

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ELC APPEAL NO. E048 OF 2024

MAURICE OFULA.....

APPELLANT

VERSUS

JOHN OTIENO

ODUOR.....RESPONDENT

JUDGEMENT

1. Joane Atieno Oduor (the Respondent herein) approached the Chief Magistrate's Court Ukwala vide his plaint dated 27th May 2022 seeking judgment against Maurice Ofula (the Appellant herein) in the following terms with respect to plot No. **Uholo/Sigomere/1216** (the suit property) measuring approximately 0.11Ha sharing a common boundary with the Respondents **Land Parcel No. Uholo/Sigomere/1158** seeking judgement against the Respondent for the following verbatim orders;-
 - a) An order that the Defendant by himself or his servants or agents or proxies do vacate all portions of the Plaintiff **land parcel No. Uholo/Sigomere/1216** forthwith or be evicted therefrom forthwith.
 - b) General Damages for trespass

c) A permanent injunction restraining the Defendant by himself or his servants or agents or proxies or any of them from entering, occupying, remaining on, developing or in any other way using or interfering with the Plaintiffs access into, peaceful possession, user and enjoyment of the said land parcel **no. Uholo/Sigomere/1216**

d) Costs of this suit and Interest thereon at court rates

2. The basis of the Respondents case was that the Appellant had illegally and forcefully defaced the common boundary between the two parcels and encroached into the suit property, cut down trees, constructed a permanent structure and denied the Respondent access to the suit property, user and enjoyment of the same without reasonable justification. That his occupation amounted to actionable trespass.
3. The Respondents filed their Statement of defence & Counterclaim dated 30th August 2022 in which they pleaded, inter alia, that the two suit properties herein both being subdivisions of **Uholo/Sigomere/1142** owned by Austin Ochieng and who sold them to the parties herein among others have distinct and clear boundaries pointed by the seller. The Respondent also denied all the allegations in the Plaint. That it was the Respondents intention to take away the alleged encroached portion. The Respondent thus prayed as counter claimer for

dismissal of the entire suit with costs for being malicious and an abuse of court process.

4. The dispute was heard by Hon. E.Tsimonjero Senior Resident Magistrate who, after hearing the plaintiff as the sole witness in her case and four other witness on the part of the defence, delivered his judgment on 30th October 2024 in which he upheld the Respondent then Plaintiff suit and dismissed the counterclaim above. The trial court ordered the Appellant to voluntarily vacate within 45 days of the judgement and awarded Kshs.500,000/= General damages to the Respondent.
5. Aggrieved by that judgment, the Appellant has now moved to this Court on appeal vide Memorandum of Appeal dated 15/11/2024 on the following grounds; -
 - 1) That the learned trial Resident Magistrate erred in both points of law and fact by failing to observe that Registry Index Maps are not authorities on boundaries.
 - 2) That the learned trial Resident Magistrate proceeded on wrong principles and disregarded the disclaimer on Registry Index maps bearing the wordings 'This diagram is not an authority on boundaries.'
 - 3) That the learned trial Resident Magistrate misdirected himself by failing to appreciate there existed fixed boundaries in Registry Index Map Sheet N.4, Uholo Sigomere which have been in place for

over 19 years and accepted by all parties since the land was subdivided

4) That the learned trial Resident Magistrate misdirected himself by awarding general damages of Kshs.500,000/- to the Respondent.

5) That the learned trial Resident Magistrate decision was against the weight of evidence.

6. On the strength of the above grounds the Appellant prays;

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1) That the appeal be allowed;

2) An order of stay of execution of lower court judgement dated 30th October 2024 pending the full hearing and determination of the appeal

3) Costs of this appeal be provided for.

4) Any other relief this Honourable court deems fit and just to grant in the circumstances.

Submissions

7. Directions were taken that the appeal be canvassed by way of written submissions. The same have been filed by the firm of Jesse David Ochanyo & Kurgat Advocates for the Appellant and by Moses J.A. Orenge Advocate for the Respondent.

