



**Nyanuga v Moseti & another (Environment and Land Appeal
3 of 2020) [2024] KEELC 695 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 695 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL 3 OF 2020**

M SILA, J

FEBRUARY 15, 2024

BETWEEN

JOSEPH SIKINI NYANUGA APPELLANT

AND

PAUL MOSE MOSETI 1ST RESPONDENT

MOSETI JOHN MOSETI 2ND RESPONDENT

(Being an appeal from the ruling of Hon. D. Mikoyan, Senior Principal Magistrate, Ogembo Law Courts, delivered on 23 December 2019 in the suit Ogembo SPMCC (ELC) No. 371 of 2019)

JUDGMENT

Appellant aggrieved by decision of trial magistrate which upheld a preliminary objection that the court had no jurisdiction on ground that what was before court was a boundary dispute; appellant having filed suit for orders of permanent injunction and trespass; the case was not a boundary dispute and decision of trial court reversed.

1. This is an appeal against the ruling of the Ogembo Principal Magistrate delivered on 23 December 2019 vide which he dismissed the appellant's motion dated 19 September 2019.
2. To put matters into context, the appellant, through a plaint filed on 20 September 2019, commenced a suit against the respondents. The appellant pleaded that he is the registered proprietor of the land parcel Bassi/Masige/1385. He pleaded that sometimes in the year 2017 the respondents, without any colour of right, destroyed the common boundary between his parcel of land and the respondents' land parcel Bassi/Masige/1386 and trespassed into the appellant's land. He pleaded that he tried to request the respondents to desist from the trespass but the respondents failed to heed the pleas. He further averred that clan elders had corrected the boundary but the same was again destroyed and the respondents continued with their acts of trespass. In the suit, the appellant asked for the following orders :-



- (a) Permanent injunction restraining the defendants by themselves, servants, agents or anybody acting under their instructions from trespassing into the plaintiff's land parcel Bassi/Masige/1385.
 - (b) Costs of the suit and interest thereon.
 - (c) Any other relief that the court may deem fit to grant.
3. Together with the plaint, the appellant filed a motion seeking the following orders (paraphrased for brevity) :-
 - (1) That the application be certified urgent and be heard ex parte in the first instance.
 - (2) That the defendants/respondents be restrained by way of temporary injunction from trespassing into the land parcel Bassi/Masige/1385 pending hearing of the application inter partes.
 - (3) That the defendants/respondents be restrained by way of temporary injunction from trespassing into the land parcel Bassi/Masige/1385 pending the hearing and determination of this suit.
 - (4) That an order be issued directing the Kisii County Surveyor and the Land Registrar, Kisii, to visit and ascertain the boundary between the land parcel numbers Bassi/Masige/1385 and 1386 and file a report to court.
 - (5) That the OCS Nyangusu do provide security to the Land Registrar and Surveyor during the exercise of determining the boundary.
 - (6) That costs of the application be borne by the defendant.
4. The application was based on grounds that the appellant was the absolute owner of the land parcel Bassi/Masige/1385; that the respondents who own the land parcel Bassi/Masige/1386 had destroyed the boundary; that the respondents' acts of destroying the boundary had dispossessed the appellant of use of his land. The application was supported by the affidavit of the appellant wherein he more or less reiterated that he owned the land parcel Bassi/Masige/1385 and that in the year 2017, the respondents destroyed the boundary separating his land from their land parcel Bassi/Masige/1386. He deposed that he reported the matter at Nyangusu Police Station and the respondents were arrested and charged. He annexed a charge sheet showing that the respondents were charged with three counts in the Ogembo Magistrates' Court, the charges being : (i) cutting down trees contrary to Section 334 (c) of the [Penal Code](#); (ii) interference with boundary features contrary to Section 21 (1) (2) of the [Land Registration Act](#), 2012; and (iii) trespass upon private land contrary to Section 34 of the [Trespass Act](#), Cap 294, Laws of Kenya. He also annexed a crop damage assessment report that had been prepared. He deposed that he made several efforts to settle the matter with the local administration but the same was in vain. He deposed that he wished to have the court direct the Land Registrar and Surveyor, to survey the land so as to have the boundary ascertained, and for them to file their report in court. He nevertheless added that the two parcels of land have a clear boundary on the map and even clan elders and the local administration had assisted in demarcating the boundary several times.
5. The respondents entered appearance in person, filed a statement of defence, a replying affidavit and grounds of opposition to oppose the application for injunction. In the defence, they pleaded that they will raise a preliminary objection that the court lacks jurisdiction to hear the suit. On the claims of trespass, they pleaded that they are wholly and exclusively resident in their land parcel Bassi/Masige/1386. They averred that their land and that of the appellant is separated by a road of access



and they do not meet at any point. In the grounds of opposition to the application, they reiterated the contention that the court lacked jurisdiction to hear the suit as the same would be a violation of Section 18 (2) of the [Land Registration Act](#), 2012, and the suit was thus an abuse of the court process. The replying affidavit was sworn by the 1st respondent. He again raised issue that the court lacked jurisdiction to hear the suit.

6. The court directed the application to be dispensed with by way of written submissions and both the appellant's counsel and the respondents filed their submissions. In his ruling, the trial court did observe that the applicant was seeking orders of injunction and also orders to have the District Land Registrar and Surveyor ascertain the boundary. He noted the preliminary objection raised by the respondents based on Section 18 (2) of the [Land Registration Act](#). In his view, the said Section barred the court from hearing boundary disputes until the same is determined by the Land Registrar. He was of the opinion that since prayer 4 of the application asked for orders for the Land Registrar to ascertain the boundary then it made the claim a boundary dispute. The final holding of the court was as follows :

The preliminary objection succeeds. Notice of Motion dated 19/9/2019 is dismissed with costs.

7. Aggrieved by the ruling, the appellant filed this appeal on the following grounds:
 1. The learned trial magistrate erred both in law and fact by not considering that there were triable issues for the court to handle.
 2. The learned trial magistrate erred in law and fact by not considering that this is a case of trespass where upon there is a defined and demarcated boundary where upon the respondent has trespassed and hence was bound to act on the same to determine into the appellant's land parcel or not (sic).
 3. The learned trial magistrate misdirected himself as to the law applicable on issues of trespass.
 4. The learned trial magistrate erred in law and fact by misinterpreting the provisions of Section 18 (2) of [Land Registration Act](#) of 2012 as the case of question was of trespass on a parcel of land whose boundaries are clearly defined (sic).
 5. The learned trial magistrate erred in law and fact by disregarding a valid document i.e a title deed without subjecting the same to its authenticity.
 6. The learned trial magistrate erred in law and fact by disregarding the evidence to be brought by the county surveyor to determine whether indeed there was a trespass to land parcel Bassi/Masige/1385 by the respondents which could have gone a long way to assist the court to determine the issues that were brought before the court.
8. In the appeal, the appellant prays that the entire ruling be set aside and the whole suit be reinstated for hearing to its logical conclusion.
9. Despite being duly served, the respondents did not appear during any mention or hearing of the appeal. I directed that submissions be filed towards the appeal and it was only counsel for the appellant who obliged. In essence the respondents did not participate in any way in this appeal.
10. In his submissions, Mr. Ondika, learned counsel for the appellant, more or less rehashed the background leading to the ruling appealed from and submitted that the court upheld the preliminary objection and dismissed the suit and the application. He pointed out that Section 13 (2) (a) of the [Environment and Land Court Act](#) expressly provides that the court has power to handle disputes relating to boundaries to land. He was of the view that a reading of Section 18(1), 18 (2) and 15



of the [Land Registration Act](#) shows that the Land Registrar can only determine disputes relating to boundaries to land where boundaries are yet to be established, where the land is unsurveyed, or boundaries undetermined. He relied on the case of Fredrick Nganga Thuo vs Prof Peter Mungai Njuho, Thika ELC No. 602 of 2017. He submitted that the properties of the plaintiff and defendant were identified based on maps and boundaries that had already been determined and that there is in fact a surveyed road separating the land of the appellant and respondents. He submitted that if the position is that there is requirement for the dispute first to be determined by the Land Registrar, the law would have made provision for this, outline the procedures and invoke an appellate process. He submitted that the County Surveyor's expert opinion was meant to guide the court and to remind the parties where the boundaries are and not to create new boundaries. He submitted that the appellant did not plead that the dispute with the respondents was a boundary dispute but pleaded that the respondents had trespassed into their land. He submitted that the court needed not strike out the suit but only refer the matter to the surveyor or registrar to go to the ground and file a report then report back to court. He asserted that the appellant's cause of action was based on trespass and the court had power to hear such a matter.

11. I have considered all the foregoing.
12. At the outset, I must say that the order of the court was rather ambiguous. Was the trial court merely dismissing the application or was the court dismissing the entire suit for want of jurisdiction? That, I am afraid, does not come out clearly in the ruling of the court. The court stated that the preliminary objection succeeded, but if so, then the court ought to have proceeded to strike out the entire suit. However, what the court did was only issue an order dismissing the application which clearly left the appellant at a limbo, wondering whether his suit still stands or not. The court ought to have been clear in its ruling, that if it had no jurisdiction, then it is striking out the suit and not just the application. A strict reading of the ruling means that only the application was dismissed, thus the suit still remained, which would be antithetical to the holding that the preliminary objection is sustained, for in such instance the court would have no suit to hear for want of jurisdiction.
13. Be that as it may, the court did decline to allow the application before it on the basis that it had no jurisdiction. The court's holding was that the matter was a boundary issue which ought to have been determined by the Land Registrar, pursuant to Section 18 of the [Land Registration Act](#), and not by court. But was this really what was before court?
14. I have already outlined the prayers that the appellant set out in the plaint. It is apparent to me that what the appellant complained of was that the respondents had trespassed into his land and he sought an order that they be restrained by way of a permanent injunction. I have not seen any pleadings vide which the appellant asked for a prayer for a determination of boundaries. He was categorical that the respondents had trespassed into his land and he wanted them permanently restrained. Those were the pleadings that were before the court.
15. In their preliminary objection, the respondents invoked Section 18 of the [Land Registration Act](#) which provides as follows :-
 18. 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).

16. I think it was wrong for the respondents to invoke the above provision and claim that the court had no jurisdiction for nowhere in the plaint was it ever pleaded that there was a boundary dispute to be determined. The pleadings remained that the respondents had trespassed into the appellant's land and the appellant wished to have them permanently restrained.
17. The issue about sending the Land Registrar and County Surveyor to the land, to ascertain the boundaries and make a report, was a matter that was only brought up within the application for injunction and was not a prayer in the plaint. I think what the appellant wanted was to build up evidence to support his allegations of trespass. I am of opinion that it was erroneous for the court to hold that the suit had now been converted into a boundary dispute because of the orders sought in the application. The orders sought in the application could not be construed as amending the pleadings and prayers in the plaint. As I have mentioned, and that was indeed what counsel for the appellant submitted, the intention of the appellant was to have a report that would assist his case for trespass.
18. While I am on this issue, I have seen common practice where persons file suit alleging trespass, then file an application seeking orders for survey. In essence what the plaintiff in such instance seeks is evidence to support his case. Ideally, when a person files suit, he should file suit with his evidence ready. Where one claims trespass or interference with land, or has any other suit based on possession or occupation of land, it is his obligation to gather evidence that will assist his cause. It is not really the duty of the court to help him gather evidence, unless, for good reason, a court order is needed in order to access or gather certain evidence. In cases of trespass, there is nothing that prevents a plaintiff from seeking the services of a private or Government surveyor to go to the ground and make a report of the alleged trespass before filing the suit. In fact, it is advisable that such plaintiff does this before filing suit. The plaintiff does not need an order of court so as to have such surveyor go to the ground, unless for one reason or another, which ought to be given by the plaintiff on application, such survey cannot be done without a court order. In our case, it would appear that the appellant failed to gather his own survey evidence before coming to court yet it was his duty to do so and was thus seeking the court to help him with the survey process. Even if I was to assess that prayer, I wouldn't grant it, because no reason was given as to why the appellant had not earlier done survey, and why he needed court assistance to undertake what was actually his duty.
19. But that is not all that the appellant was asking from court. Apart from the order for survey, the applicant wanted orders of injunction. Orders of injunction are common in such suits and the court had a duty to assess whether the applicant had provided sufficient material to entitle him to an order of injunction based on the well settled principles outlined in the case of *Giella vs Cassman Brown* (1973) EA 358. I have already mentioned that the court ought not to have construed the suit as a pure boundary dispute. The court thus had a duty to make a ruling on whether or not the applicant was entitled to an injunction. On my part, I doubt whether the applicant had made out a *prima facie* case to entitle him to an order of injunction. He really had limited, or no evidence, that the respondents



had moved into his land. It is actually the report that he was looking for that would have buttressed his allegation of trespass, and without it, I am not persuaded that he had established a *prima facie* case for trespass. I have held that it was erroneous for the trial court to fail to assess his application for injunction, but even if it was assessed, it would have failed for not being supported by sufficient evidence.

20. Although the trial court was wrong in the way it went about assessing the application before it, this court is not persuaded to grant the prayers in that application.
21. The only thing that this court is persuaded is that the trial court was wrong in upholding the preliminary objection and holding that it had no jurisdiction to hear the case. For the avoidance of doubt it is the holding of this court that the case was properly before the Magistrates' Court for trial as to whether or not the respondents have trespassed into appellant's land and whether they ought to be permanently restrained from it. Proof of such allegations will of course depend on the evidence that will be presented at the hearing of the suit. This case is thus reinstated for trial before the Ogembo Magistrates' Court.
22. This appeal succeeds to that extent.
23. The appellants have partly succeeded and will have half costs of this appeal.
24. Judgment accordingly.

DATED AND DELIVERED THIS 15 DAY OF FEBRUARY 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

In the presence of: -

Appellants – Absent

Respondents – Absent

Court Assistant – Lawrence Chomba

