

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND COURT LAND APPEAL NO.
E003 OF 2024

ELMARD ODOYO MAIRA.....

APPELLANT

VERSUS

**ROSEMARY OMUONO (Suing as
a representative of the estate
of JOSIAH KICHE MOSI.....**

RESPONDENT

***(Being an Appeal from the Judgment and Decree of Hon.
S.O. Ongeru (SPM) in Oyugis SPMCC No. 71 of 2018
delivered on 17th January 2024)***

JUDGEMENT

1. By way of an Amended Plaintiff dated 19th August 2021, the Respondent sought the following orders in the trial court;

1)An order of eviction, evicting the defendant, his servants, agents and/or employees from the plaintiff's property Central/Karachuonyo/Konyango/1090.

2)General damages.

3)Costs of the Suit.

2. The Respondent, then the Plaintiff, pleaded that the late Mosi Ngoti, his father, was the registered owner of the suit land

which neighboured the Appellant, then the defendants' land known as Central/Karachuonyo/Konyango/636. Further, that the defendant encroached on the land and put up a homestead and despite his pleas for the Appellant to desist from the illegal act he refused to make amends. The Respondent visited the land surveyor's office who ordered that the boundaries erected by the arbitration committee be respected pending the objection hearing. He urged that he reported the matter to the local administration and the appellant declined to obey the summons or any orders.

- 3.** It is worthy of note that the suit in the trial court was initially filed in the High Court at Migori and registered ELC Casue No. 321 of 2017. In it, a Plaint dated 3rd April 2017 and verified by the Affidavit of the Plaintiff initiated the suit. It was the one which was amended upon the demise of the Plaintiff in 2021, in the Oyugis subordinate Court in the new number assigned to the suit upon transfer as ELC Cause No. 71 of 2018. The lower court record shows after the suit was transferred to the Oyugis Court and the Amended Plaint filed, the Defendant did not file an Amended Defense thereto. Therefore, the court

proceeded on the basis of the Defense originally filed. It was dated 12th July 2017.

- 4.** The pleadings show that the Appellant filed the Statement of Defence, dated 12th July 2017, wherein he pleaded that the two parcels of land were ancestral land whose boundaries were placed by their grandfathers in 1846. Further, that before his father died in 1955, he passed (or gave) the land to his elder brother, Philemon Ondae who held it in trust for him as he was a minor. His brother passed on before transferring the land and therefore, by succession, his son Kennedy Ouma Ondae eventually transferred it to him. He stated that the Appellants' family had been living on the land until 1992 when it was registered in the name of Philemon Ondae. He further pleaded that the occupation of the land was not questioned by the late Mosi Ngoti or Andrea Awuor Mosi who died in the 2000s. That upon transfer, he became the proprietor of parcel no. 636. He maintained that the respondents' claim was time barred and therefore he has no rights over parcel 636.
- 5.** The matter then proceeded to full hearing each party testified as the only witness. Upon considering the testimonies of the

parties, the trial court entered judgment in favour of the Respondent and ordered the eviction of the Appellant vide the judgement delivered on 17th January 2024.

6. Being aggrieved with the decision of the trial court, the Appellant instituted the present appeal vide a Memorandum of Appeal dated 29th January 2024 premised on the following grounds;

1) That the learned magistrate erred in law and fact by failing to properly evaluate the evidence before him.

2) That an order of eviction is not warranted as this was a case to merely adjust the boundary to the extent of encroachment by 25 meters, the plaintiff having conceded that they are neighbours.

3) That other reasons to be submitted when proceedings arrive.

Hearing at the trial court

7. At the start of the trial, the parties agreed and the court ordered that the Land registrar and County Surveyor, Rachuonyo North & East Counties visit LR Nos. Central Karachuonyo/Konyango/1090 and 636 to fix and establish the

boundaries and file a report at Oyugis SPM Court for hearing and determination of the dispute.

- 8.** The matter then proceeded for hearing with the Respondent testifying as **PW1**. It was his testimony that the appellant encroached into his land, producing the title as PExh-1. Further, that they had been having the dispute since 2018. He urged that he was awarded the parcel during succession cause filed in Homa Bay. That was when he found that the defendant had encroached his land. Further, that it was the land surveyor who established the same. His evidence was that the demarcations on the land were fixed by their parents. He testified that on the day of the survey he was with the Assistant Chief, the Chief and his people and the Appellants' people. He produced the report from the surveyor as PEx2. He added that the Appellant disagreed on the encroachment.
- 9.** The Appellant testified as DW1 and adopted his statement of defence as evidence in chief. He stated that he was present when they went to ascertain the boundary and produced the survey report dated 4th January 2019 as DEx2. Further, that Josiah, now deceased, appealed in 2020 and he was

supposed to go back home. He produced the copy of the title deed for 636 and urged that the son to the registered owner gave him the title deed to where he is staying. He denied having encroached or having the Respondents' land. During cross examination, he stated that the surveyor did not agree with how 25 meters came about to his land and that he had not done another survey or registered for another to be done.

- 10.** The trial court, as aforesaid, entered judgment in favour of the Respondent and the Appellant then instituted the present appeal that was prosecuted vide written submissions.

Appellant's' Submissions

- 11.** Learned Counsel for the Appellant filed submissions titled the 'Applicants' Submissions' dated 12th November 2025 in support of the Appeal. he laid down the background of the suit and urged that if at all he had encroached on the suit land, the provisions of the limitation of Actions Act take effect and the respondents' right to recover the encroached part has been extinguished by the effluxion of time. He urged that the Appellant has never been in occupation of the suit land and the common boundary has been in existence for over 50 years. Further, that the Appellant has been occupying and

cultivating 636 fir over 24 years, peacefully and continuously and therefore the respondent shall not suffer any prejudice if the permanent injunction is granted. He additionally submitted that the respondent has never taken any steps to recover the land known as 1090 within the common boundary and consequently, the Appellant has acquired prescriptive rights over the suit land.

