



**Okwach v Kili (Environment and Land Appeal E034 of 2023)
[2025] KEELC 127 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 127 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E034 OF 2023
SO OKONG'O, J
JANUARY 23, 2025**

BETWEEN

PHELGONA AKINYI OKWACH APPELLANT

AND

JEPCHIRCHIR KILI RESPONDENT

*(Being an appeal from the judgment and decree of Hon. K. Cheruiyot(SPM)
delivered on 7th November 2023 in Kisumu CMC ELC No. E078 of 2022)*

JUDGMENT

Background

1. The Appellant filed a suit against the Respondent in the Chief Magistrate's Court at Kisumu namely, Kisumu CMC ELC No. E078 of 2022 (hereinafter referred to only as "the lower court") seeking; a declaration that she was the absolute registered owner of all that parcel of land known as Title No. Kisumu/Kanyakwar "B"/951(hereinafter referred to as "the suit property"), a permanent injunction restraining the Respondent from dealing with the suit property in any manner inconsistent with the interest of the Appellant, vacant possession of the suit property, mesne profits, general damages for trespass, costs, and interest. In her plaint dated 25th July 2022, the Appellant averred that she was the registered proprietor of the suit property. The Appellant averred that in May 2022, she discovered that the Registry Index Map for Kisumu Kanyakwar "B" Registration Section Map Sheet (Diagram) 3 (RIM) had been fraudulently amended in a manner that interfered with the boundaries of the suit property in the said RIM.
2. The Appellant averred that the fraudulent and illegal changes made in the said RIM had the effect of creating another parcel of land, Kisumu/Kanyakwar "B"/2801 ("hereinafter referred to as "Plot No. 2801") giving an impression that the suit property had been subdivided which was not the case. The



Appellant averred that when Plot No. 2801 was being created, there was in existence another parcel of land with parcel number 2801 on the same RIM.

3. The Appellant averred that when she discovered the fraudulent amendment of the RIM, she complained to the Regional Surveyor on 9th May 2022 who initiated investigations and confirmed in a letter dated 10th May 2022 that the complaint had merit and directed that the fraudulent amendment be cancelled and the suit property be restored to its original position in the RIM. The Appellant averred that the Respondent moved into the suit property in June 2022 and started constructing an underground tank and a perimeter wall around the same. The Appellant averred that her demand to the Respondent to stop her acts of trespass on the suit property was not complied with necessitating the filing of the suit.
4. The Respondent filed a defence in the lower court on 17th August 2022. The Respondent denied that she had trespassed on the suit property. The Respondent averred that together with her husband Robert Mutege Njue, they were the registered owners of all that parcel of land known as Kisumu/Kanyakwar “B”/2891 (“hereinafter referred to as “Plot No. 2891”). The Respondent averred that the perimeter walls and the underground tank complained of by the Appellant were being put up on Plot No. 2891 and not on the suit property as claimed by the Appellant. The Respondent averred that the lower court had no jurisdiction to determine the Appellant’s suit as the dispute was over the boundary between the suit property owned by the Appellant and Plot No. 2891 owned by the Respondent and her husband and the same should have been determined in the first instance by the Land Registrar.
5. At the trial, the Appellant adopted her witness statement filed together with the plaint in which she reiterated the contents of her plaint. The Appellant produced as exhibits a copy of the extract of the register for the suit property, a copy of the RIM that was altered to create Plot No. 2801, a copy of a letter of complaint by the Appellant to the Regional Surveyor dated 9th May 2022, a copy of an internal memo by the Regional Surveyor to the officer in charge of amendments of RIM dated 10th May 2022, a copy of the RIM before the amendment that created Plot No. 2801 and photographs taken at the suit property. The Appellant called the Regional Surveyor(PW3) as a witness. PW3 told the court that he received a complaint from the Appellant about the alteration of the shape and size of the suit property on the RIM. He told the court that after investigating the complaint, he confirmed that the shape and size of the suit property had indeed been altered on the RIM. He stated that there was no mutation on record to support these changes. He stated that he instructed the officer in charge of RIM amendments to restore the suit property to its original position in the RIM. PW3 told the court that he also made inquiries on Plot No. 2801. He stated that his finding was that Plot No. 2801 was a subdivision of Plot No. 529. He stated that since Plot No. 529 did not share a boundary with the suit property, it was not possible for one of its subdivisions, Plot No. 2801 to share a boundary with the suit property.
6. The Respondent also adopted her witness statements as her evidence in chief. In her witness statement filed on 2nd August 2022, the Respondent stated that Plot No. 2891 was a subdivision of Plot No. 2801. The Respondent stated that the subdivision of Plot No. 2801 gave rise to Plot No. 2890 and Plot No. 2891. The Respondent stated that the suit property was a subdivision of Plot No. 360 and measured 0.1 of a hectare and remained as such on the ground. She stated that she had not encroached on the suit property. She reiterated that she was carrying out developments on Plot No. 2891. The Respondent placed before the court among others, a copy of the title deed for Plot No. 2891, a copy of a certificate of official search for Plot No. 2891, a copy of the mutation form for Plot No. 2801, a copy of the extract of the register for the suit property and a certificate of official search for the suit property. Among the witnesses called by the Respondent was a surveyor, Patrick Opiyo Adero (DW3). DW3 was the surveyor who subdivided Plot No. 2801. He told the court that the subdivision of Plot No.



