



**Obonyo v Hongo & another (Environment and Land Appeal
E007 of 2023) [2024] KEELC 4377 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4377 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E007 OF 2023**

E ASATI, J

MAY 30, 2024

BETWEEN

FREDRICK OTIENO OBONYO APPELLANT

AND

ALOICE OWILA HONGO 1ST RESPONDENT

KISUMU DISTRICT LAND REGISTRAR 2ND RESPONDENT

(Being an appeal against the whole of the judgement of Hon. F. Rashid, PM delivered on 11/7/2023 in the Senior Principal Magistrate's court at Winam EL Case NO. 110 OF 2018)

JUDGMENT

1. The appellant was the 1st Defendant in Wiman Pmc Elc Case No. 110 of 2018 (the suit), wherein he together with the Land Registrar had been sued by the 1st Respondent herein vide the plaint dated 12th January 2020 over a parcel of land known as
2. Kisumu/manyatta 'a'/1162 (the suit land). The 1st Respondent's case in the suit was that the Appellant was the owner of Land parcel known as Kisumu/manyatta 'a'/1340 which abutts the suit land and that there has been a tussle as to the width of a disputed access road and which of the parties should adjust his property so as to give way. That the dispute was the subject of a boundary of land title Nos. Kisumu/manyatta 'a'/ 1340 & 1163 vs No. 1162 in which the Land Registrar on 18/1/1999 determined the position of the disputed boundary and the Land Registrar was statutorily expected to make a note to that effect on the Registry map. That on 18/11/2008 the 2nd Respondent purported to convene a boundary dispute hearing concerning the same dispute and purported to come up with recommendations that the 1st Respondent to change the position of his gate to facilitate the creation of a footpath through the appellant's land parcel. That the Appellant had trespassed onto the 1st Respondents land. The 1st Respondent therefore vide the plaint dated 12th January, 2010 sought in the suit for orders against the appellant and the Land Registrar for:



- a. a declaration that the recommendations by the District Land Registrar Kisumu, a Mr. R.W. Ngaanyi, dated 18/11/2008 are unlawful, illegal and unprocedural hence not capable of implementation.
 - b. a permanent injunction do issue to restrain the 1st Defendant (Applicant herein) whether by himself, servants, agents and/or anyone of them howsoever from erecting a stone wall fence or any other fence whatsoever along the disputed portion of the plaintiff's land parcel Kisumu/manyatta 'a'/1162.
 - c. General damages.
 - d. Costs of the suit.
3. The record shows that in response to the claim, the appellant filed a Statement of Defence dated 8th February 2010 wherein he denied the 1st Respondent's claim and contended that the suit was misconceived, bad in law, disclosed no cause of action against the appellant and should be struck out.
 4. The record further shows that the suit was heard before the trial court which vide the Judgment dated 11th July 2023 found in favour of the plaintiff (1st Respondent herein) and granted an order of permanent injunction and costs of the suit.
 5. Aggrieved by the whole judgment, the appellant filed the appeal herein seeking for orders that:-
 - i. the appeal be allowed and the part of the judgment of the trial court allowing the 1st Respondent's suit and the said orders granted in favour of the 1st Respondent be set aside and the Respondent's suit in the trial court be dismissed with costs.
 - ii. Costs of the appeal be borne by the 1st Respondent.
 - iii. Any other or further orders which this honourable court may deem fit and just to grant.
 6. The grounds of appeal as contained in the Memorandum of Appeal dated 10th August 2023 are that:
 - a. The learned Magistrate erred in law and fact in finding in favour of the 1st Respondent moreso by ordering a permanent injunction and costs of the suit against the appellant against the weight of the evidence.
 - b. That the learned trial Magistrate erred in ignoring the appellant's evidence.
 7. Directions were taken on 12/2/2024, inter alia, that the appeal be canvassed by way of written submissions. Written submissions dated 4th March 2024 were filed by the firm of ROW Advocates on behalf of the appellant. No submissions were filed for the Respondents.

