



**Olutukai v Kingori (Environment and Land Appeal E011 of 2023)
[2024] KEELC 3924 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3924 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E011 OF 2023**

EC CHERONO, J

APRIL 25, 2024

BETWEEN

NICKSON DICK OLUTUKAI APPELLANT

AND

APOLLO M KINGORI RESPONDENT

(Being an appeal from the Judgment of the Principal Magistrate's Court at Kimilili (Hon. G. Adhiambo (P.M) delivered on the 25th of January, 2023 in PM-ELC NO. 16 of 2019)

JUDGMENT

1. The appellant, Nickson Dick Olutukai was the plaintiff in the former suit being Kimilili SPM-ELC No. 16 of 2019 while the Respondent, Apollo M. Kingori was the defendant. Vide a plaint dated 8th May 2019, the plaintiff/Appellant averred that he was the sole registered proprietor of land parcel No. Kimilili/Kimilili/2946 and that the Respondent/Defendant had demanded that he vacates from the suit property and sought an order to stop the Respondent/Defendant from interfering with the suit land.
2. The Respondent/Defendant filed a statement of Defence and counter-claim dated 10th June, 2019 in which it denied the Appellant's/Plaintiff's claim and while admitting that he was served with a notice to vacate plot No.7 Kimilili "B" Market, he averred that he owns the suit land No. Kimilili/Kimilili/2946 which is not within the plots that belong to the County Government of Bungoma and put him to strict proof thereof.
3. He further averred that the respondent/Appellant has wrongly encroached on his plot No. 7 Kimilili "B" Market which was allocated to him by the County Government of Bungoma on 18/04/2007 pursuant to Minute No. WTP/08/07 which was approved and confirmed by the full council vide Min. Fe/08/07 on 26/4/2007. He therefore sought an order for demolition and eviction of the Appellant/



Plaintiff from the suit property to be supervised by the Officer Commanding Station (O.C.S), Kimilili Police Station.

4. The former suit was heard between 24/10/2019 and 19/2/2022 in which the Plaintiff/Appellant called six witnesses while the Defendant/Respondent called four witnesses.

Plaintiff/appellant's Summary Of Facts;

Nickson Dick Olutukei (PW1)

5. The plaintiff/Appellant testified before the trial court as PW1. He was referred his undated witness statement filed in court on 15/10/2018 which he adopted as his testimony-in-chief. He stated that on or about 16th September, 2017 he purchased a plot No. Kimilili/Kimilili/2946 from one John Khameme Wanyela. He stated that the suit land is situated within Kimilili township along Kimilili-Chwele Road. He stated that after purchasing the suit land, he processed and was issued a Title deed on 24/07/2018. Immediately thereafter, he started developing the plot in November 2018. However, he was surprised when he received a letter from the firm of Ann Kibe & Co. Advocates dated 29th April 2019 alleging that he had encroached the defendant/respondent's plot and requiring him to vacate. He then decided to institute the former suit

Joackim Namasaka Muchonji (PW2)

6. The 2nd plaintiff witness was Joackim Namasaka Muchonji who referred to his witness statement dated 31st August, 2019 and adopted in his testimony-in-chief. He stated that the suit land parcel No. Kimilili/Kimilili/2946 belonged to his elder brother namely Pascal Nabwana and was measuring approximately 104 acres. He stated that the said Pascal Nabwana demarcated part of his bordering Kimilili-chwele Road into 23 plots and gave the 1st plot to his son Emmanuel Bernard and donated the next five plots to Bungoma County Council. He stated that the title deeds for the five plots was nullified but erroneously included his 1st plot making a total of six plots. The witness stated that plot No. Kimilili/Kimilili/2946 was given to his five sons namely George Namasaka Nabwana, Kennedy Wakoli Nabwana, Benedict Masika Nabwana, Linus Kiminigichi Nabwana and John Wanjala Nabwana who later sold to one John Khameme Wanyela. He stated that his brother Pascal Nabwana died in 1984 and his elder son Emmanuel Bernard Nabwana became the administrator. He said that Emmanuel Bernard Nabwana then transferred the said plot to John Khameme Wanyela in 1997 who subsequently sold to Nickson Dick Olutukei, the plaintiff herein.

Gerald Nalianya Nabwana (PW3)

7. The 3rd plaintiff witness was Gerald Nalianya Nabwana who was sworn and stated that Pascal Nabwana was his grandfather and had a big land approximately 104 acres in Kimilili and that he demarcated part of the land into 23 plots next to Kimilili-Chwele Road. He stated that he named the first plot Taria Memorial in honour of his 1st wife. He stated that he gave the next five plots to the then Bungoma County Council and the title deeds for the five plots were nullified. The witness further stated that while nullifying the title deeds for the five plots, the first plot which was named after his 1st wife was also nullified erroneously. The witness stated that when he Pascal Bernard Nabwana died in in 1984, his father who is also the elder son to Emmanuel Nabwana became the administrator of the estate and the family agreed to have the land transferred to John Khamene Wanyela



Benedict Masika Nabwana (PW4)

8. The 4th witness called by the plaintiff was Benedict Masika Nabwana who identified himself as a resident of Kimilili. He was referred his witness statement dated 31/08/2019 which was adopted by the court as his testimony- in- chief. He stated that Bernard Emmanuel Nabwana was his elder brother and administrator of their father's estate. He stated that in order to save expenses, did not transfer the suit land parcel No. Kimilili/Kimilili/2946 according to the plot from them. He stated that the said John Khameme Wanyela sold the suit land to Nickson Dick Olutukei, the plaintiff herein.

LEONARD WABWIRE (PW5)

9. The 5th plaintiff witness was Leonard Wabwire who works as an Assistant Land Registrar, Bungoma. He stated that according to their records, land parcel No. Kimilili/Kimilili/2946 was registered as entry No.4 dated 24/7/2018 in the name of Nickson Dick Olutukei which he stated, was the last registration. He stated that the suit land parcel No. Kimilili/Kimilili/2946 was a subdivision of land parcel No. Kimilili/Kimilili/2318. However, he stated that he did not have the records to proof that land parcel No. Kimilili/Kimilili/2946 is a resultant subdivision of land parcel No. Kimilili/Kimilili/2318. He also stated that he did not have the records for land parcel No. Kimilili/Kimilili/771 or plot No.7 Kimilili "B" Market.

Stephen Lumbasi Keya (PW6)

10. The plaintiff called Stephen Lumbasi Keya as PW6 who identified himself as a retired teacher and a farmer. He was referred his witness statement dated 31/08/2019 which was adopted as his testimony- in- chief. According to him, a meeting was called by the area chief one David Barasa on 19/07/2019 for purposes of identifying plot each one had purchased. He stated that the alleged meeting was to be attended by the County Surveyor. The witness said that he attended the said meeting and took minutes as the secretary. He said that each person stood on his plot and that Nickson Dick Olutukei stood on plot No. Kimilili/Kimilili/2946 and he never heard any complaint or dispute about any boundary.

Cornelius Wanjala Nyongesa (PW7)

11. The 7th plaintiff witness was Cornelius Wanjala Nyongesa who identified himself as a land Surveyor practising in the name and style of Poly Surveys. He stated that in 1996, he was practising in the firm of Arch Surveys as an approved registered assistant when the office was engaged by one Bernard Emmanuel Nabwana to do a subdivision of his land parcel No. Kimilili/Kimilili/2318. The office asked him to do the measurements of the plot and process the Numbers. He confirmed that he visited the site around March, 1995. He carried along the necessary aids. He also had a map sheet diagram 2 of Kimilili/Kimilili sheet 2. He also carried with him map sheet 1. He said he had with him Folio Registry Map 99/13 as his base mark for the Survey. He said that the proprietor Bernard Emmanuel M. Nabwana pointed out the boundaries and then they measured the subdivisions and plotted, i.e capturing and producing the boundaries on paper which he subsequently presented to the District Surveyor for issuance of the Numbers. He stated that the Numbers that resulted from that subdivision were Kimilili/Kimilili/2931 to 2949. He stated that the original Title for land parcel No. Kimilili/ Kimilili/2318 was surrendered to the land office before the new Titles were issued. He confirmed he saw the said title. He said that the suit land is not on sheet No.2 but it is on Map sheet No.1
12. The witness further stated that after the mutation, he had the numbers registered and he did not do anything else.



Responden's/defendant's Summary Of Facts

Amos Wekesa Simiyu

13. The 1st defence witness was Amos Wekesa Simiyu who identified himself as land surveyor working for the National Government. He stated that he visited the suit land on 19/7/2019 pursuant to a court order and prepared a report dated 7/8/2019. He stated that the documents he used are map sheet No.1 of Kimilili/Kimilili/ registration Section on adjudication Section, map sheet 2 of Kimilili/Kimilili/registration section and 2 mutation forms, one for the subdivision of plot 2029 and No. Kimilili/Kimilili/2318. He started by looking at some existing land marks which could be visible on the maps. One of the land mark he identified was the road from the main Highway to Kimilili Secondary School and another land mark was the boundary between 2 locations i.e Kimilili location and Kibingei location. After establishing that these land marks were existing, he did a scaling on the maps to establish the total distance. After getting the total distance, he physically measured between those two land marks and his conclusion was that the map distances and the ground distance both with a minimal difference. Then he took physical measurements of the ground occupation plot per plot assisted by the parcel owner. After that, he compared with the measurement he had already conducted and discovered that there was a shift of 42 metres. He said that that shift of 42 metres is the one which caused or resulted into an overlap in parcel No. Kimilili/Kimilili/771. In his summarizing bit, he said that the suit property according to the measurements based on the two map sheets No.1 and 2 was inside parcel No. Kimilili/Kimilili/ 771. He checked in the land Registry parcel No. Kimilili/Kimilili/771 and found that it was registered under the County Government of Bungoma reserved for Kimilili Market. He concluded that the problem emanated from the physical placements of plots running from Kimilili/Kimilili/2156 to Kimilili/Kimilili/2166 which was a subdivision of parcel No. Kimilili/Kimilili/2029. In conclusion, he stated that the suit property is not parcel No. Kimilili/Kimilili/2946 but part of LR No. Kimilili/Kimilili/771

Apollo King'ori Mwangi (DW2)

14. The 2nd defence witness was Apollo King'ori Mwangi who is also the defendant/Respondent herein who identified himself as a resident of Kimilili and a businessman. He stated that he is the proprietor of Plot No. 7B Kimilili Market contained in Map Sheet No.2. He further stated that he applied and was allocated the said plot by Kimilili Municipal on 18/04/2007 and approved in a full Council meeting vide minute FC/08/07 of 26/04/2007. He said that he was issued with a letter of allotment but the same got lost during skirmishes and he reported the loss and was issued another allotment letter dated 5/2/2019. He stated that in 2019, he prepared a building plan with a view of constructing the plot and even obtained approvals but when he went to the site to start construction in April 2019, he found that someone had put up iron sheet structures/houses on his plot. He then instructed his lawyer M/S Anne Kibe to write a demand letter to the Municipal Council enquiring whether he was still the owner of the plot. After confirming that he was the owner of the said plot, he also instructed her lawyer to write to Nickson Dick Olutukai, the Appellant herein to vacate from his plot.

Peter Pepela(PW3)

15. The 3rd defence witness was Peter Pepela who identified himself as a resident of Bungoma and a registered Surveyor practising as a private Surveyor. He stated that on 11/6/2019, Mr. King'ori, the defendant herein came to their offices seeking geographical location and extend of freehold and leasehold property. He wanted services in relation to plot No. Kimilili B Market and freehold property No. Kimilili/Kimilili/2946. On his instructions, he visited the site on 11/6/2019. He stated that his



findings were based on PDI sheet 1 & 2 of Kimilili. He further stated that upon his examination, he found that plot No. 7 Kimilili B Market is on P1D Part Index Diagram to sheet No.2 which is a leasehold property carried plot No.771 that was Government land. He stated that L.R No.771 is a Government Number while parcel No. Kimilili/Kimilili/2946 is for the Free-Hold property. He further stated that L.R No. Kimilili/Kimilili/2946 is on sheet No. 1 while parcel No. Kimilili B Market is on sheet No.2. He stated that land parcel No. Kimilili/Kimilili/2946 is a resultant subdivision of land parcel No. Kimilili/Kimilili/2318 done on 10/1/1997 which gave rise to 19 resultant parcels. He stated that plot No. Kimilili B Market is a leasehold property and therefore different from LR. Kimilili/Kimilili/2946 which is a freehold property. He prepared a report concerning his findings on 11/6/2019.

John Wekesa Ndombi(DW4)

16. The 4th witness called by the defence was John Wekesa Ndombi who works as a Municipal Manager of Kimilili Municipality. He was referred his witness statement dated 18/10/2019 which he adopted as his testimony-in-chief. He stated that according to their records, Land Parcel No. Kimilili Kimilili/771 belongs to County Government of Bungoma inherited its predecessor, Kimilili Municipal Council. On cross-examination, he stated that land parcel No. Kimilili/Kimilili/771 belongs to the County Government of Bungoma and that the said parcel of land is the one hosting the County offices including Kimilili Law Courts. He stated that according to their records, Mr King'ori is the owner of plot No. Kimilili/Kimilili/7
17. On re-examination, the witness confirmed that according to their records, Mr. Kingori, the defendant herein did apply for allocation of the suit plot and that the allocation was done by the committee concerned and approved by the full Council and the applicant was informed by the Town Clerk on behalf of the Council. He stated that based on the report by the Surveyor, the location of land parcel No. Kimilili/Kimilili/2946 is the same as plot No. 7 which is part of land parcel No. Kimilili/Kimilili/771
18. At the close of the defence case, the trial Magistrate directed that the Land Registrar and the County Surveyor be called as witnesses with a view of establishing the actual physical location of land parcel No. Kimilili/Kimilili/2946 and L.R No. Kimilili/Kimilili/
19. At the close of the plaintiff's and the defendant's case, the trial Magistrate noted that the private surveyors called by both the plaintiff and the defendant gave conflicting evidence and directed that the land Registrar and the Surveyor be summoned as witnesses to do a re-survey of the land originally Kimilili/Kimilili/2318 which was subdivided into 19 portions (2931 to 2949) with a view to establish the physical location of the suit property LR No. Kimilili/Kimilili/2946 and further identify the physical location of plot No. 7 Kimilili B Market, if at all it exists. The trial Magistrate also directed the parties to visit the site and a report be filed in court on or before 19/7/2022.
20. Both the plaintiff and the defendant filed their respective submissions as directed by the court
21. After the delivery of the judgment by the trial court on 25th January 2023, the appellant was dissatisfied and preferred the present appeal on the following grounds;
 1. That the learned Magistrate erred in law and fact in her judgment by failing to take into account the evidence adduced by the Appellant.
 2. That the learned Magistrate erred in law and fact in her judgment by failing to consider the contradictions and inconsistencies in the evidence of the two County Surveyors; Amos Simiyu(DW1) and Mathew Nandi Khama regarding the physical location of the suit property.



3. That the learned Magistrate erred in law and fact in her judgment by relying on the County Surveyor's and land Registrar's reports dated 12th July, 2022 and 15th July, 2022 respectively, yet she had earlier excluded the same from the proceedings on account of having been conducted in the absence of the plaintiff's advocate.
4. That the learned Magistrate erred in law and fact by failing to implement her own orders regarding the extent of the second resurvey of despite insistence from the appellant's advocate.
5. That the learned Magistrate erred in law and fact by failing to determine whether the alleged County Government land was based on fixed boundaries survey or general boundaries survey.
6. That the learned Magistrate erred in law and fact by failing to consider the principles underpinning fixed boundaries survey and general boundaries survey and the strength of each when it comes to physical identification of land boundaries.
7. That the learned Magistrate erred in law and fact in her judgment by making s finding that the respondent did not demonstrate how he acquired the suit property but still went ahead and ordered the appellant to vacate the said land or be evicted therefrom.
8. That the learned Magistrate erred in law and fact in her judgment by making a finding that the respondent did not demonstrate how he acquired the suit property but still went ahead and awarded him costs of the suit.
9. That the learned Magistrate erred in law and fact in her judgment by making a finding that the suit property is owned by the county Government of Bungoma and ordered the eviction therefrom of the appellant yet the said County Government was not a party hence no such prayer had been made by the County Government.
10. That the learned Magistrate erred in law and fact in her judgment by making a finding that the suit property is owned by the County Government of Bungoma and ordered the eviction therefrom of the appellant but failed to direct the land Registrar to fix the Physical boundaries of parcel Number Kimilili/Kimilil/2946 which was found to physically exist thereby illegally dispossessing the appellant and his property.
11. That the learned Magistrate erred in law by superintending over a resurvey exercise that fell short of the provisions of Section 18 and 19 of the [Land Registration Act](#).
12. That the said County Government was not a party hence no such prayer had been made by the County Government.
13. That the learned Magistrate erred in law and fact in her judgment by failing to make an order enjoining the County Government of Bungoma despite evidence of it being a necessary party given the evidence on record.
14. That by re-opening the suo-moto and directing another re-survey of the suit property while pending judgment and after closure of the parties' submissions, the learned Magistrate erred in law and transmitted from being a neutral arbiter to being biased against the appellant as the subsequent exercise was skewed in favour of the Respondent's position on the matter.
15. That the learned Magistrate erred in law and fact by failing to give reasons while she ordered for another resurvey of the suit property despite their being on record a complete report of the county surveyor-DW1.



16. That the learned Magistrate erred in law and fact in her judgment by failing to totally address her mind on the submissions and authorities filed by the appellant.

Appellant's Submissions

22. The appellant through the firm of M/S Brayn Khaemba Kamau Kamau & Company Advocates contends that the appellant in his Memorandum of Appeal raised and highlighted the various grounds upon which he is dissatisfied with the judgment of the trial Court which he collapsed/summarized into the following issues;
- a. Whether the learned Magistrate erred in issuing orders of eviction against the Appellant despite making a finding that the respondent had not proved ownership.
 - b. Whether the learned Magistrate erred in superintending over a survey exercise that fell short of the provisions of section 18 and 19 of the [Land Registration Act](#).
 - c. Whether the learned Magistrate erred in failing to determine whether the County Government land was identified based on fixed boundaries survey or general boundaries survey and thus failed to appreciate the principles thereof.
 - d. Whether the learned Magistrate erred in failing to consider and appreciate the totality of the evidence and submissions as adduced by the parties thereby arriving at a wrong determination.
23. On the first issue, the appellant's counsel submitted that the trial Magistrate found that the Respondent had not produced any evidence that he had any legal or equitable interest in the property which he had strongly alleged to be his. He submitted that despite her finding, the trial magistrate went ahead to order for eviction of the appellant from the suit property. He submitted that it is apparent that the orders of the trial Magistrate were erroneous. The appellant since the trial found that the Respondent did not produce any documents to prove that he had any legitimate interest in the suit property, the issue of locus standi goes to the jurisdiction of the court and that where a party has no right to sue, it means that the court has no jurisdiction to consider their claim. For that reason, he submitted that the Respondent did not have the requisite locus standi to bring the counter-claim against the Appellant
24. He referred to the following cases; In law *Society of Kenya v Commissioner of Lands & 2 others* (2001) eKLR, *Daykio plantations Limited v National Bank of Kenya Limited & 2 others* (2019) KLR.
25. On the second issue, the appellant from the proceedings before the trial court, it demonstrates that the parties had presented and closed their respective cases and submitted on the evidence adduced when the court on its own motion called upon the County land Registrar and the County Surveyor to exercise their mandate in line with the provisions of sections 18 and 19 of the [Land Registration Act](#). He submitted that in contravention of the orders of the trial court, the County Land Surveyor embarked on the resurvey of Parcel No. Kimilili/Kimilili/771 from where the plot 7 Kimilili B Market was alleged to have emanated from as a consequence, it was never really established where Kimilili/Kimilili/2946 to which the appellant claim lay was located.
26. Regarding the third issue, the appellant submitted that the trial court erred when it failed to appreciate the principles underpinning general and fixed boundaries and thus arrived at an erroneous determination. He submitted that no shred of evidence was adduced to demonstrate that the suit property in question was actually Government land, considering that there is evidence indicating that the suit property was once freehold property belonging to one Pascal Nabwana and whom its alleged surrendered part of it to the government. He also submitted that a parcel of land only has general



boundaries or is rather identified using general where no fixed boundaries have been ascertained. And fixed in line with the law. He relied in the following cases; Samuel Wangau v The A.G & 2 Others (2009) KLR; Ali Mohammed v Faisal Hassan Ali (2014) eKLR.

27. On the last issue, the Appellant submitted that the trial Magistrate did not take into account the totality of the evidence and submissions adduced by the parties thereby diminishing their probative value. In conclusion, the appellant submitted that had the trial Magistrate taken into account the totality of the evidence and the submissions by the appellant, it could have found that the survey exercise as conducted by the County Surveyor was erroneous, unambiguous and unreliable for its obvious inconsistencies and inaccuracies.

Respondent's Written Submissions.

28. The respondent through the firm of M/S Hammerton Kuloba & Co. Advocates submitted on the following issues;

a. Whether the trial Magistrate erred in issuing orders of eviction against the appellant despite making a finding that the Respondent had not proved ownership.

29. On this issue, the respondent submitted that the expert reports and testimonies of Violet Lamu, the land Registrar, Mathew Nandi the County Surveyor, Amos Simiyu DW1 the land Surveyor working with the National Government and Peter Pepela DW3 all agreed with the report and testimony of the Appellant's Surveyor one Cornelius Wanjala Nyongesa who testified as PW7. He submitted that the four expert witnesses convinced the trial court that suit property is the physical location of plot No. 7 Kimilili B Market which belongs to the Respondent. He also submitted that the county surveyor went further and submitted that the Appellant occupied plot No.7 Kimilili B Market which is a private land under the mistaken belief that he was occupying L.R No. Kimilili/Kimilili/2946 and even erected structures thereon.
30. The Respondent further submitted that despite making damning finding against the Appellant, the trial court warned herself that the respondent had not produced evidence to show how he acquired plot No. 7 Kimilili B MARKET and was clear that the
31. Suit land belonged to the County Government of Bungoma. He further submitted that the reasons the trial court ordered the appellant to be evicted from the suit land is not that the Respondent had proved ownership of the suit property but that the Respondent had proven that suit property belonged to the County Government of Bungoma and not the Appellant who was unlawfully occupying the suit property under the mistaken belief that he was occupying LR No. Kimilili/Kimilili/2946. He cited in sections 1A and 1B CPA and submitted that the court is enjoined to foster and facilitate the overriding objective of the Act with a view to render justice to all parties in all civil proceedings in a just, expeditious proportionate and affordable cost to the parties. He also cited Section 3(1) of the *Environment and Land Court Act*. He also referred to the case of Abok James Odera T/A A.J ODERA & Associates v John Patrick Machira T/A Machira & Co. Advocates (2013) Eklr

b. Whether the learned Magistrate erred superintending over a survey exercise that fell short of the provisions of sections 18 and 19 of the *Land Registration Act*.

32. The Respondent submitted that the court has powers to determine its own procedures for the ends of justice to be achieved the trial court on 14/6/2022 acted suo moto to order a fresh survey to be done with a view of having clarity on whether the suit property was L.R No. Kimilili/Kimilili/2946 or Plot No.7 Kimilili B MARKET and who was the owner of the suit property. He further submitted that despite these directions being given in the presence of both parties, the appellant's advocate skipped



the exercise whereas the appellant refused to give evidence before the land Registrar and the County Surveyor insisting that he would not participate in the exercise in the absence of his advocate. He referred to sections 18 and 19 of the *Land Registration Act* and submitted that these provisions give Land Registrar initial jurisdiction to determine boundary disputes between land owners and fix the boundaries so determined and precludes courts from determining such disputes before the matter is referred to the Land Registrar. Reliance was placed in the case of *Hudson Kulundu & Martha Chibetti & Another (2020) KLR*. He argued that the dispute between the Appellant and the Respondent is about the physical location/position of two plots that do not share a common boundary i.e L.R No. Kimilili/Kimilili/2946 and Plot No.7 Kimilili B Market. He submitted that the survey ordered by the trial court on 14/6/2022 had the objective of determining clearly whether the suit property was L.R No. Kimilili/Kimilili/2946 or PLOT No. 7 Kimilili B MARKET and who was the owner of the suit property. He argued that the survey was not about determining boundaries and fixing of the boundaries of the suit property or the parcels mentioned herein and there was no basis for the trial court to require the attendance of all land owners neighbouring the suit property.

c. Whether the trial Magistrate erred in failing to determine whether the County Government land was identified based on fixed boundaries survey or general boundaries survey and thus failed to appreciate the principles thereof.

33. The Respondent submitted that the main issue that lent itself for determination before the trial court was whether the suit property was L.R No. Kimilili/Kimilili/2946(freehold tenure) or Plot No. 7 Kimilili B MARKET(leasehold from the county government of Bungoma). He submitted that the trial court appreciated that it was incapable of determining the dispute before it without the help of technical experts(surveyors) and that informed the trial court's order directing the Land Registrar and Surveyors including the County surveyor to help resolve the conundrum between the parties. He submitted that the facts in this case are distinguishable from the facts in *Samuel Wanjau v The AG & 2 Others* and *Ali Mohammed Salim v Faisal Hassan Ali* cited by the Appellant where the court that general boundaries in Registry Index Map(RIM) would not be sufficient tool to determine the dispute emphasizing the need to use fixed boundaries survey instead. He submitted that in the present case, the boundaries of the suit properties were not in contention and that the contention was whether the suit property was LR No. Kimilili/Kimilili/2946 (freehold tenure) or Plot No.7 Kimilili B Market (Leasehold from the County Government of Bungoma).

d. Whether the learned Trial Magistrate erred in failing to consider and appreciate the totality of the evidence and submissions as adduced by the parties thereby arriving at a wrong determination.

34. On this issue, the Respondent answered in the negative and submitted that the trial Magistrate considered the evidence of all witnesses and expert reports filed in court on the all important question whether the suit property was LR No. Kimilili/Kimilili/2946 or Plot No. 7 Kimilili B Market and after considering all the evidence adduced, the trial court and found the appellant's claim wanting. He submitted that the trial court found the Respondent's case more credible and believed surveyor appointed by the court who was in agreement with the County Surveyors and the Land Registrar.

Analysis And Legal Determination.

35. I have considered the extract of the appeal, the submissions by the parties and the applicable law.
36. As a first appellate court, this Honourable Court is mandated to re-evaluate the evidence before the trial court as well as the impugned judgment to consider whether the trial Magistrate took into consideration irrelevant matters or failed to take into consideration relevant matters thereby arriving



at a wrong decision. Pursuant to its powers, the first appellate court has jurisdiction to either reverse or affirm the findings of the trial court based on facts as well as the law. This duty was succinctly stated in the case of *Selle & Another V Associated Motor Boat Co. Ltd & Others* (1968)E.A 123 and *Peters V Sunday Post Limited* (1958) E.A 424. While considering the scope of Section 78 of the *Civil Procedure Act* Cap. 21 Laws of Kenya, a first appeal court has to appreciate the entire evidence adduced before the trial court and come to its own conclusion.

37. The Appellant in his Memorandum of appeal dated 9th February, 2023 raised 16 grounds of appeal but collapsed/summarized into four issues as follows;
- i. Whether the learned Magistrate erred in issuing orders of eviction against the appellant despite making a finding that the respondent had not proved ownership
 - ii. Whether the learned Magistrate erred superintending over a survey exercise that fell short of the provision of sections 18 and 19 of the *Land Registration Act*, 2012.
 - iii. Whether the trial Magistrate erred in failing to determine whether the county Government land was identified based on fixed boundaries survey or general boundaries survey and thus failed to appreciate the principles thereof
 - iv. Whether the learned trial Magistrate erred in failing to consider and appreciate the totality of the evidence and submissions as adduced by the parties thereby arriving at a wrong determination.

1. Whether the learned Magistrate erred in issuing orders of eviction against the appellant despite making a finding that the Respondent had not proved ownership?

38. On the first issue, it is apparent from the extract of the record that the expert reports and testimonies of the Land Registrar Violet Lamu, the County Surveyor Mathew Nandi, the land surveyor working with the National Government Amos Simiyo(DW1), and Peter Pepela (DW3) all agreed with the report and testimony of the Appellant's own surveyor one Cornelius Wanjala Nyongesa that the suit property is the physical location of plot No.7 Kimilili B Market which belongs to the Respondent. The County surveyor in his testimony identified the location of the appellants to the respondent's land. I agree with the Respondent's submissions that the appellant is occupying the respondent's land Plot No. 7 Kimilili B Market with the mistaken belief that he was occupying LR. No. Kimilili/Kimilili/2946. At page 201 of the extract of her judgment, the trial Magistrate observed as follows;

“...The Defendant on the other hand has demonstrated that the suit land the plaintiff is claiming to be his is indeed Plot No. 7 Kimilili B Market the property of the County Government of Bungoma....The defendant has thus not demonstrated how he acquired the said plot as such the court cannot state with certainty that the plot 7 Kimilili B Market is his. What the court is certain about is that plot No.7 Kimilili B Market is the land which was the subject matter of the suit and it is land owned by County Government of Bungoma.”

39. From the decision of the trial court, the Appellant who was the plaintiff in the former suit had failed to prove that land parcel No. Kimilili/Kimilili/2946 belongs to him. The Appellant/Appellant even failed to demonstrate the existence of the said parcel of land which from the testimony of the expert witnesses is super-imposed on Plot. No. 7 Kimilili B Market belonging to the Respondent herein.
40. From the extract of the evidence before the trial court, Apollo King'ori Mwangi, the Respondent/defendant herein testified on oath that the suit land was allocated to him by the then Kimilili Municipal Council (defunct) on 18/04/2007. The Respondent further stated that his allocation was confirmed



by a full council vide minute No. FC/08/07 of 26/04/2007. He produced a copy of the allotment letter which was issued by the County Government of Bungoma. His testimony was not controverted. There is also no evidence indicating that the County Government of Bungoma alienated the plot to any person other than the respondent. In my view, the finding by the trial Magistrate that the respondent had not demonstrated how acquired the said plot was a misapprehension of evidence and the law.

2. Whether the learned Magistrate erred superintending over a survey exercise that fell short of the provision of sections 18 and 19 of the *Land Registration Act*?

41. It is apparent from the proceedings of the trial court that on 14/6/2022, the trial Magistrate acted suo moto and ordered a fresh survey to be done with a view of having clarity and understanding the location of land parcel No. Kimilili/Kimilili/2946 and Plot No. 7 Kimilili B Market and who between the plaintiff/appellant and the defendant/respondent was the bona fide/actual owner of the disputed property. While issuing those orders, the trial Magistrate directed the parties and their advocates to attend and testify and/or cross-examine the expert witnesses. Despite these express directions being given in the presence of the parties and their advocates, the appellant's advocate skipped the exercise without any excuse or explanation while the appellant refused to testify before the two experts, the Land Registrar and the County Surveyor.
42. It is important to note that the dispute between the parties was about the physical position of two plots that do not share a common boundary. As such, the fresh survey ordered by the trial court had the single objective of determining clearly whether the suit property was LR No. Kimilili/Kimilili/2946 or Plot No.7 Kimilili B Market and who was the owner. The survey was not about determining and fixing boundaries of the suit property or the parcels mentioned therein. In that regard, there was therefore no basis for the trial court to enquire the attendance of all land owners neighbouring the suit property. For those reasons, find the argument by the Appellant that the trial Magistrate erred in overseeing a survey exercise short of the provisions of sections 18 and 19 of the *Land Registration Act* superfluous and baseless.

