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Ouko v Opoko (Environment and Land Appeal E015 of 2023) [2025] KEELC 4692 (KLR) (19 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4692 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY

ENVIRONMENT AND LAND APPEAL E015 OF 2023

FO NYAGAKA, J

JUNE 19, 2025

BETWEEN

ELIJAH OUKO .... APPELLANT

AND

DANCAN ATITO OPOKO .... RESPONDENT

(Being an appeal arising from the judgment of Hon. Onzere E.M., Principal Magistrate, delivered on the 07/03/2023 in Ndhiwa Principal Magistrates' ELC Case No. 16 of 2020)

JUDGMENT

1. The suit parcel of land herein seems to have attracted a curse and if there is none, then one of the parties just wants to vex the other to the core, thinking and wishing that the one on the receiving end might give up. The ancestors of one of the parties, the Appellant seem to have not accepted the reality that the land in issue did not belong to them, and so does the appellant. These parties have disputed over the suit land from as early as 1974, which is a jubilee. It is time they laid their weapons of war down and rested from their wars. People should not fight over a piece of earth so much that it seems as if it is the passage to eternal life. That is only "small" piece of advice as I determine this matter.
2. By way of Plaint dated June 22, 2020, the Respondent initiated a suit against the Appellant in Ndhiwa Principal Magistrates' Environment and Land Court Case No. 16 of 2020. He amended he same on 01/07/2020. He sought, among others, a permanent injunction restraining the Appellant from entering the suit land known as L.R. No. Nyokal/Kanyikela/796.
3. The Defendants filed a joint statement of defence dated 21st July 2020. They denied all the allegations in the plaint and prayed that the suit be dismissed.
4. The parties entered into a consent to have the Homa Bay County Registrar and Surveyor to visit the suit land and prepare a report on whether the plaintiff or defendant had encroached on either of the

parcels and file the same in court. The land was visited on 10th September 2021 and the report was filed in court.

5. The matter proceeded for hearing. The Appellant testified as PW1. He adopted his witness statement as evidence in chief. He produced the documents he filed as exhibits to wit; Title deed for West Nyokal/K/796 as P-Exh 1, the demand notice as P-Exh 2, the proceedings in Ndhiwa MCELC 9 of 1974 as P-Exh 3, Cadastral Map as P-Exh 4, a letter dated 21/01/1992 as P-Exh 5, Proceedings of the Boundary Dispute as P-Exh 6 and the Land Registrar's Report as P Exhibit 7.

6. It was his testimony that the Defendant had encroached his land. That his land was parcel no. 792 and he pointed out parcel no. 796 to one Everlyne who had sought to lease land from him yet the land belonged to the Plaintiff.

7. During cross examination he stated that the suit land belongs to his father and that he had built his home on the land in 1967. There was a case about the land with the Defendants' father since he wanted to take his land. He then moved his home from the land and decided to settle elsewhere. Further, that the Land Registrar came and restored the boundaries between the suit parcels.

8. The prosecution closed its case and the 1st Defendant testified as DW1. He testified that he is the owner of parcel no. 792 which was ancestral land that he got from his grandfather. He produced the title deed for 792 as D-Exh 1 and the Death Certificate as D-Exh 2. He further stated that his crops and home are on the land and he continues to occupy the land. That the Land Surveyors came to the land and pointed out a boundary that was not known to him.

9. DW2 was Didacus Achola Akech who testified that the parties are his nephews. He stated that the Defendant stays on the land to date whereas he had never seen the Plaintiff cultivating the land. That the plaintiff has built his house at another place and has not built on the land. He was among the 25 elders present during the adjudication and further, after the Plaintiff's father passed on, they discovered that he had trespassed on the land. The river was the boundary between Ouko and Opoko's land and he did not know how Dancan obtained title. After a case over the land, Dancan left the land and never came back. During cross examination he stated that 792 belongs to Elijah. He disputed the truthfulness of the surveyors' report.

10. DW3 was John Otieno Achola, a clan elder who testified that the 1st Defendant stays on parcel n. 792 which he was given by his father and has been living there since the 70s. That the land is ancestral land which belonged to Nyapara who gave it to Ouko who then left it for Elijah.

11. During cross examination, he stated that he only knew of parcel no. 792 and denied the truthfulness of the Surveyors' map.

12. DW4 was Evelyne Awuor who testified that she leased land from Elijah for 5 years. In cross examination, she stated that she leased parcel no. 792 from Elijah. She sued Elijah for conning him in a civil suit.

13. The court considered the surveyors' report, the testimonies of the witnesses and the evidence in court and established that the defendants had encroached on the whole of the plaintiff's land parcel 796. Vide the Judgement delivered on 7th March 2023, the trial court found that the plaintiff proved his case to the required standard and entered judgement in favor of the Plaintiff.

14. Being aggrieved with the decision of the trial court, the Appellant instituted the present Appeal vide the Memorandum of Appeal dated 22nd March 2023 on the following grounds;

    1. The Learned trial magistrate misdirected herself on several matters of law and fact.

2. The Learned trial Magistrate erred in law in entertaining an action involving the recovery of land occupied by the Appellant when the said action was barred by statute in accordance with Section 7 of The *Limitation of Actions Act* (cap 22).