8. I have considered the record herein and the submissions by counsel on record for the parties.

9. This is a first appeal. I must therefore be guided by the principles set out in various cases while considering this appeal.

10. In **Arthi Highway Developers Limited vs. West End Butchery Limited & 6 Others [2015] eKLR**, the court cited the case of *Selle vs. Associated Motor Boat Co.* [1968] EA 123 and 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 allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

11. In the case of **Abok James Odera t/a A.J Odera & Associates Vs John Patrick Machira &Co. Advocates (2023) eKLR** the court stated; -

'This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and

determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way'

12. The main issue for determination is whether the appeal is merited. In deciding this I will address each ground of appeal raised seriatim as has been done by both counsels on record.
13. Grounds 1, 2 and 3 of the Memorandum of Appeal can be considered together. The trial court is faulted for failing to observe that Registry Index Maps are not authorities on boundaries, for proceeding on wrong principles and disregarding the disclaimer on Registry Index Maps bearing the wordings "This Diagram is not an authority on boundaries," and failing to appreciate that there existed fixed boundaries in Registry Index Map Sheet N. 4, Uholo/Sigomere.
14. The record bears several reports that were presented in evidence during the hearing in the trial court. These are namely District Surveyors Report dated 18/5/2021 produced by the plaintiff; Private Surveyors Report (Trinity Geospatial Ltd) dated 14/09/2021 & 16/10/2023 produced by the Defendant and Report dated 22/02/2024 pursuant to the orders of the trial court dated 10/11/2022 and by consent of the parties.
15. The trial court in the impugned judgement referred to the report dated 22/02/2024 and its findings that it confirmed

a shift of 11 Metres towards the plaintiff's parcel including a recommendation for amicable resolution by way of damages to forestall damage to the Defendant.

16. The trial court then held thus -

'I find the report dated 22/02/2024 to be more reliable and a reflection of the correct position on the ground.'

17. The trial court does not in his analysis refer to Registry Index Map (RIM). All he did was to adopt a report and based on its recommendations determined the issue of whether the Plaintiff had proved there was encroachment into her land. Infact for me this report was the most inclusive in terms of participation by all relevant parties. My perusal of the report dated 22/02/2024 shows that the District Surveyor was present and N.O. Ongwae the surveyor who prepared the previous reports for the Defendant. Others present included both parties among others (16 people attended).

18. I have also read the report dated 22/02/2024 and the Methodology deployed was stated as follows; -

We used Map Sheet No. 4 of UHOLO/SIGOMRE/1156 giving rise to the new numbers 1214,1215,1216,1217 and 2018. We took measurements using a tape measure and referenced them with hand held global positioning system (GPS) garget.

19. The above clearly confirms that there was no sole reliance to RIM but measurements were taken on the ground. Bearing in mind that the plaintiffs claim alleged interference with the fixed boundary and encroachment onto the Plaintiff's parcel UHOLO/SIGOMERE/1216. Nothing in the report suggests that the plaintiff's boundary shifted by any means. It was the same one but having been affected by the shift of 11 Metres on the defendant's side. Infact the report affirms that the ground measurements reflected the same except the said shift.
20. It is my finding there was no misdirection or error committed by the Learned trial magistrate when he accepted and adopted the report of the Land Registrar.
21. Grounds 1st 2nd and 3rd of the Memorandum of Appeal must be dismissed.
22. This court has seen the submission by Counsel for the respondent that the correct forum for the appellant was to proceed under the provisions of section 85 of the Land Registration Act to state a case for the opinion of the court. I think this argument is misplaced. The report was adopted, parties had the opportunity to cross examine on the same and a decision reached by the trial court. What is before this court is an appeal against the judgement of the trial court and not an appeal against the decision of

the Land Registrar made pursuant to the provisions of section 18 and 19 of the Land Registration Act.

