



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC APPEAL NO. 47 OF 2019

KISUMU YACHT CLUB REGISTERED TRUSTEES.....APPELLANT

-VERSUS-

COUNTY GOVERNMENT OF KISUMU.....1ST RESPONDENT

CITY MANAGER, COUNTY GOVERNMENT OF KISUMU.....2ND RESPONDENT

(Being an appeal from the Ruling and Order of the Learned Trial Magistrate Honourable W.K. Onkunya (SRM) in KISUMU CM ELC CASE NO.85 of 2019 delivered on 6th November 2019)

BETWEEN

KISUMU YACHT CLUB REGISTERED TRUSTEES.....PLAINTIFF

-VERSUS-

COUNTY GOVERNMENT OF KISUMU.....1ST DEFENDANT

CITY MANAGER, COUNTY GOVERNMENT OF KISUMU.....2ND DEFENDANT

JUDGMENT

The appeal is against the Ruling and Order delivered on 6th November 2019. The Plaintiff had filed suit vide a plaint dated on 5th July 2019 and prayed for judgement against the Defendants for a permanent injunction restraining the Defendants, their officers, servants, agents or any other person /entity affiliated/associated with them or acting through or under their instructions from demolishing, alienating, encroaching, trespassing on or in any other way interfering with or dealing with Plaintiff’s property, boundary wall, development and construction on Kisumu/Municipality/Block 13/304. A declaration that its property, boundary wall, development and construction situated on Kisumu/Municipality/Block 13/304 do not encroach on the road reserve or interfere in way with the proposed upgrading of the Impala Park-Dunga Road to bitumen standards. Kshs.4,600,000/= in respect of the costs of rebuilding /constructing the demolished wall on Kisumu/Municipality/Block 13/304. An order directing the Defendants and their officers to issue the relevant approvals for the rebuilding/re-construction of the demolished boundary wall on Kisumu/Municipality/Block 13/304 with waiver of the applicable fees/charges.

General and punitive damages for the illegal actions of the Defendants and the gross and egregious abuse of authority and violation of the Plaintiff’s rights under the Constitution and law which have occasioned it embarrassment and loss. Costs of this suit and interest. Any other relief that this Honourable court will deem fit and just to grant.

It is the Plaintiff’s case that it is the registered owner of the immovable and development known as Kisumu/Municipality/Block 13/304. That the boundaries of the property are clearly shown on survey which indicates the 18-meter-wide road reserve. The Plaintiff resolved to erect a boundary wall around the perimeter of the property in line with the beacons. The Boundary wall cost the Plaintiff Kshs. 2,809,154/=. On 23rd June 2017, The Plaintiff received a letter dated 20th June 2017 from the then City Manager of the 1st Defendant which purported to issue the club notice to remove/demolish the encroaching walls /structures within 14 days failing which the county would demolish.

A joint re-survey was conducted which confirmed that there was no encroachment of the boundary wall and the City Engineer would report to the City Manager and send a letter to them confirming that the boundary wall does not encroach on the road reserve. On 28th July 2017, the Plaintiff received a letter from the Defendants referring to the re-survey and stating that the proposed upgrading of the Impala-Dunga-Nanga-Five Ways road to bitumen standards did not encroach.

That on 25th February 2019, the Defendants Askaris as well as police officers using a county government excavator and machinery

surreptitiously demolished part of the Plaintiff' wall, measuring approximately 140 meters, without any advance warning or notice issued. The Plaintiff wrote protest letters to the Defendants as well as to the chairman Kisumu Board over the unlawful and wrongful demolition of the Plaintiff's wall that took place on the night of 25th February 2019. On 28th February 2019, a joint survey meeting was held which confirmed that there was an 18 metres Wide Road Reserve between the club and the opposite property and that there was no encroachment of the Club's demolished wall on the road reserve and it was further resolved that the matter be placed before the City Engineer for immediate resolution.

That on 17th March 2019, the 2nd Defendant sent a letter insisting that the survey reports indicated that the club property has encroached into the road reserve and falsely averring that the notices had been issued knowing full well that the only notice that had been issued was the letter dated 28th June 2017 which had been withdrawn and superseded by the Defendants letter dated 26th July 2017 subsequent to a joint re-survey. The Plaintiff commissioned another survey by Cedar Geo-surveys which confirmed that there was no encroachment. The Plaintiff suffered loss and damage to the tune of Kshs. 4,600,000/= being the cost of rebuilding/reconstructing the demolished wall.

