



**Abikar v Muhamed (Environment and Land Appeal E005 of 2022)
[2024] KEELC 971 (KLR) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 971 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT GARISSA
ENVIRONMENT AND LAND APPEAL E005 OF 2022
JM MUTUNGI, J
FEBRUARY 28, 2024**

BETWEEN

ADAN ABIKAR APPELLANT

AND

ALI ABDILLE MUHAMED RESPONDENT

(Being an appeal against the Judgment delivered on 29.08.2022 by Hon. R. Aganyo Senior Principal Magistrate in Wajir Principal Magistrate's Civil Case No. 22 of 2019)

JUDGMENT

1. The instant appeal is against the Judgment delivered by Hon. R. Aganyo Principal Magistrate in Wajir ELC No. 22 of 2019 on 29.08.2022 wherein the Trial Magistrate entered a Judgment in favour of the Plaintiff, the Respondent herein as against Adan Abikar Hassan, the Appellant herein.
2. The Learned Trial Magistrate in her Judgment issued orders in favour of the Respondent as follows:-
 - i. A permanent injunction restraining the Defendant, his agents and/or servants from alienating, selling, transferring and/or dealing in any way with the property known as R4012 measuring 20 Ha and situated along El-Nur Road within Wajir Township.
 - ii. A declaration that the property known as R4012 measuring 20Ha and situated along El-Nur Road within Wajir Township is the sole property of the plaintiff.
 - iii. Costs of the suit.
3. Aggrieved by the decision of the Trial Magistrate, the Appellant appealed against the Judgment vide a Memorandum of Appeal dated 12.09.2022 setting out the following grounds of appeal:



- i. That the Honourable Magistrate erred in law and fact in failing to analyse the entire evidence on record before making a finding that the Plaintiff's title was first in time and therefore must be the Defendant's land despite the Defendant having a contrary title.
 - ii. That the Learned Magistrate erred in her Judgment by reaching a determination that Plot No. R6189 was in fact plot No. R4012 contrary to documentation filed and the evidence of the Plaintiff thereby attempting to superimpose Plot No. R4012 upon Plot No. R6189, illegally.
 - iii. That the Learned Magistrate delivered a premature judgment based on the evidence of a single witness which was not conclusive, just and decisive in the absence of the County Government Land Officer's report whose assistance the Defendant sought without success.
 - iv. That the Learned Magistrate was biased in her Judgment by failing to consider and declare that the Plots were two distinct properties separated by a two kilometre road and that the parties were neighbours and had no claim on each other's land.
 - v. That the Learned Magistrate erred in law and in fact by declaring the Plaintiff's Plot No. R4012 as registered and with earlier title as opposed to that of the Defendant thereby varying the Defendant's Plot No. R6189 and allocating it illegally to the Plaintiff.
 - vi. That in the absence of evidence to the contrary, the Learned Magistrate exceeded her power by suggesting and hinting in her Judgment that Plot No. R4012 belonging to the Plaintiff was the same as Plot No. R6189 belonging to the Defendant thereby switching Plot No. R4012 to Plot No. R6189 belonging to the Defendant thereby usurping the authority of the Wajir County Lands Office.
4. The Appellant seeks orders:
- i. That the Judgment of the Honourable Magistrate delivered on 29.08.2022 and any consequential orders thereof be varied, set aside and/or vacated.
 - ii. A declaration that Plot No. 4012 belonging to the Plaintiff and Plot No. R6189 belonging to the Defendant are two distinct plots in features, measurement and location and therefore cannot be switched to the detriment of the respective parties.
5. The Court directed that the appeal herein be canvassed by way of written submissions which directions the parties complied with.
6. The Appellant submitted that the Respondent's claim of being the owner of Plot No. R4012 together with the allegation that the Appellant trespassed and hired Police to harass him, were not made in reference to Plot No. R6189. The Appellant contended that the Respondent did not reveal the size of the portion of his land that was allegedly hived off and/or how the hiving was done.
7. The Appellant argued that the Respondent did not raise any issue nor challenge the registration of Plot No. R6189 which had a deed plan and showed the exact measurements of the Appellant's plot and therefore, both plots are separate and distinct entities registered as such so by the County Government of Wajir. The Appellant contended that as County Government of Wajir was not called to testify and/or clarify on the matter despite the appellant's insistence of having the same done, the allegations by the respondent were not proved or verified.
8. The Appellant submitted that the County Government being the custodian of the County land, had made no declaration the effect that the two plots herein had either invalid sizes nor allotment numbers. That the Trial Magistrate's holding that the Appellant's plot formed part of the Respondent's land