2801 gave rise to Plot No. 2890 and Plot No. 2891. He stated that Plot No. 2801 shared a boundary with the suit property.

7. In a short judgment delivered on 7th November 2023, the lower court struck out the Appellant's suit with costs to the Respondent for want of jurisdiction. The lower court found that the dispute before it was a boundary dispute and as such should have been determined by the Land Registrar in the first instance under Section 18 of the *Land Registration Act, 2012*.

The appeal

8. The Appellant was aggrieved with the decision of the lower court and filed this appeal on 17th November 2023. In her Memorandum of Appeal, the Appellant challenged the lower court's judgment on the following main grounds;
 1. That the Learned Magistrate erred in law and fact by holding that the dispute before him was a boundary dispute while there was overwhelming evidence that the suit property did not share a boundary with the Respondent's parcel of land, Plot No. 2891.
 2. That the Learned Magistrate erred in law and fact by ignoring the fact that Plot No. 2891 was a fraudulent parcel of land and the RIM had been amended by the cancellation of Plot No. 2891 by the Regional Surveyor who had found that the subdivision that resulted in Plot No. 2891 was not supported by documentation and reverted the suit property to its original position thus extinguishing the possibility of a boundary dispute between the suit property and Plot No. 2891.
 3. That the Learned Magistrate erred in law and fact by treating the matter simplistically and casually contrary to the provisions of Order 21 Rule 4 of the Civil Procedure Rules by failing to appraise and analyse the evidence on record thus arriving at an erroneous conclusion.
 4. That the Learned Magistrate erred in law and fact by failing to rely on the evidence adduced and relying on extraneous issues not supported by evidence thus arriving at an erroneous conclusion.
9. The Appellant prayed that the appeal be allowed and an order be made setting aside the judgment and decree of the lower court delivered on 7th November 2023 and in its place judgment be entered for the Appellant as prayed in the plaint in the lower court. The Appellant also prayed for the costs of the appeal and of the lower court suit.

Analysis and determination

10. The Appeal was argued by way of written submissions. Both the Appellant and the Respondent filed submissions dated 30th September 2024. I have considered the pleadings and the proceedings of the lower court, the judgment of the court, the grounds of appeal put forward by the Appellant, and the submissions by the advocates for the parties. This being a first appeal, the court must consider and re-evaluate the evidence on record and draw its own conclusions on the issues that were raised for determination before the lower court. The court has to bear in mind however that it did not have the advantage of seeing and hearing the witnesses who testified before the lower court. In *Kenya Ports Authority v. Kuston (Kenya) Limited* [2009] 2EA 212 the Court of Appeal held among others that:

On a first appeal from the High Court, the Court of Appeal should 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 that respect.



Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

11. The appellate court will also not interfere with the findings of fact by the trial court unless they were not based on evidence at all or they were based on a misapprehension of the evidence, or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, *Peter v. Sunday Post Ltd.* [1958] E.A 424 and *Makube v. Nyamuro*[1983] KLR 403.