It was the 1st defendant's case through a Notice of Preliminary Objection that the Honourable Court lacked Jurisdiction to adjudicate over this dispute by virtue of the provisions on Section 18(2) of the Land Registration Act, 2012 which requires boundary disputes to be first settled by the Land Registrar. That the Plaintiff's pleadings were commissioned by an Advocate who does not have a practicing certificate and therefore the same should be expunged from the court. That the suit should be struck out with costs as it is an abuse of the process of court.

The trial court ruled this matter on 6th November 2019 where it ordered that the Defendant's Preliminary Objection is merited and the Plaintiff's suit be struck out with costs to the Defendant.

GROUND OF APPEAL

Aggrieved by the Ruling of the Court, the Plaintiff filed this appeal against the whole Ruling based on the following grounds;

That the Trial Magistrate erred in Law and in Fact;

1. By failing to find that there was no boundary dispute between the Appellant and the Respondents despite uncontested documents and evidence tendered before her.
2. By dismissing the Appellant's Application and suit whereas the suit property in dispute comprises land legally owned by the Appellant and the question whether the suit property actually fell on the road reserve was a question that had been determined in favour of the Appellant and in any event had to be subjected to documentary and viva voce evidence and await hearing on merits.
3. By failing to find on the evidence before her that the Appellant had met the conditions for granting of an order of injunction as set out in the case of *Giella vs Cassman Brown* to preserve the status quo so that in case the Appellant succeeded, it would not find the property wasted by the Respondents.
4. By shifting the burden of proof to the Appellant and the Court ought to have relied on the balance of convenience on how best the subject matter of the suit would be preserved.
5. By failing to adequately consider the Appellant's pleadings and claims which included prayers for injunctive orders and claims for damages which were not capable of being determined by the Land Registrar and in doing so thereby erred by upholding the Preliminary Objection.
6. By grossly misdirecting herself in ignoring the evidence and written submissions presented and filed by the Appellant in their entirety.
7. By failing to apply herself judicially and to adequately evaluate the Appellant's evidence, submissions and authorities thereto and the applicable law and thereby arrive at a decision unsustainable in law.
8. By ruling the way, she did.

The appellant prays that the Appeal be allowed with costs to the Appellant, That the Ruling and Order of the Learned Trial Magistrate be set aside and be substituted with one that meets the ends of justice and that this Honourable court be pleased to make such orders and or issue any other judicious directions in the interest of justice.

- On 21st April 2021 when the matter came up for Mention for directions, the court directed parties to file and serve submissions.

Appellant's Submissions

The Appellant filed its Submissions on 18th August 2021 and gave brief facts of the suit submitted that the Respondents did not file any document in the Lower Court to demonstrate the alleged boundary dispute and neither did they file a Statement of Defence to plead the same.

That the Survey report dated 15th February 2021 by the City Land Surveyor found that the Appellant's property had not encroached on any road reserve serving it. The Appellant relied on the case of **Henry Onyango Oketch vs Jenifer Owour (2017) eKLR** where the court

declined to uphold a Preliminary Objection raised on the ground that the pleadings did not with certainty disclose that there was a boundary dispute and went further to state that... **“Boundary /fence line trespass disputes can be highly technical and frequently turn on historical treatment of the involved properties. This ambiguity can only be resolved upon the receipt of viva voce evidence through a full trial and not on a Preliminary Objection.”**

On the issue as to whether an injunction should issue against the Plaintiff for destroying the Defendants' land and property the Appellant relied on the principles set out in the case of **Giella v Cassman Brown (1973) EA 358** as well as the case of **Nguruman vs Jan Bonde Nielsen & 2 Others CA No. 77 of 2012 (2014) eKLR**.

The Appellant further relied in the case of **MRAO Limited s First American Bank of Kenya Ltd (2003) eKLR** where the Court of Appeal stated as follows:

a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.

The Appellant further submitted that it has a legally protected right to the suit property as established under Article 40 of the Constitution of Kenya 2010 and has clearly demonstrated that it will suffer irreparable harm if the Respondents are not restrained. The Appellant relied in the case of Pius Kipchirchir vs Frank Kimeli Tenai (2018) eKLR where the court stated that:

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury. “

That the Respondents had partly demolished the Applicant's perimeter wall which had caused irreparable harm as the Appellant is a private members club and the demolition had the effect of exposing the Appellant to astronomical loss if its operations were to be paralyzed as well as exposing the club to insecurity and theft.

The Appellant further submitted that on the question of whether the Respondents had legal, mandate to demolish the Appellant's perimeter wall is yet to be determined in the trial court and it is this basis that the Appellant's claim for compensation is founded.

The Appellant therefore prayed for the Appeal to be allowed and the Ruling of the Trial Magistrate be reversed as the Appellant has a claim under pecuniary loss both under special and general damages.

