REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELCA NO.6 OF 2018

FRANCIS OKANGA SAMSON.....APPELLANT

VERSUS

1. KASSIM SAID MWATAMU

2. BAKARI ABDALLA MWACHIBULO

3. BAKARI MWINYIATANI ZAUNGA.....RESPONDENTS

JUDGMENT

1. The Appellant filed this appeal against the judgment and order of Honourable D. Nyambu, Chief Magistrate in Kwale CMCC No. 46 of 2014 dated 28th February, 2018. In the Memorandum of Appeal dated 17th December, 2018, the Appellant has set out the following grounds:

> **1. That the Learned Magistrate erred in law and in fact in adopting wholesale the report of the surveyor as the judgment of the court without realizing that it contained a serious error and concerned the wrong parcels of land.**
>
> **2. That the learned Chief Magistrate erred in law and in fact in ignoring and failing to make any decision or finding on the central issue raised and deciding on two different parcels of land.**
>
> **3. That the learned Senior Resident Magistrate erred in law and in fact in failing to realizing and appreciate that the report of the surveyor involved land parcels numbers 70 and 72 and not 72 ad 82.**
>
> **4. That the learned Chief Magistrate erred in law and in fact in purporting to adopt the nullity and illegality that was the report of the Land surveyor.**
>
> **5. That the learned Chief Magistrate erred in law and in fact in arriving at and making final decision on the matter and ordering execution thereon in total disregard of the Appellant's inherent right of appeal.**
>
> **6. That the learned Chief Magistrate erred in law and in fact in failing to realize and appreciate that the respondents had failed to prove their case on a balance of probabilities.**
>
> **7. That the judgment delivered by the Learned trial Magistrate failed to comply with Order 21 of the Civil Procedure Rules.**

2. For those reasons the appellant prayed that this appeal be allowed and the judgment and order of the Chief Magistrate, Kwale dated 28th February, 2018 be vacated and set aside with costs to the Respondent in this appeal and at the subordinate court.

3. Counsel for the Appellant and for the Respondent both filed written submissions for and against the appeal herein. The appellant's advocates Messrs F. M. Mwawasi & Company Advocates filed their submissions on 21st November, 2019 while Messrs Kiprop Cheruyoit & Company Advocates for the respondents filed theirs on 16th December 2019.

4. In his submissions the Appellant gave a brief of the case in the subordinate court in which the respondents have sought orders that the Appellant herein was a trespasser on LAND PARCEL NO. KWALE/UKUNDA/72 and an order to vacate from the said land. That the appellant in his defence stated that he was living on his own LAND PARCEL NO. KWALE/UKUNDA/82. Counsel for the appellant submitted that before the trial magistrate delivered her judgment, she requested for a survey report as it appeared to her that the case was

essentially a boundary dispute. That the survey report was to the effect "the development done by the owner of parcel 82 appear to encroach on parcel 70. That the learned magistrate then stated "……it is recommended through the court that boundaries be determined by the Land Registrar and the map amended to suit his determination. From the above recommendation it is apparent that the defendant has encroached onto the plaintiff's parcel of land and this court allows the prayers in the plaint, cost and interest."

5. In his submissions, the appellant contended that the learned trial magistrate chose to take the easy way out by adopting the surveyor's report as judgment of the court. That the survey report specifically mentions PARCEL NO. KWALE/UKUNDA/82 and KWALE/UKUNDA/70 while the respondent's land is KWALE/UKUNDA/72. Counsel for the Appellant submitted that the judgment was erroneous for the trial magistrate to conclude that the surveyor's report proved the respondents case when the report did not touch on their land.