was not supported by any evidence and the Trial Magistrate erred in so holding. The Appellant argued that the Respondent failed to prove how the Appellant encroached onto Plot No. R4012. It was the Appellant's contention that the Appellant's documents clearly showed that he was allocated Plot No. R6189 by the County Government of Wajir in the year 2015 and consequently, issued with a deed plan and an allotment letter. That it therefore followed that the County Government being responsible for issuing allotment documents to the Appellant, the Respondent cannot be heard to say that the Appellant hived off part of the Respondent's land.

9. Lastly, the Appellant contended that due to the fact that the Respondent did not call witnesses to support his case as opposed to the Appellant who called several witnesses, it follows that the Respondent's case was not proved and therefore, the Judgment by the Trial Court ought to be set aside as the Respondent did not show that the Appellant hived off his land.
10. The Respondent on his part submitted in reference to three issues namely: whether the Respondent was the owner of the property known as R4012 measuring 20Ha situated along El Nur Road within Wajir Township; whether the Appellant had encroached on the suit property' and whether the Respondent was entitled to the reliefs granted and who should bear the cost of the appeal.
11. On the first issue, the Respondent submitted that the Learned Magistrate was well guided to find that the suit property belonged to the Plaintiff as the same was well supported by the documents produced before the Court which clearly proved on a balance of probabilities that the Respondent was the prima facie owner of the Juu Farm. Reliance was placed on Sections 24 and 25(1) of the [Land Registration Act](#) No. 3 of 2012. The Respondent submitted as the proprietor of the land, their rights of ownership were absolute and indefeasible. The Respondent relied on the Case of Elijah Makeri Nyang'wa v Stephen Mungai Njuguna & Another (2013) eKLR to urge that his title was not acquired fraudulently.
12. On whether the Appellant had encroached on the suit property, the Respondent contended that it took his intervention to notify the unsuspecting members of the public that the piece of land that the Appellant had purportedly hived off was part of his land. That he produced a sketch map which established that the suit property measured 20Ha and the same belonged to Juu Farm. The Respondent relied on Section 18 of the [Land Registration Act](#) 2012 which stipulates thatthe cadastral map and any filed map be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.... Further reliance was placed on the Case of Ndovu Builders and General Contractors Ltd v Attorney General and 6 others (2019) eKLR to buttress the fact that the Appellant's case was unbelievable given that the documents he produced such as the survey sketch did not indicate the details of the person who prepared it nor any signature to authenticate its origin.
13. Lastly, the Respondent argued that the Judgment by the Trial Magistrate only conferred the Plot No. R4012 to the rightful owner, the Respondent herein due to the fact that the Respondent proved his case to the required standard. That the Respondent's title was not impeached on account of having been acquired fraudulently as opposed to the argument(s) by the Appellant. The Respondent relied inter alia on the Case of Kenya Power & Lighting Co. Ltd. V Sharrif Molana Habib (2018) eKLR to support his prayers. In conclusion, the Respondent urged the Court to uphold the determination by the Trial Court.
14. This being the first Appellate Court, it is bound and indeed under a duty to reconsider, re- evaluate and re -assess the evidence tendered before the Trial Court and arrive at its own determination and or conclusion without losing sight of the fact that the Trial Court had the advantage of seeing and listening to the witnesses to be able to assess their demeanour. See Selle and another vs Associated Motor Boat Co. Ltd and others (1968) E.A 123 and Peters Vs Sunday Post Limited (1958) E.A 424.



15. I have considered the record of appeal, grounds of appeal and the submissions by both parties and I find that the issue for determination is whether the Respondent proved his case to the required standard to have been entitled to a Judgment in his favour.
16. In the instant appeal the real issue is really whether the Appellant had encroached onto the Respondent's Plot No. R4012 or whether it was the Respondent who had encroached onto the Appellants plot No. R6189. Both the Appellant and the Respondent held documents from the County Council of Wajir indicating they had been allocated plots. The Respondent exhibited a letter from the Clerk to Council dated 13/5/2005 whose contents inter alia were as follows:-

Re: Ownership Letter 4012 At Wajir Township.

