

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
KAKAMEGA
ELC APPEAL NO. E001 OF 2022

JOHN MAKOMERE ASHIOYA.....
APPELLANT

VERSUS

ISAAC OTENYO AMUNAYA.....
.....RESPONDENT

***(Being an appeal against the judgment of Hon. F.
Makoyo, (PM) delivered on 21st December 2021 in Butere
SPMC ELC Case No. 73 of 2018)***

JUDGMENT

Introduction

1. The Appeal before this court was filed by John Makomere Ashioya challenging the Judgment of Hon. F. Makoyo (Principal Magistrate) delivered on 21st December, 2021 in Butere Senior Principal Magistrates Court ELC Case No. 73 of 2018. In the impugned judgment, the learned trial

magistrate dismissed the plaintiff's (appellant herein) case with costs, and held that the Appellant failed to prove on a balance of probabilities that the Respondent had encroached upon his parcel of land to warrant the court to grant an injunction.

Background

2. By a plaint dated 26th April 2018 and amended on 17th September 2019, the plaintiff sought the following orders as against the defendant;

a. An order of permanent injunction restraining the defendant by himself, employees, agents, servants and or other persons claiming through him from interfering, constructing, and/or in any other way dealing with L.R. No. MARAMA/INAYA/1223

b. The defendant to be restrained from further construction of the building currently under construction L.R No. MARAMA/INAYA/1221 which is overlapping and interfering with the plaintiff's occupation and use Land parcel No. MARAMA/INAYA/1223;

c. Costs and interest of the suit.

3. The Plaintiff averred that he is the registered proprietor of land parcel MARAMA/INAYA/1223, upon which he constructed a permanent commercial building in 1998. He pleaded that the Defendant, as the owner of the adjacent parcel MARAMA/INAYA/1221, commenced construction without necessary approvals, unlawfully joined his structure onto the plaintiff's building, failed to leave the required construction setback, erected illegal beacons, overlapped roofing into the plaintiff's parcel, and encroached into his land by approximately 10 feet; thereby endangering the structural integrity of the plaintiff's building and interfering with his peaceful occupation and use of parcel No. 1223.

4. The defendant filed a defence dated 17th August 2021 in response to the amended plaint where he denied all substantive allegations contained in the plaint, putting the Plaintiff to strict proof thereof. The defendant anchored his case on the principle of indefeasibility of title, asserting that the disputed construction falls wholly within his registered parcel, L.R. NO. MARAMA/INAYA/1221, and that as the absolute proprietor, he is entitled to its

exclusive use and development. He characterized the suit as frivolous, and prayed for its dismissal with costs.

5. The matter proceeded by way of *viva voce* evidence. The plaintiff presented two witnesses and closed his case. The defendant testified as the only witness in support of his case.

Plaintiff's evidence

6. PW1 was the plaintiff John Ashioya Makomere. He adopted his written statement filed on 26th April 2018 as his evidence in chief. He stated that he was the registered owner of land parcel No. MARAMA/INAYA/1223 while the defendant was the registered proprietor of parcel 1221 and that the two parcels abut each other. That there was a road between the two parcels but that the defendant while constructing a building on his parcel encroached on the plaintiff's land and attached his building to the plaintiff's building which has endangered the structural integrity of the plaintiff's building. That he reported the matter to the County Government of Kakamega, and the National Construction Authority when it was discovered that no

approvals were issued for construction of the building by the defendant. That the defendant's acts led to disconnection of power to the plaintiff's building. He produced a title deed, Notice from the Ministry of lands and Notice from the National Construction Authority

7. On cross examination, he testified that he had left a gap of two feet between the buildings, but the defendant had allegedly taken up the space and further encroached approximately ten feet into his land, thus making a total encroachment of about twelve feet. He asserted that the defendant's wall ought to be demolished and complained that the defendant's roofing had been slanted in a manner that allowed rainwater to drain onto his land. He admitted that he had not produced photographic evidence of the alleged encroachment or damage and confirmed that the letters he produced were not addressed to him but were given to him by the relevant authorities following his complaint, and he could not confirm whether any enforcement action was taken or concluded.

