

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA-BAY
ENVIRONMENT AND LAND APPEAL NO. E046 OF 2024

**PAUL ONGONGA DIK (Suing
as the Legal Representative of
the Estate of DIK BANJA- DECEASED)**

.....**APPELLANT**

VERSUS

BENARD DEDE.....1ST

RESPONDENT

EVALINE ATIENO OWITI.....2ND

RESPONDENT

*(Being an Appeal from the Ruling delivered by Hon. Joy
Shiundu (PM), on 23rd August, 2024 in Homa-Bay MCELC
No. E024 of 2022)*

JUDGEMENT

- 1.** The Appellant filed an Application dated 26th April 2024 seeking the following orders in the trial court;
 - 1) That this court be pleased to order stay of implementation of the survey report by the county surveyor dated 7/12/2023.**
 - 2) That this Honourable court be pleased to order the Homabay District Land registrar with the assistance of the plaintiff's private surveyor to visit land parcels number East Kanyada/Kanyadier 319, 323 and 325 to establish whether there is an encroachment.**

3) That the honourable court do issue an order of resurvey of land parcels number East Kanyada/Kanyadier 319, 323 and 325 to establish the true position on the ground.

4) That the survey report be filed within 60 days.

5) That costs of the application be in the cause.

2. The application was premised on the grounds on the face of it and the contents of the affidavit sworn in support of the same. The applicant contended that the County Surveyor who conducted the survey and prepared a report dated 7th December 2023 should not have participated in the process. His basis was that he had been hired as a surveyor by the defendants prior to taking the survey, when they were purchasing portions of land parcel no. East Kanyada/Kanyadier 323 and 325. Further, he urged that the survey process was not conducted in a transparent manner.
3. The Respondent opposed the application vide a replying affidavit dated 12th May 2024. He urged that a survey was done before all the parties. That it was evident that the dispute was a boundary dispute which could only be solved by the land registrar hence the court had no jurisdiction. He urged the court to dismiss the application.
4. Upon considering the application, responses and submissions, the trial court dismissed the application. Being dissatisfied with the ruling, the appellants instituted the present appeal vide a memorandum of appeal dated 8th September 2024 premised on the following grounds;

- 1) That the learned trial Magistrate erred in law and fact in her Ruling dated 22nd August, 2024, by departing from the Order she made on 25th November, 2022, where she directed that the Homa-Bay Land Registrar and the County Surveyor, to visit the suit parcels and to determine, whether there is encroachment.**
- 2) That the learned trial Magistrate erred in law and fact by seemingly pouring cold water on the evidence tendered in support of the Appellant's case in the subordinate court without giving any reason for doing so.**
- 3) The Honourable Magistrate erred in fact and in law in giving directions in favour of the respondent intended to address and attempt to cure the weaknesses in the respondent's case and not to assist the court in arriving at an independent decision.**
- 4) The Honourable Magistrate erred in fact and in law in failing to appreciate the law relating to adversarial judicial system in Kenya.**
- 5) That the Learned Magistrate erred in both law and fact by failing to consider, analyse and appreciate the law and appellant's written submissions.**
- 6) The Learned Magistrate erred in both law and fact in being biased against the appellant.**

- 7) The Learned Trial Magistrate erred in law in law, in failing to consider and completely ignoring the arguments raised by the Appellants in their Written Submissions filed by the Appellant.**
- 8) The Learned Trial Magistrate erred in law in failing to analyse the facts and legal arguments advanced vide the Motion before Court thereby reaching to (sic) an erroneous decision.**
- 9) The Learned Magistrate erred in Law and fact by failing to appreciate the Land Registrar did not participate in the survey process contrary to the Court's direction.**
- 10) The Learned Magistrate erred in law and fact by ignoring the claim by the Appellant that the Land Registrar did not file his Report in Court neither did he serve the Appellant with the Report.**
- 11) The Learned Magistrate erred in law by ignoring the principal of natural justice that dictates that no one should be condemned unheard.**
- 12) That the Learned Magistrate erred in Law and fact by failing to appreciate that the Land Surveyor who filed the Survey Report not endorsed by the Land Registrar, was not the County Surveyor to participate in the process as per the Court Order.**

13) That the Learned Magistrate misdirected herself when she deemed the Survey Report as proper yet the same was not endorsed by the Land Registrar.

14) The Learned Magistrate erred in Law and fact when she ignored the issues of impartially by the surveyor to who conducted the survey in absence of the Land Registrar.

15) That the Learned Magistrate erred in Law and fact when she dismissed the Applicant's Notice of Motion that was seeking for a resurvey where the Land Registrar would participate and write his report and the process to be watched by Appellant's private surveyor of their choice.

5. The Appeal was canvassed by way of written submissions. The appellant filed submissions dated 19th March 2025 through the firm of **Messrs. Ochieng Adingo & Co. Advocates**. The Respondent, on his part, filed submissions dated 30th May 2025 through the firm of **Messrs. L.K. Obwanda & Co. Advocates**.

