



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ogoma v Ogoma (Environment and Land Appeal E004 of 2023)  
[2024] KEELC 4240 (KLR) (15 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4240 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL E004 OF 2023  
GMA ONGONDO, J  
MAY 15, 2024**

**BETWEEN**

**PAUL YASHON OGOMA ..... APPELLANT**

**AND**

**JAMES OMOLO OGOMA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. R. B. N. Maloba - Senior Principal Magistrate, delivered on 24th November 2022 in Homa Bay Chief Magistrate's Court Environment and Land Case No. 35 of 2019)*

**JUDGMENT**

1. This appeal arises from the trial court's judgment delivered on the 24<sup>th</sup> November 2022 by the Honourable R. B. N. Maloba - Senior Principal Magistrate, in Homabay Chief Magistrate's Court Environment and Land Case No. 35 of 2019 wherein she dismissed the defence and granted orders for permanent injunction and eviction, among others sought in the amended plaint dated 12<sup>th</sup> October 2021.
2. The appellant who was the defendant in the suit was aggrieved thereby and through the firm of Robert Ochieng Advocates, mounted this appeal by way of a memorandum of appeal dated 16<sup>th</sup> January 2023 and filed herein on even date. The Appeal is anchored on grounds 1 to 10 as set out on the face thereof and the same include:
  - a. The learned Magistrate erred in law and in fact by making a finding parcel number Kanyada/Kotieno/Katuma A/261 (L. R. No. 261 herein) was registered in the name of the appellant at the time when the judgment was issued, whereas it was not.
  - b. The learned Magistrate erred in law and in fact by proceeding with the suit and consequently issuing adverse orders against the Estate of Priscah Obar Nyayoga (deceased), the legal and



beneficial owners of L. R. No. 261, whereas the estate was not party nor was it represented in the suit before the trial court, contrary to the Constitutional tenets of fair hearing.

- c. The learned Magistrate erred in law and in fact in failing to appreciate the non derogable right to fair hearing as envisaged in Article 50 of *the Constitution* of Kenya, 2010, thus condemning the Estate of Priscah Obar Nyayoga (deceased) unheard.
  - d. The learned Magistrate erred in law and in fact by adopting the recommendations of the County Surveyor as set out in an inconclusive Surveyor's Report dated 7<sup>th</sup> June 2022 which did not by any actual measurements disclose any encroachment, or any extent thereof in terms of acreage or otherwise, by the defendant onto the plaintiff's parcel.
3. Wherefore, the appellant prays that:
- a. This appeal be allowed.
  - b. The judgment, order and/or decree of the Chief Magistrate Court at Homa Bay (Honourable R. B. N. Maloba - Senior Principal Magistrate) made and/or issued on the 24<sup>th</sup> day of November, 2022 as specified hereinabove, be set aside.
  - c. Costs of this appeal be awarded to the appellant, together with interest at court rates from the date of award.
  - d. This honourable court be pleased to make such further orders as it may deem necessary.
4. The appeal was heard by way of written submissions pursuant to this court's directions of 6<sup>th</sup> November 2023.
5. The appellant's counsel filed submissions dated 24<sup>th</sup> January 2024 and stated that the trial court should not have relied on the Land Registrar's report dated 3<sup>rd</sup> July 2018, since the same was not formally produced in court by the respondent. That the Surveyor's Report dated 7<sup>th</sup> June 2022 was equally inconclusive. That further, the trial court erred by allowing the suit to proceed without the participation of the Estate of Priscah Obar, which owns L. R. No. 261. Reliance was placed on various authoritative pronouncements including the case of Kagina -vs- Kagina and 2 others [2021] KECA 242 KLR, to buttress the submissions.
6. The respondent's counsel, M/s Abisai and Company Advocates, filed submissions dated 11<sup>th</sup> March 2024 and identified the following issues for determination:
- i. Whether the appeal is merited.
  - ii. What orders to issue.
7. Learned counsel submitted, inter alia, that the trial court's judgment was sound based on the evidence presented. That the lack of rebuttal expert witness from the defense meant that the respondent's expert evidence was uncontroverted. Thus, counsel urged the court to dismiss the appeal with costs to the respondent. To fortify the submissions, counsel relied on various authorities including the case of Juliet Karisa -vs- Joseph Barawa and Another Civil Appeal No. 108 of 1988.
8. In the foregone, the issues for determination are as captured in the grounds of appeal and boil down to:
- a. Whether the instant appeal is tenable.
  - b. What just orders can be granted in this appeal to meet the ends of justice?