Respondents' Submissions

- 12.** On whether the Appellant trespassed on the Respondent's parcel of land without consent, Counsel reproduced the definition of Trespass by the 10th Edition of Black's Law Dictionary and cited the case of John Kiragu Kimani vs Rural Electrification Authority [2018] eKLR in the same regard. He cited the provisions of Section 3 (1) of the Trespass Act and urged that it was the Respondent's testimony that the family enjoyed peaceful occupation and cultivation of the suit land until the time when the Appellant, being their neighbour, forcefully acquired part of the suit land and built a house thereon and also continued to encroach on other parts of the suit property. That the land registrar and County surveyor visited the suit parcel and confirmed that the Appellant had

indeed trespassed onto the suit parcel. The Appellant failed to heed to the advice of the land registrar and county surveyor prompting the Respondent to file the suit.

13. Counsel cited Section 18(2) of the Registration of Land Act and Section 19 of the Land Registration Act and further, urged that the surveyor's report also reveals that the Appellant had encroached onto the Respondent's land and put up a house thereon. He placed reliance on the case of *Eunice Nkirote Ringera v Kenya Power & Lighting Company* [2020] eKLR and posited that the Respondent acquired the land by succeeding her husband in *Oyugis SPM Succession Cause 81 of 2021* and produced a copy of the certificate of confirmation of grant. She also produced copy of title deed for the suit parcel that shows that her late husband the sole registered proprietor of Land Parcel No. Central/Karachuonyo/Konyango/1090, which land the Appellant has encroached. He additionally cited the case of *Isaack Ben Mulwa vs Jonathan Mutunga Mweke* [2016] eKLR in this regard.

14. On the issue of general damages for trespass, the Respondent relied on the case of *Duncan Nderitu Ndegwa vs*

KPLC Limited & Another (2013) eKLR and Kenya Power & Lighting Company Limited v Fleetwood Enterprises Limited [2017] eKLR.

- 15.** Counsel urged that the Appellant trespassed onto the Respondent's parcel thereby interfering with her quiet possession and enjoyment of her own property. He prayed the Appeal be dismissed with costs.

Analysis and Determination

- 16.** The duty of the court as an appellate court was set out in the case of **Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** 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”.

- 17.** 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 seeing the witnesses and their demeanour and giving allowance for that”.

18. Upon consideration of the Memorandum and Record of Appeal and the attendant submissions, the following issues arise for determination; **Whether the trial court erred in issuing eviction orders against the respondent**

a) Whether the trial court erred in issuing eviction orders against the respondent

19. The cause of action in the trial court arose from an alleged encroachment of the Respondents’ land by the Appellant. It was common between the parties that each was registered as owner of two adjacent parcels, namely, Central Karachuonyo/Konyango/636 and 1090. At the start of the hearing, the parties agreed and the court ordered that the

County Land Surveyor visit the suit parcels to survey the land and determine the issue of encroachment in its entirety.

20. One fact that is clear from the evidence of PW1 is that the boundaries of the parcels were fixed by their parents. DW, the appellant himself testified that when the dispute arose they went to fix the boundary.

21. Section 18 of the Land Registration Act, 2012, which provides as follows:

“Boundaries,

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)."

22. Pursuant to the above provisions, the County Surveyor visited the land and filed a report dated 21st February 2019. The findings of the report were that the Appellant had encroached on the Respondents' parcel. It is on the basis of these findings that the trial court made a finding of trespass.

23. Trespass is the unlawful interference with another's property without the consent of the owner. See, **Maina Mabuchwa -vs- Gachuma Gacheru [2018] eKLR**. Further, the Appellant, in his grounds of Appeal even conceded that the issue was the adjustment of the boundary by 25 meters. That was the encroachment the Plaintiff complained about the trial court and was found by the surveyor.

24. The evidence of the parties is clear that the parcels of land were demarcated by general boundaries, as defined by the law. Thus, their extent and place could only be established by the land registrar and a surveyor visiting the two parcels of land and fixing them. It is not in dispute that the positions of the boundaries were determined by the surveyor upon him visiting the said parcels and surveying them and making the report produced as PExh 2. The Report confirmed that indeed there was encroachment onto the Plaintiff's, now Respondent's, parcel of land. It was upon that confirmation that it is a fact that indeed the extent of their parcels of land were known. Therefore, the appellant's argument that the suit or claim was time barred is not legally and factually correct. His encroachment was not with the permission of the plaintiff or any of his predecessors on the title or land.

25. The survey report having found that the encroachment was by the appellant, the trial magistrate correctly found that the Appellant was to be evicted from the said portion. The Respondent is entitled to protection of his proprietary rights under Article 40 of the Constitution and Sections 24 and 25 of

the Land Registration Act. I find no reason to interfere with the decision of the trial court. There is no merit in this appeal.

26. The appeal is dismissed with costs to the Respondent.

27. Orders accordingly.

Judgment dated, signed and delivered virtually via the Teams Platform and in open Court simultaneously this 4th Day of March 2026.

HON. DR. IUR NYAGAKA

JUDGE

In the presence of,

Court Assistants: Terence and Ms. Fiona

Elmard, the Appellant (in open court)

Ms. Ochieng Advocate for the Respondent (online)