Respondents Submissions

The Respondents filed their Submissions on 17th May 2021 and raised the following issues for determination:

1. Whether the trial Magistrate had jurisdiction to entertain the suit.

The Respondents raised a Preliminary Objection on the jurisdiction of the court based on Section 18 (2) of the Land Registration Act, 2012 and relied on the case of **Owners of Motor Vessel ‘Lillian S’ vs Caltex Kenya Limited (1989) 1 KLR**. The Respondents submitted that **John Bецcroft Sanders in his treatise of ‘Words and Phrases Legally Defined ‘Vol.3 at p 113** defines jurisdiction as:

“.....By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

The Respondents relied in the case of **Samson Chembe Vuko vs Nelson Kilumo & 2 Others (2016) eKLR** here it stated as follows:

“It has been said time without number, that whenever an Act of Parliament provides for a clear procedure or mechanism of redress, the same ought to be strictly followed. “

In **Speaker of the National Assembly v Karume [2008] 1KLR 425. Mutanga Tea & Coffee Company Ltd v Shikara Limited & Another, [2015] eKLR,**

“.....Where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or the Act of Parliament, that procedure should be strictly followed.....”

That the provisions of Section 18 of the Land Registration Act, 2012 oust the jurisdiction of the court and precludes it from entertaining any proceedings touching on a dispute on a boundary of a registered for such a dispute has been determined by the Land Registrar. In *Willis Ocholla vs Mary Ndege* (2016) e KLR Justice S.M. Kibunja held that:

“That in terms of Section 18 (2) of the Land Registration Act, proprietors of registered land with a boundary dispute are obligated to first seek redress or solution from the Land Registrar before moving or escalating the dispute to this court. That where such a party fails to do so, and comes to court without first seeking redress from the Land Registrar, the court being a court of law, has to remind such a party that he/she has moved the court prematurely. That the provisions of Section 18 (2) of the Land Registration Act shows clearly that the court is without jurisdiction on boundary disputes of registered land until after the land Registrar’s determination on the same has been rendered.

That the parties submission and pleadings shows clearly that the dispute before this court is one of the correct position of the boundary between, land parcels Kisumu/Karateng/298 and 296 owned by the Plaintiff and Defendant respectively. That this clearly mean that the first forum with authority to settle the boundary dispute is the Land Registrar in accordance with Section 18 of the Land Registration Act.”

The Learned Judge also reiterated the same sentiments in the case of *Maurice Omoro Oudu & 2 Others vs Kisumu District Land Registrar & 2 Others* (2019) e KLR. In *Amos Mpeshe & 3 Others v Salau Ole Sokon Modo* (2015) e KLR, the High Court of Kenya sitting in Nairobi held that:

“Under section 18 of the Land Registration Act, 2012 the court is precluded from entertaining any action or any proceedings any action relating to a boundary dispute unless the boundaries have been ascertained/determined in accordance with the Act.

..... I therefore uphold the preliminary objection on the basis that pursuant to sections 16, 18 and 20 of the Land Registration Act 2012 the court lacks the jurisdiction to deal with a matter relating to a boundary dispute as in the instant suit. The boundary dispute having been determined and fixed by the Land Registrar as per the decision made on 26th July 2012 which decision was upheld by the High Court in the Judicial Review application NO. 441 of 2012 the plaintiff’s suit in my view is misconceived and incompetent and is an abuse of the process of the court.”

The Respondent further submitted that the Plaintiff in filing this suit invoked the court jurisdiction prematurely since the same ought to have been determined by Land Registrar first. That the Respondents have no interest in the suit property which they have admitted belongs to the Plaintiff. That the only interest was the road reserve along Impala Park Dunga Road. That the Plaintiff should have exercised recourse to the Land Registrar and not court.

2. Whether the matter of an Advocate practicing certificate is a question of law or a question of fact.

The Respondents submitted that Section 9 of the Advocates Act provides as follows;

Section 9 (c) of the Advocates Act (Chapter 16) Law of Kenya provides:

“9. Subject to this Act, no person shall be qualified to act as an advocate unless –

(c) he has in force a practicing certificate; and for the purpose of this Act a practicing certificate shall be deemed not to be in force at any time while he is suspended by virtue of section 27 or by an order under section 60 (4).”

Section 33 of the Advocates Act (Chapter 16) Laws of Kenya provides: -

“33. Any unqualified person who willfully pretends to be, or takes or uses any name, title, addition or description implying that he is, qualified or recognized by law as qualified to act as an advocate shall be guilty of an offence.

