

REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELCLA NO. E045 OF 2024

PETER NYABUTO ONTITA & 2 OTHERS ..... APPELLANTS

VERSUS

PERUS CAROLYNE ONGECHI ..... 1<sup>ST</sup> RESPONDENT

KISII COUNTY LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT

RULING

1. This is an appeal from the judgment of the Magistrates' Court in the suit Kisii MCELC No. E034 of 2021. The genesis of the suit was a plaint filed by the appellants dated 20 February 2021. The appellants claimed to be the proprietors of the land parcels Nyaribari Chache/B/B/Boburia/14273, 14274, and 14282. The appellants claimed that the 1<sup>st</sup> respondent and her husband had encroached partly into their land and had occupied the whole of the 3<sup>rd</sup> appellant's land. In the suit they asked for orders of eviction and declaration that the boundary features erected by the 1<sup>st</sup> respondent were not a true reflection of the common boundary. The 1<sup>st</sup> respondent filed defence and pleaded that she owns the land parcel Nyaribari Chache/B/B/Boburia/3185 and that there had been a boundary determination between that parcel and the parcels No. 14273 and 14274, which had been given effect.
2. On 8 November 2023, the matter proceeded for hearing with the plaintiffs testifying as PW-1, PW-2 and PW-3. After PW-3 had testified, Mr. Begi, learned counsel for the plaintiffs stated that he has a survey report from a private surveyor and he wished to summon him. This was opposed by Ms. Kebungo, learned counsel for the 1<sup>st</sup> defendant and Mr. Ranah, learned counsel for the 2<sup>nd</sup> defendant. Mr. Begi's rejoinder was that the matter was still at the stage of hearing of the plaintiff's case and he could not file the report without leave of court. The court held the view that it would be unfair at that stage of the proceedings to admit the document as the exercise was conducted in absence and without the knowledge of the defendants. The application was denied and the plaintiffs closed their case. The matter then proceeded for defence hearing and judgment delivered on 22 October 2024. The court held that it had no jurisdiction and dismissed the appellants' case hence this appeal.
3. The appellants compiled the record of appeal which record includes the survey report that was declined by court. When the matter came up for directions, Ms. Kebungo, objected

to this report being included in the record of appeal, for reason that it was rejected by court. Mr. Begi's view was that this was a crucial element in his clients' case and they are challenging the whole of the Magistrates' decision. Ms. Kebungo's rejoinder was that if the same is to be allowed then they would seek leave to file their own report.

4. I now need to decide whether that survey report is properly in the record of appeal and I have considered the rival arguments. Order 42 Rule 13 deals with directions before the hearing of an appeal and provides as follows :

*13. Directions before hearing*

*(1) On notice to the parties delivered not less than twenty-one days after the date of service of the memorandum of appeal the appellant shall cause the appeal to be listed for the giving of directions by a judge in chambers.*

*(2) Any objection to the jurisdiction of the appellate court shall be raised before the judge before he gives directions under this rule.*

*(3) The judge in chambers may give directions concerning the appeal generally and in particular directions as to the manner in which the evidence and exhibits presented to the court below shall be put before the appellate court and as to the typing of any record or part thereof and any exhibits or other necessary documents and the payment of the costs of such typing whether in advance or otherwise.*

*(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—*

*(a) the memorandum of appeal;*

*(b) the pleadings;*

*(c) the notes of the trial magistrate made at the hearing;*

*(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;*

*(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;*

*(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:*

*Provided that—*

*(i) a translation into English shall be provided of any document not in that language;*

*(ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).*

5. The above prescribes what should be in the record of appeal. Among the documents allowed to be in the record of appeal are “any exhibits or other necessary documents” and “all affidavits, maps and other documents whatsoever put in evidence before the magistrate”
6. The survey report in question was a document that was attempted to be put in evidence before the Magistrate but it was rejected. Part of the grounds of appeal herein are that the trial Magistrate decided the dispute on procedural technicalities rather than on substantial justice. The rejection of the report was a matter of procedure and I see that the appellant is aggrieved by the procedure employed by the trial Magistrate.
7. In my opinion, for the court to appreciate that point, i.e the reason for rejection of the report, the survey report, now becomes a necessary document to the record of appeal. Its inclusion in the record is to demonstrate that the trial court was wrong in refusing to have the appellants (as plaintiffs) the opportunity to produce it in evidence. I do not see how it will be argued that the court was wrong in not allowing it to be introduced as evidence, if the court cannot see what it is that was rejected. Allowing it in the record does not mean that it is now being allowed to form part of the evidence that was produced in the lower court so as to invite an opportunity to the respondents to now avail their own survey report as urged by Ms. Kebungo. Having it in the record is simply for purposes of having the court see what was rejected and whether the rejection by the court was a fair utilisation of discretion given the circumstances of the case.
8. For the reasons above, I do not find fault in the inclusion of the survey report in the record of appeal. It is allowed to remain in the said record.
9. The costs of the arguments herein will be in the appeal.
10. Orders accordingly.

DATED AND DELIVERED THIS 25 DAY OF NOVEMBER 2025.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Begi for the appellant

Mr. Ndiritu for the 2nd respondent

No appearance on part of Ms. Kebungo for the 1st respondent

Court Assistant – Michael Oyuko