



**Baraza v Akello & 3 others (Environment and Land Appeal
E016 of 2022) [2024] KEELC 5160 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 5160 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL E016 OF 2022**

**MN KULLOW, J
JUNE 27, 2024**

BETWEEN

JARED OCHIENG BARAZA APPELLANT

AND

ROBERT JALANG'O AKELLO 1ST RESPONDENT

COUNTY LAND REGISTRAR 2ND RESPONDENT

COUNTY SURVEYOR 3RD RESPONDENT

HON ATTORNEY GENERAL 4TH RESPONDENT

JUDGMENT

1. This Appeal emanates from the Ruling and Order of Hon. P.N. Areri delivered on 7th June, 2022 in Migori CMC ELC Case No. 15 of 2020, in which the trial court made a finding that the Plaintiff had no reasonable cause of action against the defendants and proceeded to strike out the suit with costs to the 1st defendant. The grounds in the Memorandum of Appeal dated 14.06.2022 are that: -
 - i. The Learned Principal Magistrate erred in law and in fact, to strike out the suit without giving the plaintiff the opportunity to be heard as provided in Article 50 of the constitution and a cordial principal in law.
 - ii. The Learned Principal Magistrate erred in law and in fact by only relying on the County Surveyor report which report was lopsided without the approval or consent of the County Land Registrar as provided for in section 19(1) (2) and (3) of the Land Act 2012.
 - iii. The Learned Principal Magistrate erred in law and in fact, by only relying on the wrong provisions of the law, pursuant to section 3A of the Civil Procedure Act, thus overriding the provisions of Article 50 of the Constitution.



- iv. The Learned Principal Magistrate erred in law and in fact, by delivering a Ruling instead of judgment without giving the authors of the Surveyors Reports to be cross-examined in respect to the reports thereof.
2. Consequently, the Appellant sought the following orders;
 - a. The Ruling and Orders in Migori CMC ELC No. 15 of 2020 be set aside and thus the Plaintiff, the respective land surveyors, Land Registrar and the witnesses be summoned and given an opportunity to be heard and further allow the matter to proceed to full hearing before a competent Environment and Land Court.
 - b. The costs of the Appeal be in the cause.
3. The backdrop to this Appeal is that; the Plaintiff/ Appellant instituted the suit vide a Plaint dated 15.10.2020 seeking the following orders against the 1st Defendant /Respondent; an order of declaration that he is the sole owner of parcel No. 3106 measuring approx. 2.34Ha, an order of eviction of the 1st defendant from the suit parcel No. 3106 and removal of illegal structures thereof, an order of Permanent Injunction against the 1st defendant from interfering, building structures, selling and dealing with the suit land and further for the 2nd defendant to demarcate and determine the boundaries between parcel No. 3106 and 1117 respectively.
4. It was the Plaintiff's claim that on or about 15/06/2020 and 16/6/2020, the 1st defendant trespassed into his parcel No. 3106 and occasioned wanton damage to the crops and properties thereon.
5. The 1st Defendant/Respondent in response to the Plaint filed a Statement of Defence dated 21.01.2021; wherein he denied all the allegations levelled against him particularly on trespass and/or encroachment and the boundary dispute and put the plaintiff to strict proof thereof. He thus urged the court to dismiss the suit with costs.
6. By Consent dated 9/12/2020, parties agreed that the land registrar and surveyor do visit the suit parcels of land, conduct a survey and demarcate the two parcels of land using the area map and/or existing features on the ground and to thereafter file a report in court on their findings. The survey was done and a Report duly filed in court and whose finding was that there was no encroachment on the suit parcel. Dissatisfied by the said Report filed by the County Surveyor, the Plaintiff sought leave to engage a private surveyor to resurvey the 2 parcels of land and thereafter file a report. The same was done and a report was subsequently filed in court.
7. The findings of the said Reports by the 3 different surveyors were adopted by the trial court in making its determination and a ruling dated 07/06/2022 was delivered. The effect of the said Ruling was to strike the Plaintiff's suit with costs to the 1st defendant hence the instant Appeal.
8. On 28.03.2023, directions were issued that the Appeal be canvassed by way of written submissions, to be filed and exchanged within 14 days. However, on a perusal of the court record, I have noted that only the Appellant filed his written submissions dated 20.05.2023, which I have read and taken into account in arriving at my decision. Be as it may, I will proceed to render my decision as hereunder;

Appellant's Submission

9. The Appellant's counsel submitted on 4 main issues; whether the provisions of section 19 of the [Land Registration Act](#) was contravened, whether the right to fair hearing as provided under Article 50 was contravened, whether the trial court relied on the wrong provisions of the law in dismissing the Appeal and who should bear the costs of the suit.