8. PW2 was Stephen Sogoni Chune, Director of Physical Planning with the County Government of Kakamega. He

testified that his office noted a development being undertaken at Bukura market without approval, prompting issuance of a notice dated 21st February 2018 requiring the owner, the defendant herein, to stop construction and submit building plans for approval. He stated that the defendant complied within the stipulated period, whereafter his office visited the site and approved the development in accordance with the measurements of approximately 3 metres by 30 metres. He produced his report as an exhibit. During cross-examination, he stated that at the time of his site visit, there was no boundary dispute noted between the parties and the construction stood on the defendant's land. He further stated that the defendant had complied with all relevant county requirements before continuing with his building works.

Defence evidence

9. DW1, Isaac Otenyo Amunaya, adopted his witness statement dated 30th May 2019 as his evidence in chief and produced his documents listed on 6th April 2021 and 19th August 2021 as defence exhibits. He produced title deed, certificate of confirmed grant, two Surveyors' reports,

mutation form, judgment and decree in Kakamega ELC No. 8 of 2016, letter to the Land Registrar, receipts for building approvals and copy of approved plans. He testified that he was the registered owner of land parcel MARAMA/INAYA/1221, having purchased the same from one Jotham and not from the Plaintiff. He maintained that his construction was being undertaken on his land and denied any encroachment into the plaintiff's parcel.

10. During cross-examination, he confirmed that although he initially purchased 0.075 acres (equivalent to 0.03 Ha), the title issued reflects 0.02 Ha and that he had sought rectification of the title through the Land Registrar. He acknowledged certain errors in documentation, including a mutation form not signed by the Land Registrar, but clarified that the District Surveyor had signed it and stated that the rectification process was ongoing. He denied allegations of taking advantage of the plaintiff or enlarging his portion unlawfully, asserting that both parties had appeared before the High Court in the succession proceedings that resulted in the current allocations. That marked the close of the defence case.

11. Upon consideration of the pleadings, oral and documentary evidence, and the written submissions filed by both parties, the trial court found that the plaintiff had failed to tender credible and cogent evidence to prove encroachment by the defendant into parcel MARAMA/INAYA/1223. The court noted that the defendant, as a registered proprietor, had complied with all requisite planning and construction approvals, as confirmed by PW2 and was entitled to enjoy all the rights of a registered owner as per Section 24 of the Land Registration Act 2012. Consequently, the court held that the Plaintiff had not discharged the burden of proof on a balance of probabilities and dismissed the suit with costs awarded to the defendant.

12. Being aggrieved by the Judgment of the trial court, the appellant herein filed a Memorandum of appeal dated 20th January, 2022 citing four grounds of appeal as follows: -

- a. THAT the learned trial magistrate erred both in law and fact in finding that the appellant was not entitled to orders sought.**

b. THAT the learned trial magistrate erred both in law and fact in dismissing the appellant's suit.

c. THAT the learned Magistrate erred both in law by not granting the orders sought when the suit had merit.

d. THAT the learned Magistrate erred both in law and fact in not considering all facts and circumstances of the case.

13. Consequently, the appellant sought the following orders;

a. The appeal herein be allowed.

b. The entire judgment delivered on 21st December, 2021 be set aside.

c. The costs of the trial court and of this appeal be borne by the respondent.

14. The Appeal was canvassed by way of written submissions.

On record are appellant's submissions dated 24th May 2024 and the respondent's submissions dated 8th April 2025; both of which this court has carefully considered.

Appellant's Submissions

15. Counsel for the appellant submitted that the appellant's parcel of land, being LR No. MARAMA/INAYA/1223, had

been encroached upon by the respondent, who is the registered proprietor of the adjacent parcel L.R No. MARAMA/INAYA/1221. That the trial court erred by not granting the orders of permanent injunction as sought, yet the appellant had demonstrated that the respondent unlawfully joined his structure to that of the appellant without consent, and further moved the common boundary beacons approximately ten feet into the appellant's parcel in an attempt to reclaim land allegedly lost to a road reserve. Counsel emphasized that this encroachment endangered the appellant's building and substantially interfered with his quiet possession and proprietary rights over the suit property.