This is to certify that the above land belongs to Juu Farm Group C/O Ali Abille Mohamed of ID/No. 00xxxxx and is registered in his name.

The plot measures 20 Ha and it is undeveloped. The land is situated along El-Nur road.

The Appellant for his part had a letter from the Clerk to Council dated 11/3/2006 whose contents inter alia were as follows:-

Re: Ownershil Letter R 6189 At Wajir Township.

This is to certify that the above plot belongs to Mr. Adan Abikar Hassan ID/No. 229xxxxx and is registered in his name.

The plot measures 550x450fts and is undeveloped. The plot is situated at Sunrise area.

17. The Respondent additionally exhibited a sketch plan for the proposed Juu Farm Group prepared on 17/1/2010 duly endorsed by the County Physical Planner. No sketch plan was exhibited by the Appellant to illustrate the ground position of his plot. Considering that the Respondent was claiming there was encroachment of his plot by the Appellant, it was necessary and essential that technical evidence was availed to affirm the physical ground positioning of the two plots. The allocation of land to both the Appellant and the Respondent by the County Council was not contested before the Lower Court. What was in contention was the location of the two plots. Was there a double allocation or was the Appellant's plot superimposed on the Respondent's plot so that there was an overlap? Only the evidence of a Surveyor and/or the Physical Planner from the County Government of Wajir would have resolved the issue.
18. There was no evidence adduced to show that the parcels of land had been surveyed and/or were registered under the provisions of the *Land Registration Act*, 2012. Hence though the provisions of the *Land Registration Act*, 2012 may not be applicable to the subject plots, it is easy to appreciate why we have Sections 18 of the Act which essentially operates to oust the jurisdiction of Courts where a matter touches on boundary disputes. Section 18 and 19 of the *Land Registration Act*, 2012 provide 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.

19. Quite clearly Section 18(2) of the Act ousts the jurisdiction of the Court to deal with matters where the dispute relates to boundary. I see a similar scenario in the present appeal. The Appellant and the Respondent both claim ownership of two varying and distinct plots. The Respondent avers the Appellant was encroaching onto his plot but where is evidence of encroachment. Such evidence would only have been availed by a technical person who would have testified on the actual physical location of the two plots if indeed both existed.
20. There was in my considered view no evidence upon which the Learned Trial Magistrate would have found that the Appellant had encroached onto the Respondent's plot. The Learned Trial Magistrate quite properly found that the Respondent was the owner of Plot R4012 but then that was never in dispute. The dispute was the physical location of plot No. R6189 owned by the Appellant and plot No. R4012 owned by the Respondent on the ground and/or the extent of the plots.
21. Upon a careful evaluation of the evidence adduced before the Lower Court, I am not satisfied that the Learned Trial Magistrate was justified in holding that the Appellant had encroached onto the Respondent's plot No. R4012. The ownership of plot No. R 4012 was never in issue and the Appellant was not laying claim to it. Without establishing the actual physical location of the two plots on the ground, the order of permanent injunction would not lie as no encroachment was established.
22. This perhaps would have been a proper case for the Learned Trial Magistrate to have acted suo moto and invited the County Physical Planner and the County Surveyor to prepare and file a report respecting the physical locations of the two plots to aid the Court in reaching a just decision.
23. While I find the appeal meritorious to the extent that the order for permanent injunction was granted when there was no proof of encroachment on the part of the Appellant onto the Respondent's plot, I will set aside the Judgment delivered on 29th August 2022 in its entirety and substitute in its place the following orders:-
 1. That the County Director of Physical Planning and the County Surveyor be and are hereby directed to visit plot Nos. R4012 and R6189 Wajir Township and to establish their boundaries physically on the ground within the next 90 days from today.
 2. That once the plot boundaries are established any party found to have encroached onto the others plot shall vacate within 30 days of the boundaries being established failing which an eviction order to issue on application.
 3. The County Director and County Surveyor will file in Court a report together with an illustrated sketch plan denoting the position of the two plots on the ground within 90 days from the date of this Judgment.
 4. Each party shall be at liberty to apply.
 5. Each party will bear their own costs of the appeal and of the Court below.



**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 28TH DAY
OF FEBRUARY 2024.**

J. M. MUTUNGI

ELC-JUDGE