12. In *Phoenix of E. A. Assurance Company Limited v. S.M. Thiga T/A Newspaper Service* [2019] eKLR, the Court of Appeal sated as follows:

In common English parlance, Jurisdiction denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside *ex debito justitiae*.”

13. Earlier in the judgment, I have set out the pleadings by the parties before the lower court. I have also highlighted the evidence that was given by both parties at the trial. The Appellant’s case in the lower court was straightforward. The Appellant claimed that she was the registered owner of the suit property. The Appellant claimed that the Registry Index Map (RIM) on which the location, size and shape of the suit property were indicated was fraudulently amended without reference to the Appellant through which amendment a parcel of land, Plot No. 2801 was created next to the suit property and encroached on nearly half of the suit property. The Appellant averred that when Plot No. 2801 was created, there was another Plot No. 2801 in existence on the same RIM. The Appellant contended that the creation of Plot No. 2801 reduced the size of the suit property and also changed its shape. The Appellant averred that the inquiries she carried out at the offices of the Regional Surveyor revealed that there was no documentation supporting the alteration of the size and shape of the suit property and the creation of Plot No. 2801. The Appellant averred that it was after these fraudulent activities that the Respondent encroached on part of the suit property and started developing the same claiming that it was her Plot No. 2891.

14. On her part, the Respondent did not answer the Appellant’s allegation about the fraudulent creation of Plot No. 2801 which encroached on the suit property. The Respondent also said nothing about the alterations of the shape and size of the suit property. The Respondent’s case was that she owned Plot No. 2891 which was a subdivision of Plot No. 2801. The Respondent contended that her activities were within Plot No. 2891 and that she had nothing to do with the suit property.

15. I am of the view that looking at the dispute that was before the lower court as a whole, it was not all about the boundary of the suit property. The Appellant’s claim was over land. According to the Appellant, Plot No. 2801 was created fraudulently and illegally which fraud and illegality tainted its purported subdivision into Plot No. 2890, and Plot No. 2891 owned by the Respondent. According to the Appellant, Plot No. 2891 claimed by the Respondent was created on a portion of the suit property. See paragraph 8 of the plaint. The lower court had a duty to determine on the evidence that was presented before it whether Plot No. 2801 which was subdivided to give rise to among others, Plot No. 2891 owned by the Respondent was lawfully created and subdivided. The lower court also had a duty to determine whether the creation of Plot No. 2801 and its subdivision affected the suit property. It was upon finding that Plot No. 2801 was lawfully created and subdivided that the court could talk of a boundary dispute. There could not be a boundary dispute between the suit property and Plot No. 2891 when the Appellant’s position was that the parcel of land was unlawfully created and should not



share a boundary with the suit property. The lower court had to determine the legality of the creation of Plot No. 2801 and its subdivisions and the subsequent amendment made to the RIM. These are issues that the Land Registrar has no jurisdiction to determine under Section 18 of the [Land Registration Act, 2012](#). It was after determining these issues that the court could consider whether it was necessary to involve the Land Registrar in the matter. I am of the view that the decision made by the lower court that the dispute before it was a boundary dispute was premature and erroneous in the circumstances.

Conclusion

16. For the foregoing reasons, it is my finding that the lower court erred when it failed to determine the dispute that was before it and referred it to the Land Registrar for determination. I find merit in the Appellant's appeal. The appeal is allowed. The judgment of the lower court delivered on 7th November 2023 is set aside in its entirety. The lower court costs if already paid to the Respondent shall be refunded forthwith to the Appellant. The lower court suit shall be heard a fresh at the Chief Magistrate's Court at Kisumu before another Magistrate other than Hon. K.Cheruiyot SPM, who shall determine all the issues raised in the suit including those that I have highlighted in this judgment. Each party shall bear its costs of the Appeal. The Deputy Registrar of this court shall return the lower court file to the Chief Magistrate's Court at Kisumu together with a certified copy of this judgment.

DELIVERED AND DATED AT KISUMU ON THIS 23RD DAY OF JANUARY 2025.

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Raburu for the Appellant

Mr. Yogo for the Respondent

Ms. J. Omondi-Court Assistant

