



Doset Wanjala t/a Blessed International Ministries Church v Wandera (Environment and Land Appeal E050 of 2022) [2024] KEELC 4789 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4789 (KLR)

DOSET WANJALA T/A BLESSED INTERNATIONAL MINISTRIES CHURCH V WANDERA

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ENVIRONMENT AND LAND APPEAL E050 OF 2022

DO OHUNGO, J

JUNE 20, 2024

BETWEEN

**DOSET WANJALA T/A BLESSED INTERNATIONAL MINISTRIES
CHURCH APPELLANT**

AND

JOSEPH WANDERA RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Kakamega (Hon. B Ochieng, Chief Magistrate) delivered on 19th October 2022 in Kakamega MCCC No. 307 of 2017)

JUDGMENT

1. Litigation leading to this appeal started in the Subordinate Court on 5th October 2017 when the Respondent herein filed a plaint dated 26th September 2017. He averred that he was the registered proprietor of the parcel of land known as Bunyala/Nambacha/1274 (the suit property) and that the Appellant's construction which was ongoing on an abutting parcel had encroached onto the suit property. He therefore prayed for judgment against the Appellant for demolition at the Appellant's expense of any part of the construction which had encroached onto the suit property and for costs of the suit.
2. The Appellant filed a statement of defence through which he denied the Respondent's allegations and averred, in the alternative, that construction, if any, was being undertaken on a plot forming part of the unadministered estate of Anthony Mikangi Walusala (deceased). He therefore prayed that the suit be dismissed with costs.
3. Upon hearing the matter, Hon. B Ochieng (Chief Magistrate) wrote judgment which was delivered on 19th October 2022 by Hon. L Kassan (Chief Magistrate, as he then was). The learned Magistrate



found merit in the Respondent's case and ordered demolition at the Appellant's expense of any part of the construction which had encroached onto the suit property. He also awarded the Respondent costs of the suit.

4. Dissatisfied with the outcome, the Appellant filed this appeal on 7th November 2022, through Memorandum of Appeal dated 28th October 2022. He prayed that the judgment be set aside, and that the Respondent's case be dismissed. Although the Appellant contended stated in the Memorandum of Appeal that the judgment was delivered on 19th August 2022 and even went ahead and obtained from this court an order of leave to appeal out of time, I have perused the original of the record of the Subordinate Court and I have confirmed that although dated and signed by Hon. B Ochieng on 19th August 2022, the judgment was delivered on 19th October 2022 by Hon. L Kassan. The appeal was filed within time.
5. The grounds of appeal as listed on the face of the Memorandum of Appeal are that:
 1. The Hon Magistrate erred both in fact and law when he ordered for the demolition of the Appellant's Church building without proof of such encroachment through cogent evidence such as a Survey Report.
 2. The Hon Magistrate erred in fact and law when he made a finding of fact to the effect that the boundaries of the suit land was determined at the time the Respondent acquired the land in 1996 without cogent evidence to prove this fact.
 3. The Hon Magistrate erred in fact and law when he failed to determine the dispute in accordance with Section 18 (2) of the *Land Registration Act* 2012.
 4. The Hon Magistrate made wrong findings and arrived at a wrong decision.
 5. The Hon Magistrate erred in fact and in law when he failed to give a reasoned judgement.
 6. The Hon Magistrate exercised his discretion wrongly when he condemned the Appellant to pay costs of the suit.
6. The appeal was canvassed through written submissions. The Appellant argued that there was no evidence that his construction had encroached onto the suit property. That no Registry Index Map, Survey report, authenticated survey map or even photographic evidence was produced to show how much of the suit property had been encroached onto and that in the circumstances, the Respondent did not prove his case to the required standard.
7. The Appellant further argued that his parcel and the Respondent's abut each other and that the matter before the Subordinate Court was therefore a boundary dispute. That since the boundary had not been fixed in terms of Section 19 of the *Land Registration Act*, the Subordinate Court lacked jurisdiction in view of the provisions of Section 18 (2) of the *Land Registration Act*. He relied on the cases of *Azzuri Limited v Pink Properties Limited* [2018] eKLR, *George Kamau Macharia v Dexka Limited* [2019] eKLR, *Wills Ocholla v Mary Ndege* [2016] eKLR, and *Estate Sonrisa Ltd & another v Samuel Kamau Macharia & 2 others* [2020] eKLR and argued that the learned Magistrate erred in proceeding without jurisdiction. The Appellant therefore urged the court to allow the appeal.
8. On his part, the Respondent countered the Appellant's argument that the Subordinate Court lacked jurisdiction in view of the provisions of Section 18 (2) of the *Land Registration Act* by referring to page 3 of the judgment where the learned Magistrate stated that the boundaries had been fixed in 1996 when



the Respondent became the registered proprietor. He relied on the case of *Estate of Gabriel Kiprop Chebet v Director of Land Adjudication and Settlement & another* [2022] eKLR in support of that contention.