3. The Learned trial Magistrate erred in law relating to registered land in failing to note that although the suit parcels of Land No. West Nyokal/Kanyikela/796 are registered in the name of the Respondent, the Appellant's interest, title and rights were overriding interest in accordance with Section 28 (a), 28(b) and 28 (h) of the *Land Registration Act* that the defendant had over the many years of occupation acquired rights by virtue of Section 7 of The *Limitation of Actions Act*

4. The Learned trial magistrate erred in law of evidence in deciding the case against the weight of evidence in that evidence adduced showed that the Appellant had been in occupation of the suit land for over 12 years before the instant suit was filed.

15. The parties filed submissions on the Appeal.

16. The Appellant submitted that the matter was time barred by virtue of Section 18(2) of the *Land registration Act* and Section 4(2) of the *Limitation of Actions Act*. That the suit was of trespass in nature which was a tort and that from the year when the Respondent moved out, being 1988 the year 2020 when the suit was filed was 32 years beyond the period limited by statute. Additionally, that the Respondent was barred by section 28(h) of the *Land Registration Act* which limits him from recovering a land in possession of another after the statutory period of 12 years.

17. The Appellant submitted that he was not notified of the survey ordered during the pendency of the original case and further, that the court proceeded to use the content of the survey report without calling the maker of the same to produce it. He cited section 35 and the case of Kenneth Nyaga Mwige vs Austine Kiguta & 2 Others (2015) eKLR in support of this submission. He urged that the report ought not to have been considered by the court and should be discarded. He urged the court to allow the Appeal with costs.

18. The Respondent filed written submissions dated 20th march 2025. He laid out the contents of the survey report and stated that the findings of the proceedings before Land Registrar held on 7th October 2015 confirmed that the Appellant had initially trespassed on the land sometime in 2015. He pointed out that the Appellant relied on his witness statement and statement of defence and at no time did he raise the issue of jurisdiction.

19. He stated that the Appellant is introducing new evidence and urged the court not to entertain new issues which were neither pleaded nor relied upon in the trial court. He pointed out that the Defendants witnesses never produced any evidence that they visited the suit land or were clan elders as alleged. Further, that the Appellant never stated when he started to use the land and for how long. He urged that it is not enough for a litigant to state a suit is time barred without adducing evidence as to when this right accrued and how time lapsed.

20. The Respondent maintained that the Appellant failed to fulfil the requirements to prove adverse possession and urged the court dismiss the Appeal and award general damages for trespass which was not awarded at the trial court.

Analysis & Disposition

21. The role of an appellate court by way of re-trial and re-evaluation of evidence is well settled as was stated in the case of Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, where the Court of Appeal stated that;

> " 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 and draw its conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect."

22. I have considered the record of appeal and submissions by Counsel. I conclude that the grounds of appeal may be consolidated into the following issues for determination;

Whether the suit was time barred

23. The Appellant contends that the suit was time barred by virtue of section 18(2) of the *Land Registration Act* and Section 4(2) of the *Limitation of Actions Act*.

24. Section 18(2) of the *Land Registration Act* provides as follows;

    (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.

25. Section 4(2) of the *Limitation of Actions Act* provides as follows;

    (2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

    > Provided that an action for libel or slander may not be brought after the end of twelve months from such date.

26. I have considered the plaintiff and the cause of action was not entirely founded on the tort of trespass. The Plaintiff now Respondent testified that the Appellant herein moved onto his land and destroyed the boundary. It was then then that he reported the case to the land registrar who visited the land and established the boundary. That was in 2015. PW1, DW1, DW2 and DW3 all acknowledged that the survey, leading to establishment of the boundary was done in 2015. It means that all along the parties knew that the respective portions they occupied were theirs. Additionally, before the establishment of the boundary, the parties must have used the general boundary demarcations which is not accurate. It is clear to me, from the Plaintiff's testimony that when the Appellant (now) encroached or entered his portion he (Respondent) called on the land registrar to go and establish the boundary. He did so with the surveyor and gave a report which the Appellant disputed the contents thereof. While DW3 stated that the 1st Defendant (now appellant) resided on the land since 1970s his evidence was not clear as to whether it was on the portion that the surveyor found to be his. This Court is finds, even as the trial Court found, that the said party, Appellant, had been residing on his parents' parcel of land, over which the 1974 and subsequent appeal disputes were and the demarcation objections were all of which his parents lost or were dismissed as demonstrated by the evidence. For instance, the DM II Land Case No 6 of 1974 at Ndhiwa Court and RMC Land Appeal No. 20 of 1974, Objection No. 154 heard and determined on 21/01/1974 and the boundary dispute that was heard and determined

by the Land Registrar on 7th October 2015. Specifically, in 2015 when the Land Registrar was on the land to determine the boundary dispute, the Appellant stated that he owned parcel No 792 and about the Appellant now he added, "This No. 796 Dancan is talking about I am now aware. He stopped me from clearing the bush to do some cultivation. Where I have planted my sugarcane and maize is my land. I know I border the road on the left, Orwa on my right 970 and the land run up to the river."