16. It was further submitted on behalf of the appellant that the appellant's claims were supported by a Survey Report dated 18th March 2021, indicating that the respondent had unlawfully erected new beacons within the boundaries of LR No. MARAMA/INAYA/1223, at distances of 3.08 metres and 3.04 metres respectively from the true boundary line. This finding, it was argued, was corroborated by a Ministry of Lands Technical Report dated 24th May 2017 which

noted material discrepancies in boundary measurements between Parcels No. 1221 and 1223, with the true demarcation line passing through an existing permanent structure. Counsel submitted that the said evidence was uncontroverted during trial, and the trial court's failure to consider it amounted to a misdirection in law and fact. Accordingly, it was urged that this Court allows the appeal as prayed in the Memorandum of Appeal.

Respondent's submissions.

17. Counsel for the respondent submitted, that the appellant is improperly represented before this Court, contrary to the requirements of Order 9 Rule 9 of the Civil Procedure Rules. It was argued that once judgment had been delivered in the subordinate court, any change of advocates could only be effected through a formal application with notice to all parties, or by a consent between outgoing and incoming advocates. Reference was made to the case of ***Monica Moraa v Kenindia Assurance Co. Ltd. [2010] eKLR***, wherein the issue of representation post-judgment was emphasized as a critical procedural requirement. Counsel contended that the firm

of 'Odongo Okal & Co. Advocates' failed to file the requisite Notice of Change of Advocates and therefore lacks proper audience before this Court. It was urged that the Record of Appeal together with the Appellant's submissions be struck out for being incompetent.

18. Counsel submitted on without prejudice to the foregoing argument, that even if the appellant were to overcome the procedural objection, the appeal remains devoid of merit. It was argued that the appellant's claim before the trial court was premised on alleged encroachment by the respondent onto LR No. MARAMA/INAYA/1223; and that the burden of proving encroachment lay squarely upon the appellant, in line with Sections 108 and 109 of the Evidence Act. Counsel emphasized that no expert evidence was adduced from either the County Land Surveyor or the Land Registrar to ascertain and determine the boundaries between the two properties, notwithstanding the appellant's acknowledgment during cross-examination that such evidence was necessary and had not been produced.

19. Counsel further invoked Section 18 of the Land Registration Act, which expressly stipulates that "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” by the Registrar. Counsel averred that the appellant’s encroachment claim was quintessentially a boundary dispute. Therefore, the lack of a report from the County Surveyor and Land Registrar amounted to failure by the appellant to comply with this statutory precondition thus rendering the entire suit incompetent and deprived the trial court of jurisdiction *ab initio*.

20. On the allegation that the respondent’s building lacked requisite approvals, counsel cited the testimony of PW2, the Director of Physical Planning, who confirmed that the respondent had submitted building plans, complied with regulatory requirements, and was constructing on land registered in his name. It was submitted that this evidence further weakened the appellant’s case.

21. Finally, counsel submitted that the appellant’s grounds of appeal are vague, generalized and fail to attribute any specific error to the trial court and prayed that the appeal be dismissed with costs to the Respondent.

Analysis and determination

22. The court has carefully considered the appeal, the entire trial court record and the parties' rival submissions. A preliminary issue raised by the respondent was on the legality of the legal representation of the appellant. As regards provisions of Order 9 Rule 9 of the Civil Procedure Rules which require leave of court for change of legal representation post judgment, my position is that when the appellant's counsel herein filed the memorandum of appeal in this appeal, there is no judgment by this court to require them to obtain leave. In the premises, the appellant's counsel has been and continues to be properly on record and hence the appeal is competent.

23. The role of this court as a first appellant court is to rehear the dispute. It therefore must re-assess, re-evaluate and re-analyze the facts and the law and make its own independent conclusions. This position was stated in the case of **Selle & Another -vs- Associated Motion Boat Co. Ltd & Others (1968) EA 123.**

24. The appeal herein is a challenge against the trial court's decision to dismiss the appellant's claim on the basis that there was no evidence to show encroachment. Therefore, the issue is whether the appellant proved encroachment of parcel Marama/Inaya/1223 by the respondent.