9. The Respondent further argued that the Appellant conceded during the trial that he did not know the identity of the parcel from which he purchased his portion of land or the actual size of the portion that he purchased. That the Appellant also conceded that he did not engage a land surveyor to ascertain the boundaries prior to purchase and prior to embarking on the construction. The Respondent went on to argue that although the Appellant is faulting the trial court for ordering demolition of the entire church without proof, paragraph 3 of the judgment makes it clear that only that part of the Appellant's church which is found to have encroached onto the Respondent's land ought to be demolished. That in view of ground 1 of the Appeal, the Appellant seems not be against having the disputed site surveyed, this court order for a survey under Section 78 (d) of the *Civil Procedure Act*.
10. This is a first appeal. Consequently, this court's mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial Magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their pleadings and evidence. See *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
11. I have considered the grounds of appeal, the pleadings, the evidence, and the submissions. The issues that arise for determination are whether the Subordinate Court had jurisdiction, whether there was proof on encroachment and whether the reliefs sought ought to have issued.
12. The centrality of the issue of jurisdiction can never be overstated. Jurisdiction is the entry point in any matter that a court of law is called upon to determine. Without jurisdiction, the proceedings come to a certain end and the court cannot take any further step. See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR.
13. As the Supreme Court stated in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR:

A Court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. ...
14. The Appellant has contended that the Subordinate Court lacked jurisdiction in view of the provisions of Section 18 (2) of the *Land Registration Act*. Section 18 of the said statute provide:
 - (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). [Emphasis added]

15. The Respondent produced a copy of a title deed which shows that he was registered as proprietor of the suit property on 22nd July 1996 and title deed issued to him on 20th August 1996, under the Registered Land Act (repealed). Since he did not produce a copy of the register, we are unable to ascertain if there was any indication in the register that the boundary had been fixed. Nevertheless, there is a presumption under Section 18 (1) of the Land Registration Act that in the absence of a note in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan are to be deemed to indicate only the approximate boundaries and the approximate situation of the parcel on the ground.
16. The Court of Appeal discussed the role of the Land Registrar in resolving boundary disputes in the case of Estate Sonrisa Ltd & another v Samuel Kamau Macharia & 2 others [2020] eKLR where the court stated that the Registrar has wide powers under Sections 18 and 19 of the Land Registration Act, some of which are quasi-judicial and that it is only after the Registrar has determined the dispute that parties can move to court to challenge it.
17. The Respondent's case, as he pleaded it, was that that the Appellant's construction which was ongoing on an abutting parcel had encroached onto the suit property. In his own pleadings, he acknowledged that the Appellant's construction was substantially on an adjoining parcel. The only way in which the construction could encroach onto the suit property was if it went beyond the boundary. There was therefore need to determine the position of the construction relative to the boundary of the suit property. If the boundary was not fixed, then the Subordinate Court would not have jurisdiction.
18. The burden of proving that the boundary had been fixed was upon the Respondent, since he is the one that moved the Subordinate Court. It cannot simply be assumed, as the Respondent would like us to do, that the boundary was fixed, simply because he has a title deed. That kind of reasoning flies in the face of Section 18 (1) of the Land Registration Act. I am satisfied that the boundary of the suit property was not fixed and that in the circumstances, the Subordinate Court did not have jurisdiction to hear and determine the matter. In those circumstances, this court cannot simply cure the defect by ordering the preparation and filing of a survey report, as is suggested by the Respondent.
19. Even if I had found that the Subordinate Court had jurisdiction, the Respondent would have had one more obstacle to surmount. He must prove that there was encroachment. Encroachment on registered land is a technical issue which requires expert evidence. Detailed survey evidence including a survey plan must be produced to help the court in establishing the true identity of the parcels, their boundaries and location of developments. The significant role played by surveyors and survey plans was discussed by the Court of Appeal in Elizabeth Wambui Gitinji & 29 others v Kenya Urban Roads Authority & 4 others [2019] eKLR. Even though the standard of proof in a civil case is proof on a balance of probabilities, a litigant alleging encroachment through construction of part of a building into his parcel cannot simply rely on his own layman's assertions to prove his case. In the circumstances of this case, the Respondent did not prove any encroachment.
20. Beyond the question of the Respondent failing to prove any encroachment, the final orders granted by the learned Magistrate are also problematic. The learned Magistrate ordered demolition at the Appellant's expense of any part of the construction which had encroached onto the suit property.



Needless to state, such an order cannot be enforced without a secondary process of establishing what portion of the construction had encroached onto the suit property. I am not surprised that the Respondent has seen the lacuna in the order and has attempted to cure it by inviting this court to order the preparation and filing of a survey report.

21. In view of the foregoing discourse, the learned Magistrate misdirected himself by entertaining the matter in the absence of jurisdiction. I find merit in this appeal.
22. I set aside the judgment of the Subordinate Court and replace it with an order striking out the Respondent's case for want of jurisdiction. The Appellant shall have costs of both this appeal and of the proceedings in the Subordinate Court.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 20TH DAY OF JUNE 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Kadenyi for the Appellant

Ms Ikhumba for the Respondent

Court Assistant: M Nguyayi

