



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT BUSIA

ELC APPEAL NO. 004 OF 2020

JOSEPHINE OUYA OBUYA.....APPELLANT

VERSUS

WILBERFORCE MUGUBI.....RESPONDENT

(An appeal from the judgement/order made in Busia Chief Magistrate's Court by Hon. S. Temu PM delivered on 7th July 2020 in Busia CM ELC Case No. 35 of 2019)

J U D G E M E N T

1. This appeal arises from the judgement/decreed made in Busia Chief Magistrate's Court by Hon. S. Temu PM in Busia CM ELC Case No. 35 of 2019 delivered on 7th July 2020 in this suit. The Appellant raised the following grounds in their Memorandum of Appeal dated 14th July 2021;

- 1) *The Learned Magistrate erred in holding that the Respondent proved his claims of trespass on his land parcel No. SAMIA/LUCHULULO-BUKHULUNGU/2291 against the Appellant;*
- 2) *The Learned Magistrate failed to take into account the evidence of the Appellant with the documents produced which documents clearly confirmed that the Appellant's land parcel No. SAMIA/LUCHULULO-BUKHULUNGU/874 neighbours land parcel No. SAMIA/LUCHULULO-BUKHULUNGU/873 and not the Respondent's land parcel No. SAMIA/LUCHULULO-BUKHULUNGU/2291;*
- 3) *The Learned Magistrate erred in failing to order for the Surveyor's visit to the Appellant's land parcel No. SAMIA/LUCHULULO-BUKHULUNGU/874 and the Respondent's land parcel No. SAMIA/LUCHULULO-BUKHULUNGU/2291 to confirm the claim of trespass before determination of BUSIA CM ELC Case No. 35 of 2019;*
- 4) *The Learned Magistrate misapprehended the facts by failing to hold that the Appellant's land having been registered earlier could not have encroached into the Respondent's land which was later a subdivision.*

2. The Appellant urged the court to find merit in his appeal and the same be allowed with costs in this Court as well as the Trial Court and the Trial Magistrate's decision be set aside. The Record of Appeal was filed on the 13th of October, 2018 and on the 9th of February, 2021 the Court issued directions for the Appellant to follow up for the lower court file to be brought to the Court and that parties file written submissions.

3. The Appellant filed her submissions on the 5th of March, 2021 and she submitted that trial court's judgement is as a result of misdirection by the Learned Magistrate. That the SAMIA/LUCHULULO-BUKHULUNGU/398 which was subdivided into two portions; 873 and 874. The Appellant's husband bought parcel No. 874 and she still resides on the said parcel of land. She submitted further that the parcel No. 873 has been subdivided severally after the death of the owner. That the Respondent cannot therefore challenge boundaries that have been present since 1980. She concluded that the trial court erred by failing to order that a surveyor visit the suit parcels and confirm encroachment. She urged this Court to allow the appeal and the judgement of the trial Court be set aside.

4. The Respondent filed his submissions on the 27th of April, 2021. He stated that the Appellants submissions failed to deal with grounds of the appeal and only re-affirm the fact that the Appellant owns suit parcel No. 873 which fact the Respondents state is a non-issue. He submitted that land parcel 2170 was subdivided out of suit parcel 873 and the former parcel 2170 was subdivided to new number 2290 and 2291 and the Appellant cannot possibly deny the lack of existence of land parcel no. 2291. With regards to the issue of the boundary, the Respondent submitted that during the trial, Appellant had not rebutted his claim that she had encroached onto the Respondent's land and destroying known and existing boundary features and cannot therefore do that at the appeal stage. He urged this Court to dismiss the appeal

with costs as it is not merited.

5. From the pleadings and submissions before this Court I frame two issues for determination:

a) Whether the trial magistrate misdirected herself in finding that the Respondent's case was proved; and

b) Whether the appeal has merit.

6. From the record, the Respondent's claim was for an order of permanent injunction to issue against the Appellant restraining her and any other person claiming through them from encroaching on and interfering with the Appellant's land parcel No. SAMIA/LUCHULULO-BUKHULUNGU/2291. The second prayer was for an eviction order to issue against the Appellant. A permanent injunction also known as perpetual injunction is granted upon the hearing of the suit on merits and it fully determines the rights of the parties before the court. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the Plaintiff to be protected.