Issues for determination

8. From the grounds of appeal and the submissions made, the issues that arise for determination are:-
 - a. Whether or not the decision of the trial court was against the weight of the evidence.
 - b. Whether or not the trial court ignored the evidence of the appellant.

Analysis and determination

9. This being a first appeal, the court is under a duty to reconsider the evidence adduced before the trial court and re-evaluate, re-analyze it so as to arrive at its own independent conclusions and thus determine whether the conclusions reached by the trial court are consistent with the evidence adduced



and the applicable law. See case of Peter M. Kariuki vs Attorney General [2014]eKLR and Gitobu Imanyara & 2 Others vs Attorney General [2016]eKLR where it was held that:

“this being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

10. The first issue for determination is whether or not the decision of the trial court was against the weight of the evidence - The evidence placed before the trial court by the 1st Respondent who was the plaintiff in the suit, comprised of his own testimony, the testimony of PW.2 and the exhibits produced. The 1st Respondent testified that he did not agree with the recommendations of Mr. Ngaanyi. That he was a neighbor of the appellant who covered/closed the road of access. That the appellant built his house and a septic tank on the road. That he can't use his land well. He produced exhibits namely; title deed in respect of Kisumu/manyatta "a"/1162, report by the District Land Registrar one Mr. Ngaanyi dated 18th November, 2008, report by District Land Registrar one Muthuta dated 18th January, 1999 and sale agreement for Kisumu/manyatta "a"/1162. He testified that he would like the report dated 18th January, 1999 to be adopted by the court and the access road be opened and the boundary measured.
11. On cross examination, the 1st Respondent stated that he was advised to change the position of his gate. That his gate was not on the Appellant's land. That the report by the Land Registrar was not fair. That he did not appeal against the decision of the Land Registrar made in 2008 and did not file Judicial Review proceedings as well. That the Land Registrar identified that his parcel of land had encroached into the access road and that part of his house was on the road.
12. PW2 was the caretaker of the 1st Respondent. He stated on cross –examination that he agreed with the report of Mr. Ngaanyi. That the report says that the 1st Respondent should open the access road. That the gate for parcel No. 1162 had moved to No. 1340 the defendant's road. That the 1st Defendant (Appellant) uses another access road.
13. On behalf of the appellant, only the appellant testified as DW1. He stated that PW1 had interfered with his land. That the report by Land Registrar was proper and that the boundary was where the plaintiff had built. That the 1st Respondent had put a gate on his parcel.
14. The proceedings show that on 10/5/2022 the trial court made an order at the instance of all the parties that the District Surveyor visits the land parcel Numbers Kisumu/Manyatta "A"/1340, 1163 and 1162 and ascertain the boundaries thereof and thereafter file a report. The court further ordered the parties to the suit to visit the site with the surveyor together with their independent surveyors, if they so wished, on a date to be set. The report was to be filed within 2 months from the date of the order. On 26/7/2022, the court confirmed that the Report had been filed and fixed the suit for hearing on 13th September, 2022. The record of appeal shows that the report was forwarded to court under cover of letter dated 15th June, 2022.
15. In its Judgment the trial court relied on the surveyor's report done pursuant to the court order. The trial court observed: -

“Vide an order issued on the 10/5/2022, the court directed the District Surveyor to visit the site and prepare a report. The report dated 15/6/2022 was filed in court on 21/6/2022 and in



the said report the Regional Surveyor Nyanza region, after visiting the site on the 15/6/2022 recommended as follows; -

On land parcel boundary between Kisumu/Manyatta A/1162 and Kisumu/Manyatta A/1340 no boundary was existing. This was demarcated with boundary marks whose position were agreed on by all the five surveyors present.