10. On the first issue, it was counsel's submissions that the trial magistrate contravened the provisions of 19 of the Act since he never considered any report from the Land Registrar, who has the mandate to solve boundary disputes. That despite the Land Registrar having been directed to visit the land parcels in question, the court never called for a Report from the Land Registrar before striking out the suit.
11. On the second issue of fair hearing; counsel submitted that the trial court applied principles that were unjust to the Appellant's case. That at page 17 of the Record of Appeal, it is evident that counsel applied for a hearing date but the matter was instead subjected to a Ruling whose effect was to strike out the matter, without giving him an opportunity to be heard. He further maintained that from his list of documents, there were photographs showing the activities that he was disputing and he thus ought to have been given a chance to present his case.
12. He further submitted that the trial magistrate did not consider all the three reports before arriving to his decision, particularly the report by the independent surveyor. It was his contention that the report by the Independent Surveyor showed that there was a problem with the previous report by the County Surveyor, the same indicated that the parcel of land in question had some discrepancies, hence the reason he ought to have been heard.
13. Lastly, he submitted that the trial court erred in dismissing the suit pursuant to Order 2 Rule 15(1) (a) of the Civil Procedure Rules, when in fact the Appellant's suit disclosed reasonable cause of action which ought to have been adjudicated on full hearing. Counsel thus urged the court to allow the Appeal as prayed.

Analysis and Determination

14. I have looked at the grounds of Appeal, the Record of Appeal and the Appellant's submissions in totality and it is my considered view that the sole issue arising for determination is whether this Court should interfere with the exercise of discretion by the trial court by setting aside and substituting its ruling delivered on 07.06.2022 and I will proceed to discuss the same on account of section 19 of the [Land Registration Act](#) and the 3 Survey Reports filed in court.
15. This court's jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion. This however does not entail taking on board matters which were never brought to the trial court's attention or were not subject of the said court's consideration. In *Selle v Associated Motor Boat Co.* [1968] EA 123) the Court of Appeal held as follows: -

“ this court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard the witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
16. I will now proceed to re-evaluate each of the party's claim from the trial court record, the 3 survey reports and the trial court findings in determining whether the Appellant is entitled to the reliefs sought in the Memorandum of Appeal dated 14/06/2022.
17. From the trial court record, it is evident that by consent dated 26/11/2020; the parties herein agreed that the land registrar and surveyor would visit the suit parcel of land in question, conduct survey and



thereafter demarcate the two parcels of land using the area map and/or existing features on the ground, a report would thereafter be filed in court on their findings. The site visit was done and 2 Reports dated 31/05/2021 and 25/10/2021 were filed to that effect.

18. Dissatisfied by the said Reports, the Plaintiff/ Appellant sought leave to engage a private surveyor for purposes of resurveying the suit parcels. Leave was granted and after the site visit carried out on 25/10/2021, an Independent Survey Report dated 23/11/2021 was thereafter filed.
19. I have critically analysed the 3 reports dated; 31/05/2021, 25/10/2021 and 23/11/2021 respectively. The two reports dated 31/05/2021 and 25/10/2021 were similar and both made a conclusion that the Plaintiff's parcel of land is intact; the acreage of the plaintiff's land parcel No. 3106 is intact. They however made a recommendation about the road that exists on the ground but is not included on the area map.
20. The independent survey dated 23/11/2021 was of a different finding on the issue of boundary between the two parcels of land. However, in his conclusion; the independent surveyor was of the view that the problem faced by the parties was procedural and that the records should therefore be implemented both on the ground and on the PID.
21. It is not in dispute that the Appellant is the registered owner of the land parcel No. 3106 while the 1st Respondent is the registered owner of parcel No. 1117. However, it is instructive to note that from the three 3 Reports, it is clear that there was no trespass by the 1st Respondent into the Appellant's suit land No. 3106. The Appellant has solely based his claim on the Report by the Independent Surveyor. However, from the conclusion on the Report by the Independent Surveyor it cannot be said with certainty that there has been encroachment on the plaintiff's parcel of land as alleged.
22. In view of the foregoing, I find that the learned trial magistrate exercised his discretion properly in striking out the plaintiff's claim. The analysis and ruling were purely made upon examination of the full facts of the case together with the Survey Reports. I find no reason and/or justification to interfere with the said decision.

Conclusion

23. In conclusion, I accordingly find that the Appeal is not merited and the Memorandum of Appeal dated 14th June, 2022 is accordingly dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 27TH DAY OF JUNE, 2023.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

No Appearance for the Appellant

1st Respondent in Person

No Appearance for the 2nd -4th Respondents

Court Assistant- Tom Maurice/ Victor

