

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMABAY
ENVIRONMENT AND LAND COURT APPEAL NO. E019 OF
2024

ALPHONCE D. ODOYO.....

....APPELLANT

VERSUS

AMON OWINO

ODOTE.....RESPONDENT

***(Being an appeal from the judgment and decree of
Honourable E. Onzere (PM) of Ndhiwa Principal
Magistrate's Court in Land Case No. 13 of 2019
delivered on the 4th of July, 2023)***

JUDGMENT

- 1.** By way of a Plaint dated 16th January 2019, the Appellant herein, then the Plaintiff, sought the following orders;
 - 1)An order for evicting the defendant from the suit land.**
 - 2)Costs of the suit and interest thereon as from the date of filing the suit until payment in full.**
 - 3)Any other relief the Honourable court deems just and expedient to grant.**
- 2.** The Appellant pleaded that on 20th February 1985 he bought a portion of 456 from Wilson Ogenge Rapudo. He proceeded to have the transfer of the same and carried out the subdivision of 456 which resulted into 1216 hereinafter referred to as the suit land. Further, that the defendant

trespassed onto the suit land and refused to vacate the same. He prayed that the suit be allowed as prayed.

3. The Respondent/defendant filed a statement of defence dated 25th June 2019 denying all the allegations in the plaintiff save for the description of the parties.

Hearing at the trial court

4. The parties agreed to have the Land Registrar and Surveyor Homa Bay visit **Kanyamwa/Kochieng/Komungu/Kakaeta/1216 & 502** to ascertain whether there is encroachment and the report be availed in court.
5. The matter then proceeded for hearing.
6. **PW1** was **Alphonse O. Odoyo**, the Plaintiff, adopted his witness statement as evidence in chief. He acknowledged that the same read the name Amos Aineah Otia which name was erroneous. He admitted his list of documents as exhibits and urged that he wanted the court to give him his land where they had put up their houses.
7. During cross examination, he stated that the land shared a common boundary with land parcel 502. Further, that he purchased his land from Wilson Ogenge Rapudo and had a green card but he had not given it to the court. He maintained that the defendant encroached on his land which he bought on 20th February 1985. Further, that the district surveyor came and sub divided the land and he was given a title deed. He urged that Wilsons' grandfather and himself were present during the survey. That the surveyor invited

the owners of the neighboring parcels but the defendant and his father were not present. He conceded that he had not produced the sketch map. Further, that he was present when the Land registrar visited the land after the court ordered a visit. He conceded that the land registrar found that he had encroached on land no. 502.

- 8. PW2 was Clement Daniel Odhiambo.** He stated that he was the senior assistant chief Kochieng sub location and adopted his witness statement as evidence in chief. He was present during the survey.
- 9.** During cross examination, he stated that he had not seen the report by the registrar and had only seen the report by the 2nd surveyor. He further stated that Amon was not present when the Land Registrar came.
- 10.** The plaintiff closed his case and the defendant called a witness in support of its case.
- 11. DW1 was Amon Owino Odote,** the defendant, who adopted his witness statement as evidence in chief. He produced a copy of the sketch map and stated that he was present when the land registrar came. That the plaintiff requested to have a private surveyor visit the land but he was not invited by the private surveyor. He agreed with the land registrar's report that it is the plaintiff who had encroached on his land.
- 12.** During cross examination, he stated that the boundary dispute has been there since 1995 and that it was untrue that the same had been resolved.

13. The trial court found plaintiff had failed to prove his case and dismissed the suit.

14. Being aggrieved by the decision of the trial court, the Appellant instituted the present appeal vide a Memorandum of Appeal dated 3rd April 2025 premised on the following grounds;

1)The Honorable Subordinate Court failed to appreciate that the Surveyor's report were integral in her findings and needed to consider the same judiciously.

2)The Honorable Subordinate Court failed to allow the further Survey Report by the Appellant's Surveyor to be filled as part of evidence in the matter.

3)The Honorable Subordinate Court failed to appreciate that it is a court of law with the sole responsibility of dispensing justice by providing a platform for all to have their evidence taken.

