST/KAGILO/754** belonged to the Joka Odinga family. Both were members of Kamkwaya clan. That their boundaries are well known by the clan members. He adopted the statement filed on 28/11/2018 as evidence in chief.

On cross examination, he states that his land is **EAST/KAGILO/755** whilst the respondent's land is 754. He does not remember the size of his land. He was present when the court visited the land. He states that he moved out of the land number **EAST/KAGILO/ 755** because it was flooded.

DW2, Moses Agik stated that the land in dispute belonged to the Joka Obado who left it to John Ojwang Obanjo the father to the appellant. The father left the land to the appellant. On cross examination he states that where the respondent lives is in the name of Ojwang Obanjo. DW3, David Onyango Ojwang states that he is the last born son of Mzee John Ojwang Obanjo. That in the 70s and 80s their father planted sugar cane on the whole of **EAST/KAGILO/755**. The two parcels of land have marked boundaries. On cross examination by Mr. Odhiambo, he states that boundaries were drawn before he was born.

DW4, Truphena Aluoch the appellant's mother testified that she got married in June 1948 and settled in Kagilo Sub location and started cultivating **EAST/KAGILO/755**. However, she left the land fallow and grass grown on it. 755 and 754 had a marked boundary. In 2013, she cleared the land started ploughing again and that is when the dispute arose.

After considering the evidence on record and rival submissions, the Honourable Court framed 3 issues for determination. Thus:

- 1. Is the plaintiff the owner of land number EAST/KAGILO/754.**
- 2. Has the defendant entered into the plaintiff's land.**
- 3. Is the plaintiff entitled to the prayers sought.**

On the 1<sup>st</sup> issue the court found that the plaintiff was the registered owner of **EAST/KAGILO/754** as evidenced by the title deed.

On the second issue, the court found that the County Surveyor's evidence was that the appellant had encroached on the respondent's land and constructed the houses. The evidence of the County Surveyor was not controverted.

The court came to conclusion that the appellant trespassed on the Respondent's land and constructed 2 houses. He found that the respondent had proved his case on a balance of probabilities and granted:

- a) An order of permanent injunction restraining the defendant, their employees, servants and/or agents from entering or in any other manner interfering with the plaintiff's parcel No. EAST/KAGILO/754 is hereby issued.**
- b) The issue of damages was not proved**
- c) The Plaintiff also gets costs of the suit and interest.**
- d) The defendant is hereby ordered to remove his structures from the Plaintiff's land within 30 days from the date of this judgment failing which the same to be removed by the plaintiff.**

The Appellant has now lodged this appeal in this court on grounds that the Learned Magistrate failed to appreciate the evidence in the case and disregarded the written submissions. That the Learned Magistrate did not consider the fact that failure by the Land Registrar to provide a report determining the boundaries in accordance with Sections 18 (2) of Land Registration Act rendered the Judgment nugatory. Moreover, that the report of the County Surveyor alone was not enough to determine the boundary.

The Appellant prays that the appeal be allowed and the Judgment delivered on the 25/7/2019 be set aside and that the Plaintiff's case be dismissed with costs.

As a first appellate court, this court's role is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions about it, bearing in mind that It did not have the opportunity of seeing and hearing the witnesses first hand. This duty was well 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*