27. Clearly the evidence of the Appellant before the Land Registrar when properly analyzed is that he did not physically occupy the disputed portion as at 2015 but rather he believed that his land bordered one Orwa's to the right and ran all the way to the river. As for him he did not know parcel No. 792. Further, in that believe, around that time he set out to clear the bush and he was stopped by the Respondent who then referred the matter to the land Registrar. The Land Registrar then went to the land to establish the boundary. Thus, it was in 2015 just before the Registrar visited the land that the Appellant had attempted to move to the Respondent's land but was stopped. When he cultivated sugarcane and maize on parcel No. 792 the Respondent did not dispute but when he attempted to clear the bush on 796 he was stopped for the dispute to be resolved first. His claim of being on the land since 1970s therefore fails. It is false. The Court therefore finds that the party has never been on the land for more than 12 years as he tried to convince the Court. Much more also is that he as been on the land since 2018 because a boundary was established in 2015 and the parties lived peacefully since then to the 2018 year.

28. Additionally, the Appellant lied on oath and is an unreliable witness. The reason is that he cannot deny knowledge of the parcel of land over which there was a dispute between his mother, Paulina w/o Ouko Yada in the Ndhiwa and Kisii courts, and even the objection stage. In any event when demarcation is usually done anyone who had a claim over the land which is demarcated usually raised an objection and it is determined. Such claim is not raised unless the Adjudication Officer has shown the parties where their parcels extend to and invites anyone to object. Since it is in evidence that adjudication was carried out in 1992 when Fanuel raised the Objection which was dismissed, it is hardly impossible that Elijah Ouko, the Appellant whose land is adjacent to the Respondent's, was unaware of the demarcations at the time hence did not raise an objection. He must have been aware of the demarcated portions extents and agreed to the boundaries.

29. In any event, there was no evidence tendered by the appellant to show that after the establishment of the boundary was made, in 2015, he did not move away from the portion he was found to have encroached and which belongs to the current Respondent. There was no evidence led by the Defendant/ Appellant to demonstrate when moved back onto the disputed parcel of land after the survey of 2015 in order for him to contend that the tort of trespass was not proved by the Plaintiff. It is therefore my view that the evidence by the Respondent in terms of his Written Witness Statement dated 22nd June 2020, that the said party/ Appellant moved onto the land in the year 2018 when he started cultivating it and barring the Respondent from using it. An inference to be drawn from the Report and finding of the Land Registrar on 07th October 2015 as compared with the Appellant's allegation of having been resident on the land since 1970s and also the Respondent's claim that the appellant moved onto the land in 2018 is that after the Land Registrar established the boundary on 07th October, 2018 the parties lived peacefully on the parcels they were shown. The problem arose again in 2018. When that evidence is analyzed and compared with the Plaintiff's/ Respondent's claim of trespass in the trial court, I find that it was not time barred because it was brought within two (2) years of commencement of the invasion of the land.

30. Even if the Court were to be wrong on this limb, the Plaintiff's claim was more than trespass, it included encroachment and injunction, among others.

31. Since the Appellant gave evidence in his written witness Statement dated 21st July 2020, that he has always lived on parcel No. 792 whose size he gave as 1.79 hectares which was their ancestral land and he

was registered as owner at demarcation and has never trespassed onto the Respondent's parcel (796) then it is clear if he claims more than 1.79 hectares, he encroached onto the neighbour's/ Respondent's land as the surveyor found in 2015.

32. Further, the Defendant and his witnesses tried to discredit the Surveyor's report. However, they did not show how or where the report was untruthful. In my humble view the issue of illegal occupation of the other party's land did and could only arise from the date the boundary was determined hence clarified, and not earlier.

33. Further, in making its determination, the court rendered itself on an ownership dispute pertaining to the suit land. Thus, the claim was not only trespass: it involved encroachment and injunctive reliefs too. Further, the court acknowledged that the boundary dispute had already been determined by the land registrar and Surveyor, pursuant to Section 18 of the *Land Registration Act* and the parties were aware of the boundaries and therefore, it did not delve into determination of the same. The survey conclusively determined the issue of encroachment and found that the Appellant had encroached the whole of the Plaintiff's land.

34. Additionally, the appellant raised the issue that the court failed to recognize that he had been in occupation of the suit land for 12 years despite the weight of the evidence. I have considered the record of the trial court and the judgement and I find no merit in this ground of appeal. In sum, there was no sufficient evidence that the Appellant had occupied the suit land for 12 years and the Appellant did not even raise this issue at the trial court. Therefore, the finding of the court was merited.

35. In the premises, all the grounds of the appeal fail. The appeal is dismissed in its entirety with costs to the Respondent.

36. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 19TH DAY OF JUNE 2025.

HON. DR. IUR NYAGAKA,

JUDGE

In the presence of,

Elijah Ouko, the Appellant (in open Court hence logged in through Court gadget)

Court Assistant/ Interpreter in Dholuo -Present