On land boundary between Kisumu/Manyatta A/1162 and Kisumu/Manyatta "A"/1163, there existed a wall put up by the Plaintiff. This wall was found to be the current position of the boundary between these two parcels, a decision also unanimous among all the surveyors present.

Guided by the Surveyor's report on record, I direct that a permanent injunction be issued....."

16. It is clear that the court relied and was guided by the report made by the Surveyor pursuant to the court order. It is also noteworthy that as at the time of filing suit, there were two Surveyor's reports – one dated 18th January, 1999 - preferred by the 1st Respondent and one dated 18th November, 2008 preferred by the Appellant.
17. The appellant's complaint is that the decision was against the weight of the evidence. Counsel for the appellant submitted herein that the appellant had disputed the report of the Regional Surveyor. That the trial court did not undertake any reasoned analysis why she fully relied on the findings of the 2022 Nyabola report and ignored the 2008 Ngaanyi report. Yet, for example the 1st Respondent's own witness agreed with Mr. Ngaanyi's report. That the trial court erred in finding in favour of the 1st Respondent without fully interrogating all the evidence on record especially Ngaanyi's report and the testimonies of PW2 and the appellant. That under Article 40 of *the Constitution* and section 24 of the *Land Registration Act* 2012, the appellant as the registered proprietor of parcel No.1163 is entitled to exercise his proprietary rights to use his parcel No.1340 yet the trial court issued an injunction restraining him from building a wall even after the boundary was determined in the year 2008.
18. From the proceedings, it is evident that the request for a land surveyor to visit the site was initiated by the appellant. On 2/3/2021 the record shows that Mr. Adiso Advocate appearing for the appellant prayed that the District Land Registrar and Surveyor do visit the parties land parcel Numbers Kisumu/Manyatta "A"/1340, 1162 and 1163 and file a report within 30 days and that parties' private surveyors to be present and that parties to share the cost of the survey. It appears the prayer was granted because the court fixed the matter for mention on 18/5/2022 to confirm filing of the report. The record shows that the matter was thereafter mentioned on several occasions to confirm filing of the surveyor's report.
19. The record further shows that on 10/5/2022 in the presence of all the parties it was confirmed that the report had been filed. The same was said to be ambiguous upon which a fresh request was made for the surveyor to visit the site. It was indicated that the Surveyor had requested that the court be specific. By consent of all the parties present an order was made for the District Surveyor to visit the subject lands, ascertain the boundary thereof and file report within 2 months.
20. There was no protest by the Appellant to the Surveyor visiting the site pursuant to the court order.
21. I find that the trial court was justified to rely on and be guided by the resultant report which had been made on the request of all the parties. No report was filed or produced by the appellant by his independent/private surveyor to controvert the contents of the report done pursuant to the court order. The court order allowed the parties to have their independent/private surveyors present during the exercise. The report shows that present during the Surveyor's visit, among others, was the appellant's surveyor. The report further indicates that the determination by the surveyor was agreed



on and unanimous amongst all the 5 surveyors present. The surveyor's report was expert evidence as opposed to the testimony of PW2.

22. I find that the trial court's decision was not against the weight of the evidence.
23. The next issue for determination is related to the first issue. It is whether or not the trial court ignored the Appellant's evidence. It was submitted that the court ignored the report made by Mr. Ngaanyi and the testimony of PW2. The record shows that the Appellant did not produce any documentary evidence during trial. The report by Mr. Ngaanyi was on record when all parties agreed to refer the matter back to the Surveyor for determination of the dispute.

I find that the trial court took into account the evidence placed before her and did not ignore any evidence produced by the Appellant.

24. On costs, though under Section 27 of the *Civil Procedure Act*, costs ought to follow the event, the Respondents in this appeal did not participate in the appeal hence are not entitled to costs.
25. I find that the appeal lacks merit and hereby dismiss it. No orders as to costs.
Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 30TH MAY, 2024
VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Okello for the Appellant.

No appearance for the 1st Respondent.

Essendi for the 2nd Respondent.