15. The parties prosecuted the appeal by way of written submissions.

Appellants Submissions

16. Learned counsel submitted that the Appellants' main prayer is that the lower Courts' Judgment be set aside and matter be set back for re-trial and a resurvey conducted. That the main reason for this prayer is that in as much as the Land Registrar conducted survey on the parcels, the said report was contested by the Appellant and upon the Appellant filing another report from a private surveyor the same was not considered by the Court. Considering that both

the surveyors' report and the Land Registrar report were disputed by the Appellant the Court ought to have directed for a re-survey of the land and allowed both parties to call in private surveyors to accompany the government land surveyor and Land Registrar before its final Judgment.

- 17.** Counsel urged that failure to invite a second opinion led to an unfair trial on the appellant. He urged the court to allow the appeal.

Respondents Submissions

- 18.** On whether the report filed by the land registrar and surveyor is reliable counsel cited Section 18(2) of the Land Registration Act, 2012 and urged that it is in the spirit of this legal provision that the Honourable Magistrate at Ndhiwa ordered the Land Registrar and Surveyor on the 19th February 2021 to visit the scene and file a Report in Court. Further, that the Land Registrar and the County Surveyor visited the scene on 29th September, 2021 and the Land Registrar filed a report in Court and his conclusion was that it is the Appellant who has encroached on land parcel number Kanyamwa/Kochieng/Komungu/Kakaeta/502 and built a permanent house on the land.
- 19.** Counsel urged that the Registrar's Report suffices as conclusive evidence that it is the Appellant that has encroached onto the Respondent's land and not vice-versa. He submitted that being dissatisfied with the Report of the Land Registrar, the Appellant sought to engage a private surveyor who visited the land on 9/1/2022 in the absence of the Respondent. The re-survey carried out by the private

surveyor was conducted in contempt of the order of the court issued on the 18th January 2022, which required the Appellant to inform all the parties of the private surveyor's visit so that they participate. That the Respondent only realized that the re-survey had already been done when the matter came up for hearing on 25th of May, 2022. Counsel urged that the private surveyor's report falls short of the legitimacy and cannot be relied upon.

20. Counsel urged that the trial magistrate was right in dismissing the appellant's suit with costs and prayed the court dismiss the appeal with costs to the Respondent.

Analysis & Determination

21. This being an appeal, I must state the duty of the appellate court. In **Williamson Diamonds Ltd and another v Brown [1970] EA 1**, the court held that:

"The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion."

22. Further, in **PIL Kenya Limited v Oppong [2009] KLR 442**, it was held that:

"It is the duty...of a first appellate court to analyze and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeking the witnesses

and their demeanour and giving allowance for that”.

23. The following issues arise for determination; **Whether the trial court erred in dismissing the suit**

24. From the evidence on record, it is not in dispute that both the parties' portions of land were a subdivision of Kakaeta 456. The same was evidenced by the production of a certificate of official search and the maps which revealed that indeed the appellants' parcel of land bordered that of the respondent. The court correctly identified the same as a boundary dispute.

25. Section 18 of the Land Registration Act vests the jurisdiction to determine boundary disputes regarding general boundaries in the Land Registrar, and states as follows;

18 (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(2) 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 in accordance with this section.

(3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the registrar, may, in any proceedings concerning the

parcel, receive such evidence as to its boundaries and situation as may be necessary; provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act (Cap 299).

- 26.** I note that at the start of the proceedings, the trial court directed that the Land Registrar visit the suit land and conduct a survey to establish whether there was encroachment of the suit land by the respondent. The Land registrar visited the property and a survey was conducted with the report being filed in court. The appellant was dissatisfied with the results of the survey, which were that there was no encroachment by the respondent, which result he acknowledged in court and sought to be allowed to engage a private surveyor to conduct another survey. Accordingly, the appellant conducted the survey, but in the absence of the respondent.
- 27.** The trial court opined that the results of the said survey could not have any probative value as they were done in the absence of any of the other parties and additionally, they conveniently favoured the appellant.
- 28.** In accordance with the provisions of Section 18 of the Land Registration Act, the court correctly considered the findings of the Land Registrar and found that the appellant had failed to prove his case to the required standard.

29. I find no reason to interfere with the decision of the trial court. In the premises, I dismiss the appeal with each party to bear own costs.

Judgment **dated, signed and delivered** via the **Teams Platform** this **20th** day of **January 2026**.

HON. DR. IUR NYAGAKA
JUDGE

In the presence of,

Court Assistants: Terence & Obunga

Ms. Odera for the Appellant

Mr. Ngani Advocate for the Respondent