25. Section 107 of the Evidence Act places the burden of proof in a case on the plaintiff. In this case, the appellant's complaint was that the respondent encroached on his parcel No. Marama/Inaya/1223, erected beacons on his land, interfered with the use of the plaintiff's parcel and failed to comply with the construction regulations by National Construction Authority, County Government of Kakamega and Ministry of Land housing and urban areas. The respondent's defence was that he is the registered proprietor of his land Marama/Inaya/1221 and has absolute rights to use it as he pleases.

26. Both the plaintiff and defendants produced documents. The mutation in respect of parcel 594 show that the two parcels were created from subdivision of the said parcel. The appellants parcel measures 0.05 hectares while the respondents parcel measures 0.02 hectares.

27. The plaintiff produced a surveyor's report by Jooyato Surveys dated 18th March 2021, which showed that the respondent had encroached into the appellant's parcel by 0.4 meters and that the respondent had constructed beacons X and Y in parcel No. 1223 and beacon X is 3.08metres from the common boundary fronting Sigalagala- Butere Road while beacon Y is 3.04 metres from the common boundary. Therefore, the appellant presented clear evidence of encroachment by the respondent. The National Construction Authority in its suspension of works on parcel No. 1221, on 21st February 2018 stated that the development of the respondent had intruded on the appellant's parcel and there was need to use gutters and divert rainwater not to affect the neighbouring establishment.

28. On his part, the respondent produced summons from the Land Registrar Kakamega dated 25th July 2016 in regard to a boundary dispute for parcel Nos. 1223, 1218 and 1221. He also produced an order was issued in Kakamega HCC No. 221 of 2015 for the Land Registrar and surveyor to visit parcel Nos 1221, 1223, 1228, 1218 and 1219 and file

their report in 60 days. In that regard a report was filed by the Survey office dated 24th May 2017. It showed that there was encroachment on the boundary between parcel No. 1221 and No. 1223 and that the common boundary went through an existing permanent building. The respondent has not complained that his boundary goes through the appellant's building and he was not the plaintiff in Kakamega HCC No. 221 of 2015. It is clear therefore that the evidence of both the appellant and respondent clearly demonstrated encroachment by the respondent as there is a clear finding of encroachment from the visit made to the suit property by the Land Registrar and surveyor. And on that basis, the issue of encroachment having been settled by the Land Registrar in consultation with the surveyor the question of jurisdiction by dint of section 18 of the Land Registration Act does not arise. Therefore, the trial court was wrong in concluding that the appellant failed to avail evidence of encroachment. I find and hold that the appellant proved encroachment by the respondent.

29. In the premises, the appeal herein succeeds, the trial court's judgment is set aside and substituted with an order that the appellant suit before the trial court succeeds and judgement is entered in his favour as prayed in the amended plaint dated 17th September 2019, that;

a) An order of permanent injunction is hereby issued restraining the defendant by himself, employees, agents, servants and or other persons claiming through him from interfering, constructing, and/or in any other way dealing with L.R. No. MARAMA/INAYA/1223

b) The defendant is hereby restrained from further construction of the building currently under construction L.R No. MARAMA/INAYA/1221 which is overlapping and interfering with the plaintiff's occupation and use Land parcel No. MARAMA/INAYA/1223;

c) The costs of this appeal and those incurred before the trial court are hereby awarded to the appellant and shall be borne by the respondent.

30. It is so ordered

**DATED, SIGNED AND DELIVERED AT KAKAMEGA IN
OPEN COURT/VIRTUALLY THROUGH MICROSOFT
TEAMS VIDEO CONFERENCING PLATFORM THIS 26TH
DAY OF NOVEMBER, 2025**

**A. NYUKURI
JUDGE**

In the presence of;

Mr. Siwolo holding brief for Mr. Odongo for the appellant

Mr. Ashioya for the respondent

Court Assistant: Delphine