7. The Appellant has stated in her grounds of appeal that the trial magistrate failed to take into account the documents produced which documents proved that her land parcel No. SAMIA/LUCHULULO-BUKHULUNGU/874 neighbours parcel No. SAMIA/LUCHULULO-BUKHULUNGU/873 and not the Respondent's parcel number SAMIA/LUCHULULO-BUKHULUNGU/2291. The mutation forms produced by the Respondent on the face of it indicates that the parcel numbers 874 and 873 are subdivisions of land parcel No. 398 which is a first registration while land parcel 2291 was a subdivision of land parcel No. 2170. There is no document produced to trace the history of parcel 2170 to parcel number 873.

8. According to the Respondent's evidence, his parcel No. 2291 shares a boundary with the Appellant's parcel No. 874. Besides the mutation forms for the subdivisions of parcel number 398 and 2170, the Reference Index Map (RIM) for the area was not produced. As submitted by the Appellant, there was also no survey report (private or government surveyor) to confirm that indeed the two parcels of land are neighbouring each other. The burden was placed upon the Respondent to demonstrate this fact before a finding on encroachment could be reached and in the proceedings before the magistrate's court, no evidence was presented to prove that the two plots neighboured each other.

9. The Respondent pleaded in paragraph 6 of the amended plaint thus; *the Plaintiff states that by virtue of the two parcels being neighbouring and adjacent to each other, the defendant without any colour of right has encroached into a portion of the Plaintiff's Land Parcel No. Samia/Bukhulungulu/2291 destroying boundary beacons and features and she is undertaking her farming activities on the said encroached portion thereby infringing on and abusing the Plaintiffs rights over the said portion.* My interpretation of the claim is that the Appellant encroached on to a portion of the Respondent's land not the whole of it. The Respondent was under the law required to demonstrate the extent of the encroachment. In doing so, he stated thus; *the defendant encroached onto my land parcel number 2291 and has destroyed the boundary beacons and features and she is undertaking farming activities on the said portion of the land.*

10. The Respondent's evidence did not specify the size of the portion encroached, what boundary features were removed by the Appellant and when the alleged destruction took place. **Section 18 (2) of the Land Registration Act directs Courts not to entertain any action or other proceedings relating to a dispute as to the boundaries of registered land.** In the case of Samuel Wangau Vs. AG & 2 others (2009) eKLR, the Court held as follows:

“...Indeed, both PW1 and DW2 were agreeable that for one to determine a dispute in respect to general boundaries, the physical features existing on the ground are very critical. Such features include hedges, fences and roads. Because general boundaries are identifiable by using the existing physical features, and by interviewing the owners of the adjacent plots, the law requires disputes relating to such boundaries to be handled by the Land Registrar, and not Surveyors or even the court.’

11. The trial honourable magistrate in his judgement stated *that the plaintiff's evidence was that the defendant had planted cassava on L.R. No. 2291 which was bordering L.R. No 874. That was a clear demonstration that the issue was beyond boundary dispute as the defendant was occupying and using part of the plaintiff's land.* The trial magistrate erred because the Respondent was required to prove on a balance not just state that indeed where the cassavas were planted comprised part of L.R. No. 229. The fact that the defendant did not answer the question that the two suit plots were next to each other was not sufficient proof of the alleged encroachment.

12. The trial magistrate went on to hold that parcel No. 2291 and 874 were at one time one parcel of land before subdivision. As I started earlier, I did not find anything on record linking parcel No. 873 to numbers 2290 & 2291 or L.R. 2170 which gave birth to 2290 & 2291. This finding by the trial court was reached without any evidence to support it. In concluding, the honourable magistrate said thus; *the fact that the plaintiff has stated that the defendant has planted cassava on his land was enough evidence that the defendant had trespassed... and there was need to move out voluntarily or by way of eviction.* Needless to state that the trial court did not give any reasons for making such a conclusion in the absence of an expert's report to ascertain that indeed the Appellant had exceeded her boundary of land parcel number 874.

13. In light of the analysis given above I agree with the Appellant that the trial magistrate erred in law and in fact in holding that the Respondent had proved his claim of trespass on L.R. No. Samia/Luchululo/2291 against the Appellant. Accordingly, I hold that this Appeal has merit and allow it on the following terms;

a) The judgment and orders made by the trial court on 7th July 2020 be and is hereby set aside and in their place an order is made dismissing the Respondent's claim with costs.

b) The Appellant is hereby granted the costs of this Appeal and those of the Court below.

Dated, signed and delivered at BUSIA this 27th day of October 2021.

A. OMOLLO

JUDGE