The Respondents relied in the case of *Geoffrey Orao Obura v Martha Karambu Koome* (2001) eKLR where the court stated as follows:

“That contention on behalf of the applicant appears to us to be well founded. However, Mr. K’Owade for the respondent, submitted that Section 9 of the Act should be so construed that the act of an unqualified person does not render his acts invalid because of lack of qualification unless the client was aware of such lack of qualification. Apparently, this submission is based on the common law of England. It is said that proceedings are not invalidated between one litigant and the opposite party merely by reason of the litigant’s solicitor being unqualified, for example for his not having a proper practicing certificate in force.

With respect, we reject this argument. The facts of this case are governed clearly by the provisions of the Advocates Act and not the common law in England. The provisions of section 9 are unambiguous and mandatory and the principles of common law do not apply as the jurisdiction of this court is to be exercised in conformity with the Constitution and subject thereto, all other written laws. Section 3(1) of the Judicature Act (Cap 8) reads: -----”

Therefore, the matter of the Appellant’s documents being commissioned by an unqualified advocate is a question of fact and not that of law.

3. Whether the new evidence adduced ought to be considered in determining this Appeal.

The Respondents submitted that Rule 29 (1) (b) of the Rules of this Court allows for admission of new evidence under specific guidelines. That the new evidence adduced by the Plaintiff herein do not meet the threshold in law and the Respondents relied in **Dorothy Nelima Wafula vs Hellen Nekesa Nielsen & Paul Fredrick Nelson (2017) e KLR**.

The Respondents further relied in the case of **Attorney General vs Torino Enterprises Limited (2019) eKLR** where the court outlined the guidelines to be observed before admitting new evidence. The Respondents therefore submitted that the Notice of Motion dated 20th April 2021 was not subject of the original suit. The original was demolished and a new one constructed many metres away.

The Respondents for prayed for the Appeal to be disallowed and the Judgment of the Trial Magistrate be upheld against the Appellant and costs be awarded to the Respondents.

ISSUES FOR DETERMINATION

Having looked at the Pleadings and the Submissions filed by both parties, the following issues are to be determined:

i. Whether the trial Magistrate had jurisdiction to entertain the suit.

Section 18 of the Land Registrar Act No. 3 of 2012 provides as follows: -

18. (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(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;

Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act.

Further Section 19 of the same Act provides as follows: -

19.(1) if the Registrar considers it desirable to indicate on a field plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

(2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.

(3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.

The Law on boundary disputes is very clear based on the provisions of Section 18 (2) of the Land Registration Act. I do not agree with the learned trial Magistrate that this was a boundary dispute as there was no evidence that the boundaries had not been fixed and to the contrary there was evidence that the surveyors used to come up with the position of the boundary. This court holds that the court is only prohibited from entertaining a boundary dispute where the boundary has not been fixed. In this case the appellant has a title and there is an area Registry Index Map and therefore it cannot be said that the boundaries have not been fixed.

ii. Whether the matter of an Advocate practicing certificate is a question of law or a question of fact.

The Provisions of the Advocates are very clear that if an Advocate does have a current practicing certificate, he or she is not qualified to practice. I agree with the Respondents Submissions that an Advocate Practicing Certificate is a matter of Law.

iii. Whether the new evidence adduced ought to be considered in determining this Appeal.

This Court allowed the Application made by the Appellants to adduce new evidence. A clear look at the relevant documents filed, we find that the Approval by the City Manager of Kisumu County is relevant to the Appellant's case as it was an approval for the construction of the boundary wall as well as the Survey Report and the photograph showing the reconstruction of the perimeter wall.

Chesoni, Ag JA. (as he then was) in the often quoted case of ***Mzee Wanjie & 93 Others vs A. K. Saikwa & Others [1982 - 88]1 KAR 462*** as follows:

“The principles upon which an appellate court in Kenya in a civil case will exercise its discretion in deciding whether or not to receive further evidence are the same as those laid down by Lord Denning LJ, as he then was, in the case of Ladd vs. Marshall [1954] 1 WLR 1489 at 1491 and those principles are:

(a) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

(b) The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;

(c) The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible”.

iv. **Whether the Appeal should be allowed or not.**

From the evidence on record, this court finds that the Appellant filed the dispute in the right forum and the trial magistrate had jurisdiction to hear the matter as it was premised on trespass and encroachment and not a boundary dispute. Moreover, the appellant sought an injunction restraining the respondent from interfering with the perimeter wall and damages for the destroyed wall. All these issues can only be determined by the court and not the land Registrar. The appeal is allowed and the matter is remitted back to the trial court to hear the suit on merit. The same to be heard by a Magistrate other than the one who conducted the proceedings. Costs of appeal to the appellant.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 19TH DAY OF NOVEMBER, 2021

ANTONY OMBWAYO

JUDGE

This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE