



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kilasi v Opiyo (Environment and Land Appeal 31 of 2022)
[2024] KEELC 3439 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3439 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL 31 OF 2022
EC CHERONO, J
APRIL 24, 2024**

BETWEEN

MERCY NEKESA KILASI ALIAS KNIGHT KILASI APPELLANT

AND

MANGALITA NAFULA OPIYO RESPONDENT

*(Being an appeal arising from the ruling and order of Hon.CAS MUTAI
(SPM) dated 18TH November, 2022 in Bungoma CM ELC Case no. 81 of 2019)*

JUDGMENT

1. This appeal arises from the judgment of the Senior Principal Magistrate Hon. Hon. CAS Mutai delivered on 18th November 2022 in Bungoma Chief Magistrate Court ELC Case No.81 OF 2019.
2. The brief background of this case is that vide a plaint dated 14th August, 2019 the Respondent/plaintiff herein sought judgment against the Appellants/defendants for;
 - a. An order of injunction against the defendants, their relatives, servants, agents and/or any other from encroaching on, constructing, cultivating and/or in any other manner dealing with and/or blocking the road of access to the plaintiff's LR. No. E. Bukusu/W.Sangalo/3074.
 - b. An order that the defendants vacate from the access road existing to the plaintiffs LR. No. E. Bukusu/W.Sangalo/3074.
 - c. In default thereof, the OCPD Bungoma Police Station to supervise the removal of the defendants and the structures from the said access road.
 - d. Costs of the suit.
 - e. Any other suitable or alternative relief this honourable court may deem fit.



3. The respondent's case was that she was the registered owner of LR. No. E. Bukusu/W.Sangalo/3074('the suit land') and that she was entitled to the peaceful and quiet enjoyment and access of the suit land. It was averred that there exists an access road to the suit land passing next to LR. No. E. Bukusu/W.Sangalo/2328 inhibited by the Defendant/Appellant. She averred that the appellant and another person whom she had sued as the 2nd defendant had without any colour of right or justification illegally encroached on, blocked the access road leading to the suit land thus illegally erecting fences, permanent and semi-permanent structures thereon preventing her and her dependents from accessing the suit land.
4. The appellant filed a statement of defence dated 24th October, 2019 in which she denied the Plaintiff's/ Respondent's claim in its entirety and averred that there is no access road passing through LR. No. E. Bukusu/W.Sangalo/2328 thus she has not blocked any. She also denied the assertions that the local authorities and the county surveyor have been invited to determine a boundary dispute between her and the respondent. It was further averred that the court lacked jurisdiction to entertain the suit since it was a boundary dispute. The appellant also averred that she is the widow but not the legal representative of Fedrick Kirasi Sagra-Deceased who is the registered owner of LR. No. E. Bukusu/W.Sangalo/2328 and as such she has no capacity to be sued in respect of the estate of her husband. The appellant prayed to have the suit dismissed with costs.
5. Upon hearing the matter to conclusion, the trial court entered judgment in favour of the Plaintiff/ Respondent as against the Defendant/Appellant on 18th November, 2022 and issued an order of injunction against the Appellant/defendants, their relatives, servants, agents and/or any other from encroaching on, constructing, cultivating and/or in any other manner dealing with and/or blocking the road of access to the plaintiff's LR. No. E. Bukusu/W.Sangalo/3074. The trial court also ordered the Defendant/appellant to vacate from the existing access road to the plaintiff's/Respondent's land plus costs and interests.
6. Being aggrieved by the court's judgment, the Defendant/Appellant herein preferred this appeal vide a memorandum of appeal dated 17th December, 2022 on the following grounds;
 - a. The trial magistrate erred in law and in fact by not determining that he had no jurisdiction to entertain boundary issues hence arriving at a wrong decision.
 - b. The trial magistrate erred in law and in fact by not holding that LR. No. E.Bukusu/ W. Sangalo/3074 has a wide public road making the respondents moving easier.
 - c. The trial magistrate erred in law and in fact by not holding that the appellant not being the legal and personal representative of the estate of her husband she cannot be sued.
 - d. The trial magistrate erred in law and in fact by failing to hold that the appellant was not given a fair hearing by the land registrar & surveyor hence the decision thereto is null and void.
 - e. The trial magistrate erred in law and in fact in allowing the respondents claim when the witness gravely contradicted each other.
 - f. The trial magistrate erred in law and in fact by not considering the R.I.M (Map) showing the location of LR. E. Bukusu/ W.Sangalo/2328 & 3974 hence arriving at a wrong decision.
 - g. The trial magistrate erred in law and in fact by not considering the doctrine of quid quid plantatur solo solo credit hence arriving at a wrong decision.
 - h. The trial magistrate erred in law and in fact by not considering the defence evidence and submission hence arriving at a wrong decision.



7. The appellant sought to have the judgment of the trial court set aside substituted by an order dismissing the plaintiff's/Respondent's case and the appeal allowed with costs of both the primary suit and the appeal.
8. Thereafter, directions were taken to have this appeal canvassed by way of written submissions with each party given timelines within which to file and serve their respective submissions.
9. The appellant filed submissions dated 1st December, 2023 where she submitted that the trial court lacked jurisdiction to entertain the claim since it was a boundary dispute which falls under the domain of the Land registrar and surveyors and not the court as per Section 18(1) of the [Land Registration Act](#). It was also submitted that the proprietor of LR. No. E.Bukusu/W. Salongo/2328 was not issued with the county surveyors summons over the boundary dispute and as such she was not granted a fair hearing. Reliance was placed in the case of [The Owners of Motor Vessel 'Lillian S' vs. Caltex Oil Kenya Ltd](#) (1989) eKLR and [George Kamau Macharia vs. Deska Limited](#) (2019) eKLR.
10. It was further submitted that the appellant was not the legal representative of the estate of the registered owner of LR. No. E.Bukusu/W. Salongo/2328 and as such she could not be sued in respect to that land. It was her argument that the latrine built on her land was built by the deceased and formed part of that land under the doctrine of quid quid plantatur solo solo cedit. Reliance was placed in the case of [Leonard Otworu Juna vs. Francis Ongati Mamboleo](#) (2022) eKLR and [Patrick Kiseki Mutisya \(Suing as the personal representative of the estate of Nzomo Mutisya -Dcd\) vs. K.B. Shngani & Sons Limited & Another](#) (2012) eKLR.
11. The respondent filed submissions dated 20th February, 2024 and submitted on three issues. It was argued that the respondent proved her case on a balance of probabilities and the appellant did not sufficiently rebut the evidence adduced thus the trial court was right in reaching the conclusion it did. Reliance was placed in the case of [Silipet Proparties Ltd & Another vs. Chege Mwaura & Another](#) (2017) eKLR, [Abdalla Ali Nasoro vs. Wycliff Lukio & Another](#) (2021) eKLR. It was contended that the appellant was undeserving of the orders sought due to her approach to the court with questionable integrity and a clear intention to engage in unlawful activities. The respondent asked the court to uphold the lower court's judgment and dismiss the appeal with costs.
12. I have read the Memorandum of Appeal, the Record of Appeal, written submissions filed by the parties and the court record generally and identify the following as the issues that commend for determination:
 - a. Whether the trial court had jurisdiction to hear and determine the suit.
 - b. Whether the appellant was properly sued.
 - c. Whether the trial court erred in its decision.
 - d. Who bears the costs.
13. It is trite that a first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent decision on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in [Selle & another v Associated Motor Boat Co. Ltd. & others](#)¹ and in [Peters v Sunday Post Limited](#) (1958) EA page 424.
14. A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. It has to be decided on facts as well as on law. In the first appeal, parties have the right to be heard on both questions of law as well as on facts and the first court is required to address itself to all issues and decide the case by



giving reasons. While considering the scope of Section 78 of Civil Procedure Act, a court of first appeal can appreciate the entire evidence and come to a different conclusion.