6. The respondents counsel cited the case of **Kenya Ports Authority ―v- Kuston (Kenya) Limited (2009) 2 EA 212** quoted in **Abok James Odera t/a A. J. Odera Associates –v John Patrick Machira t/a Machira & Co. Advocates (2013)eKLR** and submitted that the trial court enjoyed the advantage of seeing and observing the witnesses as they testified allowing it to arrive at its own independent conclusions on the factual issues in contention in the matter. It was therefore their submission that even as this court re-evaluates, re-assesses and re-analyzes the extracts on record to make a determination whether the conclusions reached by the learned trial magistrate are to stand or not, due regard must be had to the fact that the trial court's conclusion were guided by various factors as it had the advantage of seeing and observing the witnesses as they testified. That from the respondents' testimony and as noted by the court, it was clear that the respondents and the appellant in this matter are neighbours, and the Appellant had encroached on the respondents parcel of land where he has built his four bedroomed house. That despite efforts to have the matter resolved by a surveyor evidenced by P.exh. 2, the Appellant has refused to cooperate and remained adamant, hence necessitating the action. The respondents' counsel further urged the court to be guided by the reasoning of the court in the case of **Peters –v Sunday Post Limited (1958) EA 424** and submitted that the appeal has no merit and should be dismissed with costs to the respondents.

7. I have perused and considered the Record of Appeal and the submissions by the parties. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyze the evidence on record to determine whether the conclusions reached by the learned trial magistrate were justified on the basis of the evidence presented and the law.

8. The issues for determination in this appeal as I can deduce from the grounds of appeal are:

i. Whether the learned trial magistrate was justified in adopting the surveyor's report.

ii. Whether the decision of the learned trial magistrate was against the weight of the evidence.

9. From the pleadings, it is clear that the respondents' case against the appellant was a boundary dispute. The respondents accused the appellant of encroaching onto their PARCEL NO. KWALE/UKUNDA/72. The appellant is the registered owner of PARCEL NO. KWALE/UKUNDA/82. The proceedings indicate that after hearing the parties and before retiring to write the judgment the learned trial court was of the view that it required the opinion of the County Land Surveyor for it was apparent that the matter before the court was boundary dispute. Both parties were asked to necessitate the costs of the surveyor who visited the disputed land and filed his report dated 1st October 2017. The surveyors findings were as follows:

"7. Findings

Both plots as shown by the respective owners are out of place and considerably bigger than they are on the map.

When comparing measurements taken on the ground to those on the map, developments done by the owner of parcel No. 72 appear to encroach on parcel no. 70.

8. Recommendations.

As the developments of this area do not conform with the map, plot boundaries could not be authoritatively derived. It is recommended that through the court, the boundaries be determined by the Land Registrar and the map consequently amended to suit his determination."

10. Pursuant to that surveyor's report, the learned trial magistrate stated in her judgment as follows:

"From the above recommendation, it is apparent that the defendant has encroached onto the plaintiff's land and this court allows the prayers in the plaint, costs and interest."

11. According to the Black's Law Dictionary, the word "apparent, is an adjective of "visible; manifest obvious". It is clear, however that the surveyor in his report stated that the plot boundaries "could not be authoritatively derived." The surveyor indeed recommended to the court that the boundaries be determined by the Land Registrar through the court. From the surveyor's findings, it was not obvious that encroachment had been proved as implied by the trial magistrate. It is clear that the learned magistrate relied on a report that was not conclusive. In my view, the survey report was not conclusive as to the boundaries of the two parcels of land. The trial magistrate therefore erred in arriving at a concussion that the appellant was a trespasser on PARCEL NO. KWALE/UKUNDA/72, and ordering the appellant to vacate therefrom. In my view, the respondents had not proved their case against the appellant on a balance of probabilities.

12. The upshot of this is that this appeal has merit and the same is allowed with costs. The judgment/decree of the lower court in Kwale CMCC No. 46 of 2014 is set aside and in lieu thereof an order is made directing the Land Registrar, Kwale to determine the boundaries of land parcel numbers KWALE/UKUNDA/72 and KWALE/UKUNDA/82. Any party that will not be satisfied with the decision of the Land Registrar will be at liberty to seek legal redress. Each party to bear their own costs.

Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 9TH day of July 2020.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant