



REPUBLIC OF KENYA



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**Bogonko v Rasugu (Civil Appeal 142 of 2019)
[2025] KECA 485 (KLR) (7 March 2025) (Judgment)**

Neutral citation: [2025] KECA 485 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 142 OF 2019
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
MARCH 7, 2025**

BETWEEN

STEPHEN NYACHIEBO BOGONKO APPELLANT

AND

PETER BOGONKO RASUGU RESPONDENT

*(Being an Appeal from an Order of the Environment and Land Court at
Kisii (Mutungi, J.) dated 20th November, 2018 in ELC Case No. 17 of 2016)*

JUDGMENT

1. Peter Bogonko Rasugu (Peter), who is the respondent in this appeal, filed a suit in the Environment and Land Court at Kisii against Stephen Nyachiebo Bogonko (Stephen), who is the appellant in the appeal.
2. Stephen is the owner of land parcel known as Central Kitutu/Monyerero/1053 (Monyerero 1053), while Peter is the registered owner of Central Kitutu/Monyerero/1052 (Monyerero 1052). Peter filed suit claiming that Stephen had encroached and or trespassed onto Monyerero 1053 and occupied a portion of land measuring 0.6acres, wherein he erected an illegal and unauthorized structure without the consent of Peter. A boundary dispute was referred to the County Survey Office and the Kisii County Survey Officer accompanied with the Kisii County Land Registrar visited the two properties on 10th February, 2015, with the intention of resolving the boundary dispute but their efforts were thwarted and frustrated by Stephen.
3. Peter sought judgment in his favour, for eviction of Stephen from Monyerero 1053; a permanent injunction restraining Stephen from interfering with Monyerero 1053; an order directing the Land Registrar and the County surveyor to visit the two parcels and establish a common boundary between Monyerero 1053 and Monyerero 1052; and costs of the suit.
4. Stephen filed a statement of defence in which he denied Peter's claim and contended that Munyerero 1052 and 1053 have had and continued to have clearly defined natural common boundaries on the



ground since 1997. Stephen stated that he had erected two houses and a pit latrine on the disputed portion, and that Peter's action for trespass is statutory time-barred. In addition, Stephen stated that Peter was jailed for four months in 1972 for trespassing onto Stephen's land. He challenged the report allegedly compiled by the Land Registrar and the Surveyor on 10th February, 2015, as the same was done in his absence as he was not given an opportunity to be heard. Stephen, therefore, urged the Court to dismiss Peter's claim.

5. On 15th June, 2017, the matter was listed for hearing. However, the parties having both agreed that the dispute touches on the location of their respective boundaries, the Environment and Land Court (ELC), (Mutungi, J), ordered that the Land Registrar Kisii and the County Surveyor to visit the land parcels Munyerero 1052 and 1053, to establish and fix the respective boundaries in terms of Sections 18 and 19 of the *Land Registration Act*, 2012, and to confirm whether either party had encroached onto the others land parcel. The Land Registrar was given ninety days to file their report. Subsequently, a report dated 4th October, 2010, was filed in which the County Surveyor confirmed having visited the scene, noted that there was a clear live fence separating the two parcels but there was an encroachment by the defendant into the plaintiff's land by approximately 12 meters wide and 200 meters long, and that there were trees and old houses on the disputed portion.
6. There is no copy of a judgment in the record of appeal but there is a copy of an order showing that the matter came up before Mutungi, J., on 20th November, 2018, when the Judge made an order which we reproduce herein verbatim:

“In court before J.M. mutungi, j on 20th November, 2018

Order

This matter coming up for mention before Hon. J.M. Mutungi – Judge on 20th November, 2018, in the presence of Bigongo, counsel for the plaintiff and in the absence of counsel for defendant, when it was ordered:

It is hereby ordered that:

Court

“I have perused the report by the Land Registrar and the Surveyor filed herein. The report is clear that the land in dispute belongs to the plaintiff and it is therefore the defendant who had encroached onto the plaintiff's land to the extent of a portion of land in excess of half acre. The court, in the premises adopts the report of the Land Registrar/Surveyor as judgment of this court and in that regard enters judgment in favour of the plaintiff against the defendant as prayed in the plaint. The costs of the suit to be borne by the defendant.”

Given under my Hand and Seal of this Honourable Court on 20th day of November, in the Year 2018.

Justice J.M. Mutungi

Judge - Kisii Environment & Land Court

Issued at Kisii this 21st day of 03, 2019

Signed

Deputy Registrar - Kisii High Court

7. On 10th July, 2019, Stephen lodged a notice of appeal indicating his intention to appeal the decision given by Mutungi, J., on 20th November, 2018. The notice is indicated as having been filed with leave of



Court given in Civil Application No. 49 of 2019. In a memorandum of appeal dated 20th November, 2019, Stephen raised three grounds as follows:

- i. that the learned trial Judge erred in law in entering judgment against the appellant herein who had no notice or had not been served with a report by the Land Registrar and County Surveyor;
 - ii. that the learned trial Judge erred in law in entering judgment against the appellant herein as per report by the Land Registrar and Surveyor whereas the said report was not explicit and conclusive in all aspects;
 - iii. that the learned trial Judge erred in law in proceeding to enter judgment against the appellant on the day the matter was scheduled for mention and not hearing.
8. The appellant has filed written submissions in support of the appeal. In the submissions, the appellant contends that the record of appeal shows that the report by the Land Registrar and County Surveyor, was not filed in court within the time given and the court had to extend time for this to be done. The matter was fixed for further mention on 20th November, 2018. When the matter came for mention, apparently the report had been filed in court on 4th October, 2018, which fact was not within the appellant's knowledge, but the court nevertheless proceeded to make the impugned order. The appellant argued that he was not accorded the right to be heard and has, therefore, suffered a miscarriage of justice. He relied on *Savings and Loan Kenya Ltd -vs- HO Odanga & others - Civil Appeal No. 6 of 1987*.
9. It was also pointed out that although the respondent's counsel was in court on 20th November, 2018, the record does not indicate that the counsel requested the court to enter judgment as per the report. It is argued that the learned Judge erred in entering judgment relying on the report by the Land Registrar and the Surveyor, because the report was neither explicit nor conclusive; and that the Land Registrar and the Surveyor's verdict, was that the dispute concerned a substantial claim of land over 0.5 acres and touched on the law of adverse possession; and therefore left it to the court to give directions. This meant that the Hon. Judge of the ELC could not simply adopt the report, without having any input from the appellant. The appellant faulted the court for failing to comply with the provisions of Order 46, which could have entailed supplying both parties with copies of the report and then hearing of both parties.
10. During the plenary hearing of the appeal, there was no appearance for the respondent who was duly served with the hearing notice. The respondent did not also file any written submissions. Hearing therefore proceeded ex parte with Mr. Soire, who was present for the appellant, relying on his written submissions.
11. We have carefully considered this appeal, and it is clear to us that the same is for allowing. The record indicates that the learned Judge adopted the report of the Land Registrar and the Surveyor as a judgment. In his plaint, apart from seeking an eviction order and a permanent injunction, Peter had sought an order for the Land Registrar assisted by the District Surveyor to visit the disputed portion of land with a view to fixing a legally recognized common boundary between the respective parcels of land. The report by the Land Registrar and the Surveyor was necessary because under Section 18(2) of the *Land Registration Act*, the court cannot 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 Sections 18 and 19 of the *Land Registration Act*. The report by the Land Registrar and the Surveyor, makes reference to the presence of boundary features like overgrown trees, old houses and a clear live fence separating the two parcels of land. It is not clear from the report whether a common boundary had been fixed before in accordance with Section 18 of the *Land Registration Act* or who had fixed the boundaries features that were observed. That being the position, it was necessary for the learned



Judge to hear the parties before determining whether the eviction order and the permanent injunction should issue.

12. Secondly, and of more importance is that the parties were not given an opportunity to interrogate that report. The order adopting the report as a judgment was made on a date when the matter was before the court for mention. At best, the court ought to have given directions on the way forward with regard to the hearing. There is no evidence that the appellant was served with a copy of the report. Right to hearing is an important fundamental right breach of which vitiated the proceedings. As observed by Gachuhi, JA, in *Savings & Loan Kenya Ltd -vs- Odongo* [1987] KECA 90 (KLR):

“It is a fundamental principle of justice that parties who appear in court should be heard and a determination of their grievances given. If there will be a right of appeal, then the aggrieved party can appeal. The grounds of appeal should attack what there is on the record. The order now appealed against has nothing to support it from the record..

Taking the situation as it is, can it be said that justice in the case was meted out? The principles of natural justice should always be dispensed by the court, that is, both parties must be heard on the application before a final decision falling which there is miscarriage of justice.”

13. Thirdly, a look at the report reveals that it was not intended to conclusively determine the issues before the court. Contrary to the appellant’s submissions, the Land Registrar and the Surveyor were not appointed as arbitrators under Order 46 of the Civil Procedure Rules. They were merely acting as experts assisting the court in identifying the boundary between the two parcels of land. The learned Judge could not abdicate his responsibility to determine the dispute by adopting as a judgment the report of the Land Registrar and Surveyor.
14. The upshot of the above is that we allow the appeal, set aside the order made by the learned Judge on November 20, 2018, and remit the suit back to the ELC at Kisii for hearing to proceed before a judge other than Mutungi, J.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF MARCH, 2025.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H.A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

