

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KISII
ELCLA NO. E006 OF 2023

JEREMIAH ONSARE SOIRE APPELLANT

VERSUS

TERESIA OMBABA RESPONDENT

JUDGMENT

(Being an appeal from the ruling of Hon. P.K Mutai, Principal Magistrate, delivered on 7 August 2023 in the suit Kisii MCELC No.60 of 2021)

1. The appeal herein arises from the ruling of the Magistrates' Court delivered on 7 August 2023. That ruling adopted a survey report as the judgment of the court with each party ordered to bear his/her own costs.
2. To put matters into context, the suit before the lower court was commenced by the appellant through a plaint filed on 6 May 2021. He pleaded to be the registered owner of the land parcel West Kitutu/Bomatara/1683 and that he had planted 26 trees on this land in the year 2005 which trees are now mature. He pleaded that on 29 April 2021, the respondent laid claim to the said trees and proceeded to prune them. He filed suit seeking a declaration that he owns this land parcel No. 1683, a permanent injunction to restrain the respondent from the said land, and costs of the suit.
3. I need to mention that together with the plaint, the appellant filed an application for injunction, seeking to restrain the respondent from interfering with the trees or cultivating on the land parcel No. 1683.
4. The respondent filed defence wherein she pleaded to be the owner of the land parcel West Kitutu/Bomatara/879. She averred that on her land she has planted grevillea trees and a blue gum tree near the boundary of her land with the appellant. Her position was that the trees in issue were on her land. In the replying affidavit to the application for injunction, she deposed that in 1992, she instructed her sons to plant 17 grevillae trees and a blue gum tree which trees were now mature. She asserted that the trees she pruned were on her land and pointed out that no survey report had been annexed by the appellant.
5. When that application came up for directions on 2 June 2021, counsel agreed by consent to have the Kisii County Land Registrar and the Land Surveyor visit the two parcels of land and establish their boundaries.
6. The Land Registrar and Surveyor visited the disputed land on 6 July 2022 and filed a report dated 30 December 2022. Inter alia, that report elaborated that the respondent was

occupying two parcels of land, that is the parcel No. 879 and 890 registered in the name of her husband. The two parcels respectively measure 0.7 ha and 1.1 ha. These two parcels are original adjudication numbers. The appellant's parcel of land on the other hand was a subdivision out of the parcel No. 1412. The officers held the opinion the appellant's parcel No. 1683 had encroached into the parcel No. 879 by an acreage of 0.09 ha. Further, that this parcel No.879 had been encroached by a third party to the extent of 0.03 ha. The officers proceeded to determine and mark the boundary on the ground.

7. On 26 June 2022, the matter came up before court. Mr. Anyona, learned counsel for the appellant submitted that his client was not satisfied with the report and intended to engage a private surveyor. The court directed that it would make a ruling on the issue and proceeded to do so on 7 August 2023. The court held the following view :

“Both the plaintiff and the defendant own distinct parcel (sic) of land. This was purely boundary dispute which has now been determined by Land Registrar. Their boundaries were determined and marked. This in my view settles the suit. I therefore adopted (sic) the report dated 30th December 2022 as judgment of this court. Each party to bear own costs.”

8. Aggrieved by this ruling, the appellant has preferred this appeal on the grounds :
 - (1) The trial Magistrate erred in refusing the appellant an opportunity to engage a private surveyor thus occasioning a miscarriage of justice.
 - (2) The failure by the trial Magistrate to allow the appellant engage a private surveyor denied the appellant a right to be heard.
9. The appeal was argued through written submissions and I have taken note of the submissions filed.
10. It will be observed that the appellant came to court claiming that the respondent was interfering with his trees. The respondent's defence was that these are her trees. The parties agreed to have the Land Registrar visit the land and a report was made stating that the boundaries have been determined, and that it is actually the appellant who has encroached into the land of the respondent. The appellant of course stated that he would wish to engage his private surveyor. It will be seen that what the court did was to consider that the dispute was nothing more than a boundary dispute and adopted the report of the Land Registrar and Surveyor despite the protest of the appellant to its contents. The trial court thought that this report settles the issue. I am not persuaded.
11. It is true that in the report, the Land Registrar and Surveyor stated that they established the boundaries of the disputed parcels of land and they made their opinion on who they thought has encroached into the land of the other. However, the dispute was much more than a boundary dispute. The appellant did assert that there are trees on his land which the respondent was pruning and he wanted the respondent stopped. I have looked at the

report, and save to state that there has been encroachment, the report does not say anything about the trees. It does not say whether the trees are on the land of the appellant or the land of the respondent. In fact, there is no mention at all about the trees. It cannot therefore be said that the report settled the dispute.

12. I think the appellant was within his rights to seek another opinion, though I wonder why the appellant filed the suit without any survey report in the first instance, for how was he ever going to prove that the trees are actually on his land without such a report? Anyway, as I have said, it cannot be claimed that the report dated 30 December 2022 settled the dispute since it did not make any mention of the trees. The dispute remains unresolved and needs to be determined. In the circumstances of the case, the report was merely one bit of evidence that either party could rely on.
13. For the reasons above, I allow this appeal. I set aside the ruling dated 7 August 2022. I direct that the case be remitted back to the Magistrates' Court Kisii for determination.
14. On costs, I note that the parties are neighbours. I also observe that the respondent was not present when submissions were made on what to do with the report and she never asked for adoption of the report. The adoption of the report was suo motu by the court. In those circumstances, I think the best order on costs is that each party bears his/her own costs. I observe that the appellant had made an application for stay pending appeal and the lower court made an order for deposit of Kshs. 30,000/= as security as condition for stay. If at all this money was deposited, it be returned to the appellant given that I have made no orders as to the costs of this appeal.
15. Judgment accordingly.

DATED AND DELIVERED THIS 26 DAY OF NOVEMBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Anyona for the appellant

No appearance on part of Mr. Omwega for the respondent

Court Assistant – Michael Oyuko