Appellants' Submissions

6. Learned counsel for the Appellant gave a background of the case leading up to the impugned ruling and proceeded to submit on the issues he identified for determination. Counsel urged that the Order of the Trial Court dated 25th October, 2022 had directed that both the Land Registrar and the Surveyor Homa-Bay County to visit the suit parcel and to file their respective reports thereafter within thirty (30) days.

The first two paragraphs of the Order of the Trial Magistrate were as follows:

That, “the Land Registrar and Surveyor-Homa Bay County to visit and survey land parcels L R. No. Kanyada/Kanyadier/319, 323, and 325, to determine whether there is encroachment between the aforestated parcels of land.”

That, “the Land Registrar and the Surveyor shall thereafter file their after file their respective reports within 30 days.

7. He urged that it is not in dispute that the Trial Court had directed both the Land Registrar and the County Surveyor Homa-Bay, to visit the suit parcels and to write their respective reports. That it is also not in dispute the Land Registrar did not take part in the said exercise neither did he write any report to that effect. The Land Registrar did not equally endorse the surveyor’s report dated 7th December, 2023 that was filed in the Trial Court. Further, that it is not in dispute that the said Court Order had not been varied and or set aside. Counsel submitted that the issues of encroachment on the suit parcels that was to be determined, is a statutory duty of the Land Registrar and not the Surveyor.
8. Counsel cited the case of **Kobia v Ikonga (Environment and Land Appeal E074 of 2022) [2024] KEELC 1595 (KLR) (13 March 2024) (Judgment)** and urged that the Trial Court’s Orders directed both the Land Registrar and the County Surveyor to visit the suit parcels and to determine as

to whether there was an encroachment. It is unfortunate that it is only the surveyor who filed his report which report was not endorsed by the Land Registrar. The Trial Magistrate, therefore deviated from her Orders when she failed to appreciate that the Land Registrar did not participate in the exercise and or file his report. Counsel urged that Court Orders are not issued in vain.

9. Counsel submitted that for the foregoing reasons, the Trial Magistrate erred when she dismissed the appellant's application and prayed that the appeal be allowed.

Respondents' Submissions

10. Learned counsel for the respondent submitted that the appellant is seeking to appeal the decision by the trial court that was delivered on 22nd August 2024 and the appeal herein, dated 8th September 2024, was filed on 6th October 2024 which by all conduct the same was filed out of time without obtaining leave from the Trial Court to file the same. Further, that as stipulated in section 79 G of the civil procedure act, the appeal herein ought to be filed within 30 days from the issuance of the order. Notably it is on record that the order herein was delivered on 22nd August 2024 and the appellant herein filed the said appeal on 6th October 2024, 13 days after the lapse of 30 days but did not even seek leave to appeal out of time the said decision nor was the leave of the Trial Magistrate's Court sought to file the appeal on the ruling delivered as is required by Law. Counsel placed reliance on the position in the case of **Muchiri v Pal (Civil Appeal 54 of 2023) [2024] KEHC 2225 (KLR) (6**

March 2024) (Ruling) in this regard. Counsel urged the court to dismiss the appeal on this ground.

- 11.** On whether the trial court was biased, counsel urged that a citizen is entitled under the provisions of Article 50(1) to trial by an impartial court, tribunal or other body. The claims of bias should not be made or taken lightly as impartiality is the cornerstone of both procedural and substantive justice and a clear jurisprudence. Further, that the Appellant herein is affirming that the trial court herein was impartial as she is allegedly trying to cure the weakness in the respondent's case which is not true. The matter is still at the pre-trial stage yet to be set for full hearing. Therefore, he cannot allege that his right to hearing has been infringed. On the other hand, the matter herein is a 2022 matter which ought to have been concluded expeditiously as required in Article 159 of the constitution. Counsel urged that the appellant is employing delaying tactics to drag the respondents through an endless litigation.
- 12.** Counsel submitted that jurisprudence at all material times indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence as intimated in the case of the **Supreme Court of Canada R vs. S.C.R.D.) [1977], 3SCR 484 cited by the Court of Appeal in Kalpana H. Rawal**

& 2 others v Judicial Service Commission & 3 others [2016] eKLR.

- 13.** Counsel submitted that the likelihood of bias must be demonstrated and further, that in this case, nothing can be inferred from the trial court proceedings or judgment that the trial magistrate was biased in any way. Section 107 (1) of the evidence Act obligates the Appellant to prove any form of impartiality that he so claims which evidence were not presented before the court.
- 14.** On whether the survey was conducted in an impartial manner, counsel submitted that section 107 (1) of the evidence Act obligates the Appellant to prove any form of impartiality that he so claims which evidence were not presented before the court. Further, that a survey was conducted on 1st December 2023 and there was no indication that the appellant was displeased with the survey exercise. If indeed he was not satisfied with the way that the land registrar and surveyor conducted the same he ought to have protested the same which would have been captured by the land surveyor that indeed the appellants herein protested. Additionally, that the survey report as capture intimates that all parties herein participate in the said exercise without any hitch therefore the same was conducted as required by law as held in the case of **Kiragu v Munyi & 2 others (Appeal E18 of 2023) [2025] KEELC 693 (KLR) (20 February 2025) (Judgment).**
- 15.** Counsel urged that Section 18 and 19 of the Land Registration Act, 2012 outlines the procedure for

determining the exact boundaries of land parcels which the land surveyor and registrar complied with to the effect that a report was filed before trial court. That he believes that the appellants herein is not satisfied with the said report and is trying to challenge the same through this proceedings. Counsel pointed out that it is not a mandatory requirement that a report prepared by the county surveyor ought to be duly executed and co-signed by the land registrar, rather the land registrar has the obligation to ensure that the said report in compliance with section 18(2) of the land registration act. The land registrar main role is to determine land dispute and ascertain the exact location of boundaries, often with the assistance of a surveyor therefore there was no impartiality.