15. The Appellant contends that the trial court should not have made the determination since it did not have jurisdiction to determine disputes concerning boundaries since the office mandated to do so was the office of the Land Registrar as contained in Section 18(2) of the Land Registration Act, 2012. Since the jurisdiction of a court is a pertinent issue in any suit, I shall consider this issue first. Section 18 of the Land Registration Act, 2012 provides as follows:
 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. In essence, the court is precluded from determining questions concerning boundary disputes unless the same has already been determined under this Act. Undeniably, the Court lacks the technical capacity to determine such disputes and that explains why that mandate has been given to technical experts. Under Sections 18 and 19 of the Land Registration Act 2012, the Land Registrar and the Surveyor being the custodians of the land records have been given the mandate to handle issues relating to boundary disputes.
17. It is not in dispute that the issue in question is whether the appellant has encroached into an access road leading to the respondent’s land. This ideally translates to being a boundary issue which falls under the realm of the Land Registrar and Surveyor. The respondent in support of her case at the trial court called three witnesses i.e. PW1, Mangalita Nafula Opiyo, PW2 Brian Wafula Kubwa a surveyor with the County Government of Bungoma and PW3 Rober Barasa the area chief. In their testimonies, it emerged that the respondent had severally complained to the area chief and the lands office on the issue and that the area chief had written numerous letters to the land registrar, Bungoma County to determine the boundary issue between LR. No. E.Bukusu/W.Salongo/ 3074, 3073 and the land owned by the parties herein i.e Magarita Nafula, Mary Shireku, Mercy Nekesa and Rev.Evans Nlianya. Those letters were produced as P-Exhibits 5&7. The Lands Registrar in turn send PW2 who testified that he visited the site three times and all parties in this suit were present. It was his testimony that they pegged the access road which was touching LR. No. E.Bukusu/W.Salongo/2338, 2328 and 3074 and they realized there were structures constructed thereon blocking the road. Having established the above, the Respondent was advised to approach the court to obtain orders for the structures to be removed so they can open the road. PW2 produced a report dated 25th June, 2019 which attached a map showing the access road touching the three parcels of land.
18. The Appellant on the other hand maintained that the requirements of Section 18(1) of the Land Registration Act,2012 has not been met. They also argued that they were not granted a fair hearing since they were not invited to the alleged boundary dispute meeting. However, I note that the letter dated 16th March, 2019 by the area chief to the land registrar included the name of appellant which letter was served upon her as per PW3’s testimony. It is also to be noted from the evidence of the respondent’s



witness, PW2 that all the concerned parties including the appellant were present during the meeting. I am persuaded by the evidence of these two witnesses who are government officials and experts in their own right.

19. Section 19 of the *Land Registration Act* provides follows:-

19. Fixed boundaries

- (1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.
- (2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.
- (3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.”

20. From the above analysis of evidence and the facts and being guided by the above quoted provisions of the law, I find that the respondents followed the correct channel prior to instituting the current suit. Given that the surveyor's mandate was confined to assessing the boundaries of each land parcel, and upon finding structures erected on the road access but lacking the jurisdiction to authorize or carry out demolition, they appropriately guided the respondent to seek legal recourse through the court. I therefore find that the trial court was clothed with jurisdiction to hear and determine the suit in the first instance.

21. The appellant further contends that she was improperly enjoined in this suit since she was neither the registered proprietor of LR. No. E.Bukusu/W.Salongo/2328 nor was she the legal representative of the estate of the registered owner who is deceased. However, it is essential to point out that the crux of the matter in this case pertains to encroachment upon an access road, which is a public road. By this, I mean it is not registered under anyone's ownership, neither the appellant's nor the respondents. The respondent in her claim does not claim any part of the deceased portion of land i.e. LR. No. E.Bukusu/ W.Sangalo2328 but seeks a right of access to a public road leading to her property which has been provided for. Having said that therefore, it is irrelevant who the owner of LR. No. E.Bukusu/ W.Sangalo 2328 is since the issue in contention is who is in use of the access road. It has been established that the appellant is in use of structures on the access road and as such she is correctly sued.

22. Turning to the respondent's prayers in the plaint where she sought for an order of injunction against the appellant, the principles guiding the grant of injunctions are now well settled. Those principles were set out in *East African Industries vs. Trufoods* [1972] EA 420 and *Giella vs. Cassman Brown &*



Co. Ltd [1973] EA 358. In *Nguruman Limited vs. Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court restated the law as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a *prima facie* level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.

23. On the first element whether a *prima facie* case has been established, the respondent claimed that the appellant had blocked an access road by constructing structures on the land. She produced a report of the county surveyor who attached a map of the area and highlighted the access road in question. The appellant in her evidence admitted to the existence of a structure on the access road which she claimed became part of the soil and that she is not the one who constructed it. I find that the respondent had proved a *prima facie* case against the appellant and that she had indeed been denied access to her property by the appellant’s continuous use of the access road. In my humble view, the respondent is entitled to an order of injunction against the appellant from utilizing the public access road.
24. Ultimately therefore and having considered the Record of appeal and the applicable law, this court finds this appeal devoid of merit and makes the following disposal orders;-
 - a. The appeal is hereby dismissed.
 - b. The appellant shall meet the costs both of this court and the trial court.
25. Orders accordingly.

DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 24TH DAY OF APRIL, 2024.

.....

HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Wamalwa R for the Appellant
2. Mr. Wanjala h/b for Otsiula for Respondent.
3. Bett C/A