9. It is important to note that the instant appeal being the first one from the trial court, I have the jurisdiction to review the evidence of the trial court in order to determine whether the conclusion originally reached upon that evidence should stand. However, this is a jurisdiction which should be exercised with caution; see *Peters-vs-Sunday Post* (1958) EA 424 at 429.
10. At the trial court, the plaintiff/respondent generated the suit by way of an amended plaint dated 12<sup>th</sup> October 2021 against the defendant/appellant, seeking the following orders;
  - a. A permanent injunction to issue restraining the defendant from trespassing, occupying, putting up any structure or dealing in any manner with land parcel number Kanyada/Kotieno/Katuma A/1415 (the suit land herein) and an order directing the Land Registrar Homa Bay Sub County to re-establish the common boundary which the defendant defaced.
  - b. An eviction order evicting the defendant from the suit land.
  - c. Costs.
  - d. Interest on (c) above.
  - e. Any other relief that the honourable court deems fit to grant.
11. The plaintiff/respondent (PW1) contended that he is the registered owner of the suit land. That sometime in the year 2013, the appellant trespassed onto the suit land and established his home thereon.
12. PW1 relied on his statement on record which was adopted as his evidence in chief. He relied on the following documents: a copy of title deed to the suit land, green card for land parcel number 1416, green card for the suit land and green card for land parcel number 261 (PExhibits 1 to 4 respectively).
13. During cross-examination, PW1 stated that the appellant has taken over land parcel number 261 which belonged to their deceased mother. That the appellant also owns land parcel number Kanyada/Kotieno/ Katuma A/1416 and has encroached onto the suit land. That he was not present when the appellant built his house. That the said encroachment was confirmed by the Land Registrar.
14. Felix Odhiambo, County Surveyor (PW2) testified that they accompanied the court to the site on 15<sup>th</sup> June 2021, following a court order. He stated that land parcel number Kanyada/Kotieno/Katuma A/1416, which is owned by the appellant is not within the disputed area. That the dispute is between L. R. No. 261 and the suit land herein. It was his finding that the appellant's home has encroached onto the suit land. He produced in evidence a Report, Surveyor's Report and a map (PExhibits 5(a), (b) and 6 respectively).
15. During cross-examination, PW2 stated that the Land Registrar had visited the site, taken measurements and prepared a report.
16. The suit was opposed by the appellant vide a statement of dated 12<sup>th</sup> September 2019. He prayed for dismissal of the suit with costs.
17. DW1, Paul Yashon Ogoma, the appellant herein, relied on his statement dated 12<sup>th</sup> September 2019 as well as a letter dated 24<sup>th</sup> June 1979, minutes dated 14<sup>th</sup> November 1989, a letter dated 20<sup>th</sup> December 2012, a letter dated 25<sup>th</sup> November 2012 and minutes dated 19<sup>th</sup> July 2018 (DExhibits 1 to 5 respectively).
18. Under cross-examination, DW1 conceded that both the Land Registrar and Surveyor have visited the suit land. He stated that L. R. No. 261 initially belonged to his mother but that the same is currently



- registered under his name. That he has instituted succession proceeding intestate, with respect to his deceased mother's estate. He averred that it is the respondent who showed him where to build therefore, he is not a trespasser as alleged by the respondent.
19. It is noteworthy that the learned trial magistrate set out the parties' respective cases, framed two issues for determination, analysed them and arrived at her decision based on reasons. So, the impugned judgment was in line with Order 21 Rule 4 of the Civil Procedure Rules, 2010.
  20. In her judgment, the learned trial magistrate relied on the report by the Land Registrar dated 3<sup>rd</sup> July 2018 and observed, inter alia;  

“...For this court to deviate from the findings of the Land Registrar, there should be evidence which cast doubt on the same as being biased or totally untrue on account of some error or mistake apparent on the face of it. I have found nothing of the sort to exist in this report. I find the report to be prima facie evidence of the alleged encroachment as there is no expert evidence to contradict it...”
  21. The appellant contends that the trial Magistrate erred in law and in fact in placing reliance on the inconclusive Surveyor's Report dated 7<sup>th</sup> June, 2022 and the Land Registrar's Report dated 3<sup>rd</sup> July 2018. This court is cognizant of Sections 18 and 19 of the [Land Registration Act 2016](#) (2012) which gives the Land Registrar authority to fix boundaries to registered land.
  22. Pursuant to the foregoing, it is noted that the trial court visited the site on 15<sup>th</sup> June 2021, in the presence of the parties and/or their respective counsel, the Land Registrar and Land Surveyor- Homa Bay County. PW2 testified that following the visit, it was his finding that the appellant's home has encroached onto the suit land herein and he produced a Report, which was admitted in evidence (PExhibit 5(b)).
  23. In particular, PW2 stated that:  