- 16.** On whether the trial court herein departed from her ruling delivered on 25th November 2022, counsel submitted that there is no doubt that there was an order directing the land registrar and the land surveyor to visit the property, which they did in compliance with the court order as evidenced in the survey report dated 7th December 2022, the same captured that indeed the land registrar and county surveyor visited the land on 1st December 2022 of which the parties herein were also present during the exercise. Satisfactorily, both the Land Registrar and the County Surveyor both in charge of Homabay duly complied with the order of the Court by their exercise done on 1st December 2022 and they used the proper tools to guide them to arrive at the findings they did. Therefore, the orders issued on 25th November 2022

were fully complied with and hence the court at no juncture department from its orders. Therefore, the application for resurvey herein was not merited on account that there was a survey exercise that was already conducted and no evidence has been adduced that the same was conducted without the involvement of the appellant herein.

17. Counsel submitted that memorandum of appeal is misconstrued an abuse of the courts process only meant to delay this matter further and hence ought to be dismissed with costs to the Respondents.

Analysis and Determination

18. The role of the Appellate Court was stated by the Court of Appeal in the judicial decision of **Gitobu Imanyara & 2 others Vs Attorney General [2016] eKLR**. It was held as follows;

“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 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 allowances in this respect.”

19. In **Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR** the Court held as follows;

“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

20. The following issues arise for determination; Whether the Appeal is incompetent for failure to seek leave; Whether the trial court erred in dismissing the applicants’ application.

Whether the Appeal is incompetent for failure to seek leave

21. The impugned decision was delivered on 23rd August 2024. The Memorandum of Appeal dated 8th September 2024 was filed on 6th October 2024.

22. Section 75(1) of the Civil Procedure Act, 2010 provides for the orders against which an appeal would lie as of right and/or with the leave of the court. It provides as follows:

75(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted-

(a) An order superseding an arbitration where the award has not been completed within the period allowed by the court;

(b) An order on an award stated in the form of a special case;

(c) An order modifying or correcting an award;

(d) An order staying or refusing to stay a suit where there is an agreement to refer to arbitration;

(e) An order filing or refusing to file an award in an arbitration without the intervention of the court;

(f) An order under section 64;

(g) An order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;

(h) Any order made under rules from which an appeal is expressly allowed by rules.

23. Order 43 rule (1) of the Civil Procedure Rules sets out the orders and rules in respect of which appeals would lie as of right. Under rule 2 of the order, it is provided that an appeal shall lie with the leave of the court from any other order made under the rules. This means that unless the order sought to be appealed against falls under the orders which are appealable as of right under the said Order 43 rule (1), leave to appeal must be obtained before such an appeal can be preferred.

24. This court doubts whether in absence of the said leave the appeal would be competent. But for now, the important issue to address is whether the appeal was filed in time.

25. Section 79G of the Civil Procedure Act provides as follows;

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which

the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

26. This Court has carefully examined the Memorandum of Appeal herein and the submissions of the parties. It is clear that the appeal lies from the Ruling of the Honourable court dated and delivered on 23rd August 2024. I have looked at the court record also. It shows that the appeal was filed on 6th October 2024 at 11:34 AM. This was 44 days after the delivery of the Ruling. The record does not bear that there was leave sought to file the appeal outside of the thirty (30) days provided for. A copy of the order granting leave ought to have been filed with the Memorandum of Appeal or in the very least with the Record of Appeal but there was none. It means that no such leave exists. In essence, the Appellant filed this appeal without seeking leave to appeal the ruling out of time.

27. In fact, the applicant has not addressed this issue at all and went directly into the appeal. As was stated in **Nyutu Agrovet Ltd v Airtel Networks Ltd [2015] eKLR** a right of appeal only lies where the law specifically provides for such right to accrue and where no such right is automatic it follows that a party seeking to appeal must first obtain leave

of court. The right of appeal is conferred by statute and cannot be inferred.

28. The provisions of section 79G of the Civil Procedure Act are couched in mandatory terms. Therefore, as the appellant failed to seek leave to file this appeal out of time, the same is incompetent and hereby struck out with costs to the Respondent.

Judgment **dated, signed and delivered virtually** via the **Teams Platform** this **26TH** day of **November 2025**.

.....
HON. DR. IUR NYAGAKA
JUDGE

From 14:14 hours

In the presence of

Ms. Kimberly for Obwanda for the Respondent.

Mr Adingo for the Appellant (absent)