3. Whether the trial Magistrate erred to determine whether the County Government land was identified based on fixed or general boundaries survey and thus failed to appreciate the principles thereof?

43. From the extract of the record, the main issue that commended itself for determination before the trial court was whether the suit property was L.R No. Kimilili/Kimilili/2946 or Plot No. 7 Kimilili B Market and who was the bona fide owner. It is to be noted that the trial Magistrate appreciated that it was incapable of determining the dispute without the help of the land Registrar and the land surveyor who are also custodians of all Government land records. It was on this basis that the trial Magistrate ordered the two technical experts (Land Registrar and Surveyor) to assist resolve the conundrum between the parties. In doing so, the trial court gave the parties and their Advocates the right to cross-examine the witnesses.
44. After the two testified, the trial court was satisfied that the evidence and reports presented by two witnesses had adequately established that the suit property is L.R No. 7 Kimilili B MARKET and not LR No. Kimilili/Kimilili/2946 which had superimposed on PLOT No. 7 Kimilili B MARKET.
45. At page 199 of the impugned judgment, the trial Magistrate observed as follows;

“The County surveyor's report aforesaid is consistent with the survey reports by Mr. Peter Pepela the private surveyor engaged by the defendant and then Mr. Amos Simiyu a Land surveyor based at the national Government formerly the County surveyor Bungoma.”



46. Based on this finding, it is therefore incorrect to say that the trial court relied on evidence of the Land Registrar to arrive at the impugned decision. My view is that the additional report from the land Registrar and the Surveyor was to bring clarity and reinforce the evidence already tendered by the witnesses and other expert witnesses called by the plaintiff/appellant and the defendant/respondent.

4. Whether the learned trial Magistrate erred in failing to consider and appreciate the totality of the evidence and submissions as adduced by the parties thereby arriving at a wrong determination.

47. From my reading of the impugned judgment, the trial Magistrate considered the evidence of all the witnesses as well as the expert reports filed in court. On whether the suit property was LR No. Kimilili/Kimilili/2946 or Plot No. 7 Kimilili B Market, the trial court adequately considered the appellant/plaintiff's evidence and that of his witnesses and found it short of the standard required in civil claims which is on a balance of probabilities. On the other hand, the trial court subjected the same test to the evidence adduced by the Respondent/defendant and his witnesses particularly the surveyor whose evidence was in agreement with that of the County surveyor and land Registrar whom the court had called as witnesses suo moto and found it consistent and more credible. A closer look at the impugned judgment, it shows that the trial magistrate devoted 26 pages of the judgment (page 132 to 158) discussing the testimonies of the appellant's witnesses and 10 pages evaluating his advocates written submissions (pages 174-189). The trial court placed reliance on the County surveyor's report which blamed the Appellant's surveyor for confusion by not adhering to the first principle of surveying which calls for working from the whole to the part when he created LR No. Kimilili/Kimilili/2946 concluding at page 199 of the impugned judgment as follows;

“The County surveyor's report aforesaid is consistent with the survey reports by Mr. Pepela the private surveyor engaging (sic) the defendant and then Mr. Amos Simiyu a land surveyor based at National Government formerly the County surveyor Bungoma. It is evident that there was improper map interpretation done by the said Cornelius Nyongesa just as concluded by the County land surveyor.

.....The county surveyor was able to tell the court checks he made to make sure that he did not miss out on the physical location of plot 7 Kimilili B Market. He took the court through the survey plan FR99/13, aerial photographs Kimilili/Kimilili sheets 1 and 2 and interpreted them to the court while showing the court the parcels of land on the ground, the position of the beacons AC11, AC12 and explained that all the surveyor of the plaintiff needed to do was sale (sic) a distance of 169 metres from the Kimilili Boys road to get the boundary between Kimilili/Kimilili/771, the Government land and Kimilili/Kimilili/1 which is freehold land this he also demonstrated at the site having explained that he was relying on the general boundaries and the road. The aforesaid scaling of 16 (sic) metre from Kimilili Boys Road clearly demonstrated that the suit land is County Government land. The County surveyor did not stop at that he also identified parcel No. 2946 which the court noted was not where the suit land was.”

48. From the entirety of my re-evaluation and analysis of the testimonies and evidence adduced before the trial court, it leaves no doubt in my mind that this appeal is devoid of merit and the same is hereby dismissed with costs.

It is so ordered.

READ, DELIVERED AND SIGNED IN THE OPEN COURT/VIRTUALLY AT BUNGOMA THIS 25TH DAY OF APRIL, 2024.



HON. E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Wangila H/B Maloba for Respondent
2. Appellant-present
3. Bett C/A