23. Ground 4 impugns the trial court judgement on the basis that the learned Magistrate misdirected himself by awarding general damages of Kshs.500,000/- to the Respondent. This ground appears not to have been argued by the Appellant in his submissions. However, I will treat it as having been subsumed under ground No. 5 where the trial court is faulted for finding against the weight of the evidence.
24. I think a keen look at the evidence presented before the trial court and surveys undertaken including the last survey informing the report dated 22/02/2024 all evidence pointed towards the fact that there was encroachment of 0.03 Ha which was seen in year 2021 and confirmed by the report dated 22/02/2024. The analysis is captured at page 104 of the Record of Appeal. I have already indicated I find no reason to fault the trial court decision to adopt this report. I would have done likewise
25. General damages for trespass were pleaded in the plaint. The trial court made a finding that indeed there was encroachment into the Plaintiffs parcel and it is also that the defendants permanent structure was partly in the said encroached portion. The powers of the court to grant general damages is discretionary. However, it is trite that trespass is actionable perse without proof of damage.

Having proved the unlawful entry of the Defendants into the land the Plaintiff is entitled to general damages without proving the injury - See **Park Towers Ltd v. John Mithamo Njika & 7 others (2014) eKLR.**

26. In the impugned judgement the trial court exercised his discretion to award a reasonable sum of Kshs 500,000/- as against the plaintiff's proposal of Kshs.3 million. I see no reason to interfere with this discretion as exercised.
27. The issue of the trial court jurisdiction has elicited a contention by the Respondent that the lower court was not addressed on the issue and the trial Magistrate did not pronounce himself on it. I respectfully disagree. The first issue identified by the trial court was *'Whether this is a boundary dispute and thus the court has no jurisdiction to entertain it...'*
28. The trial courts analysis is on page 101 to 103. It had been urged that the Plaintiff had not exhausted the mechanism set out under section 18 and 19 of the Land Registration Act 2012. The trial court pointed to four summonses for boundary identification issued by the Land Registrar pursuant to the plaintiff's request. The district surveyor visited and prepared a report dated 29/04/2021. The report indicated there was encroachment followed by the suit filed by the plaintiff.
29. The above in my view evidences that the plaintiff did approach the Land Registrar as the first port of call and thereafter moved the court. The claim then mutated into a

case for trespass and encroachment which the Land Registrar was divested of jurisdiction to determine. At no point did the trial court usurp the powers of the Land Registrar.

30. This court finds that the matter was properly before the trial court and I agree with the analysis of the issue as recorded by the trial court.
31. This court has noted in the impugned judgement reference by the trial court to the admissions by the respondent that he did offer amicable settlement for good neighbourliness. However, this in my view leaned towards the recommendations in the survey reports undertaken by the District Land Surveyor. I think this is a path that can still be pursued by consent of the parties. Article 159 (2) (c) of the Constitution of Kenya recognises alternative dispute resolution mechanisms and which must be encouraged.
32. The up-shot of all the above is that this appeal is devoid of merits and it is disposed of in the following terms;
 - 1) The appeal is dismissed.
 - 2) That in the event the Appellant wishes to enter into amicable resolution of the dispute as recommended in the report dated 22/02/2024 to mitigate loss he is at liberty to do so and at the option and will of the Respondent and file terms of settlement within 60 days of this judgement. Provided that the full judgement of the trial court shall come into effect

upon the expiry of the said period without further reference to this court.

3) To encourage (2) above each party shall bear their own costs of this appeal.

Orders accordingly.

Dated at Siaya this 23rd Day of February 2026

HON. JUSTICE A. E. DENA

JUDGE

23/2/2026

**Judgment delivered virtually through Microsoft Teams
Video Conferencing Platform in the Presence of:**

Mr. Ochanyo for the Appellant

Mr. Orenge Moses for Respondent

Court assistant: Ishmael Orwa

ORIGINAL