“...The home of the defendant encroaches into the plaintiff's land which is 1415...”
  24. Notably, the Report by the Land Registrar dated 3<sup>rd</sup> July 2018 formed part of the respondent's list of documents dated 11<sup>th</sup> July 2019. It was duly produced in court.
  25. Indeed, PExhibits 5(a) and (b) are opinion evidence. The law on opinion of an expert witness is well established; See Sections 48 to 54 of the [Evidence Act](#), Chapter 80 Laws of Kenya. Expert evidence is a piece of evidence to be considered alongside other evidence on record; see *Shah and Another -vs- Shah and Others* [2003] 1 EA 290.
  26. I am therefore, satisfied that the learned trial magistrate correctly exercised the discretion of the court in considering and adopting the expert opinion evidence. She found no reason to hold otherwise as held in the case of *CD Desouza -vs- B R Sharma* (1953) 26 KLR 41 at 42.
  27. The appellant lamented that the trial Magistrate allowed the suit to proceed without the participation of the Estate of Priscah Obar which owned L. R. No. 261, thus condemning the said estate unheard. On that score, I find that the trial court was guided by the evidence on record. The respondent produced in evidence the green card in respect to that parcel which indicated that the appellant was the registered owner of the same.



28. Also, the appellant himself testified that he owns the said parcel. He stated thus:
- “...parcel number 261 belongs to my mother. It is currently registered in my name...”
29. Clearly, no other evidence was produced in court to indicate a different set of facts. It is crystal clear that no leave to introduce additional evidence has been sought herein pursuant to Section 78 of the Civil Procedure Act, Chapter 21 Laws of Kenya and Order 42 Rule 27 of the Civil Procedure Rules, 2010.
30. Additionally, no application for review was lodged by the appellant at the trial court as stipulated under Section 80 of the Civil Procedure Act, Chapter 21 Laws of Kenya and Order 45 of the Civil Procedure Rules, 2010.
31. Regarding the appellant’s contention that the trial Magistrate erred in law and in fact by taking into considering and making judicial determinations on issues which were not specifically pleaded by the Plaintiff/Respondent, this court subscribes to the decision in *Odd Jobs –vs- Mubia* [1970] EA 476 where the Court of Appeal for East Africa held that a court may base its decision on an unpleaded issue, if it appears from the course followed at the trial that the issue has been left to the court for decision; see also *Vyas Industries –vs- Diocese of Meru* [1982] KLR 114, among other authoritative pronouncements.
32. It must be borne in mind that the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue; see Sections 107 to 109 of the Evidence Act, Chapter 80 Laws of Kenya.
33. The standard of proof in civil matters including the instant case, is on a balance of probabilities. In that regard, having taken into account the entire evidence on record in this appeal, the facts of the case as well as the legal principles stated above, it is my finding that the respondent who was the plaintiff before the trial court proved that he is the lawful owner of the suit land. Expert evidence adduced at the trial court confirmed that there was encroachment thereon by the appellant. I therefore, would endorse the learned trial magistrate’s finding.
34. In conclusion, it is the considered view of this court that the learned trial magistrate’s judgment is unfaulty at law. I proceed to uphold the same in entirety.
35. Wherefore, the instant appeal originated by way of a memorandum of appeal dated 16<sup>th</sup> January 2023 and duly filed on even date, be and is hereby dismissed.
36. The proviso to Section 27(1) of the Civil Procedure Act, Chapter 21 Laws of Kenya provides that costs follow the event, within the discretion of the court. However, owing to the nature of the relationship between the parties herein, each party shall bear own costs of this appeal.
37. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 15<sup>TH</sup> DAY OF MAY 2024.**

**G.M.A ONG’ONDO**

**JUDGE**

Present

Ms. P. Odhiambo holding brief for R. Ochieng’, Learned Counsel for the appellant

Mr. B. Singei, Learned Counsel for the respondent

Respondent- present in person



Mutiva, Court Assistant

