Atieli & another v Okumu (Environment and Land Appeal 3B of 2020) [2024] KEELC 5455 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5455 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIRONMENT AND LAND APPEAL 3B OF 2020

BN OLAO, J

JULY 25, 2024

BETWEEN

THOMAS OMUSE ATIELI .... 1ST APPELLANT

JAMES OKONDA ETOLE .... 2ND APPELLANT

AND

ISAAC NAMWAYA OKUMU .... RESPONDENT

(Being an appeal from the Judgment of HON. LUCY AMBASI CHIEF MAGISTRATE delivered on 19th December 2019 in BUSIA CHIEF MAGISTRATE'S COURT CIVIL CASE NO 128 of 2012)

JUDGMENT

1. Isaac Namwaya Okumu (the Respondent) was the Plaintiff in Busia Chief Magistrate's Court Civil Case No 128 of 2012. By an amended plaint dated 7th March 2018, he impleaded Thomas Omuse Atieli And James Okonda Etole (the Appellants herein and who were the 1st and 3rd Defendants respectively) as well as Sarah Akello Mukele, County Government Of Busia, Land Registrar Busia And County Surveyor Busia (who were the 2nd, 4th, 5th and 6th Defendants in the subordinate Court but who are not parties in this appeal). He sought judgment against the Appellants and the other Defendants in the following terms with respect to the land parcel No Bukhayo/Mundika/9128 (the suit land):

    a. An order that the Bulanda Junction Bwameni road be re-surveyed and be re-routed to it's rightful place and that the land belonging to the Respondent unlawfully encroached upon by the road works be restituted to the Respondent and or that he be compensated for the same.

    b. An order of eviction.

    c. General damages/mesne profit to be paid to the Respondent for the unlawful occupation of his land by the 1st 2nd, 3rd, 4th, 5th and 6th Defendants.

d. A permanent injunction against the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants restraining them by themselves, their agents and/or officers and barring them from encroaching onto, continuing to encroach and/or occupying land parcel No Bukhayo/Mundika/9128 or any part thereof.

e. An order of eviction against the Defendants their servants, agents and/or officers from encroaching onto land parcel No Bukhayo/Mundika/9128 and a concurrent order of demolition of all those structures owned by the Defendants, servants and/or agents and situate on the land parcel No Bukhayo/Mundika/9128 and that costs of such demolition be borne by the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants.

f. Costs of the suit and interest.

2. The basis of the Respondent's case was that he is the registered proprietor of the suit land while the 1st Appellant is the proprietor of the land parcel No Bukhayo/Mundika/6111 and the 2nd Appellant is the registered proprietor of the land parcel No Bukhayo/Mundika/6351. That the 2nd Defendant and who is not a party to this appeal is the registered proprietor of the land parcel No Bukhayo/Mundika/9127 on which there is a storey residential building that occupies 7 metres of the suit land. That the 4th, 5th and 6th Defendants, wrongly and improperly created a 10 metre road i.e. Bulanda Junction Bwameni which has encroached onto the suit land. That there was no due diligence in the creation of the said road which has encroached onto part of the suit land which is unfair and illegal and for which no compensation has been paid for the said encroachment. That necessitated the suit so that the portion of the suit land unlawfully encroached upon be restituted to the Respondent.

3. The record shows that of the two Appellants, only the 1st Appellant as well as the other Defendants filed their defences to the Respondent's claim. The 2nd Appellant did not file any defence.

4. In his amended defence and counter-claim dated 23rd October 2014, the 1st Appellant denied the Respondent's averments and added that he had developed his land several years ago by building a house thereon. He pleaded further that if his act offended the Respondent who mistakenly terms it as trespass, then his claim is barred by the *Limitation of Actions Act* and should be struck out. He pleaded in paragraph 5 of his defence that the Court lacked the jurisdiction to determine the suit but later amended the same paragraph to read paragraph 5A where he pleaded thus:

5A: "The Defendant states that this Honourable Court has subsequently been granted jurisdiction to hear the case herein."

5. In his counter-claim against the Respondent, the 1st Appellant reiterated the averments in his amended statement of defence and pleaded that the Respondent had unlawfully caused alterations to and manipulated the mutation form to the suit land such that it does not conform to what is on the ground and thereby affected the sub-divisions of the land parcel No Bukhayo/Mundika/1660 into No Bukhayo/Mundika/6110 and 6111 as well as the land parcel No Bukhayo/Mundika/6110 into No Bukhayo/Mundika/6350 and 6351 which sub-divisions were effected and registered before the Respondent's title came into existence. He pleaded the particulars of the Respondent's misconduct as follows in paragraph 7(a) to (c) of his amended defence and counter-claim:

a. Preparing faulty Mutation Forms and registering the same.

b. Unlawfully extending the area of the suit land.

c. Demanding for compensation.

The 1st Appellant pleaded further that the Respondent unlawfully facilitated the creation and registration of faulty unprofessionally prepared Mutation Forms which should be cancelled. He therefore sought the following by way of counter-claim:

1. An order directing the cancellation of the Appellant's title deed to the suit land.
2. An order directing the County-Land Registrar and Surveyor to draw and register a fresh Mutation Form creating the Appellant's land which Mutation Form should conform with the Mutation Forms earlier created, approved and registered facilitating the sub-division of land parcel No Bukhayo/Mundika/1660 into No Bukhayo/Mundika/6110 and 6111 and No Bukhayo/Mundika/6110 into No Bukhayo/Mundika/6350 and 6351 and new title deed be issued to the Appellant conforming with the proper ground position of the Appellant's parcel of land as per the fresh and registered form as aforesaid.

   The Appellant therefore prayed for the dismissal of the Respondent's suit with costs and judgment be entered for him in terms of the counter-claim with costs.

6. The 2nd Defendant also filed a defence. She is not a party to this appeal but for purposes of completeness, I will summarise it.
7. In her defence dated 7th December 2018, the 2nd Defendant stated that she is the proprietor of the land parcel No Bukhayo/Mundika/9127 but denied having encroached onto the suit land. She pleaded that she had purchased her land from one Fredrick Oyango Maloba when it was vacant and the Respondent never complained when she put up her building and added that if there is any encroachment on the suit land, she is not responsible for the same. She added further that the trial Court had no jurisdiction to determine a boundary dispute.
8. The 5th and 6th Defendants are also not parties to this appeal. They filed a joint defence dated 11th march 2019 in which they pleaded, inter alia, that they are strangers to the Respondent's averments as contained in his plaint and put him to strict proof thereof. They denied having advised the 4th Defendant to create a 10 metres road thus encroaching on the suit land and asked the Court to dismiss the Respondent's suit with costs.
9. The case was heard by Hon. L. Ambasi Chief Magistrate from 29th August 2019 and on 10th December 2019, she delivered her judgment in which she found that the Respondent had proved his case and dismissed the 1st Appellant's counter-claim with costs.
10. The judgment provoked this appeal in which the Appellants seek the following order:
    1. That the appeal be allowed with costs.
    2. That the judgment of the lower Court be set aside and it be substituted with an order dismissing the Respondent's suit with costs and allowing the 1st Appellant's counter-claim.
11. The following eight (8) grounds of appeal have proferred in seeking to set aside the judgment:
    1. The learned Magistrate erred in law and fact by hearing a matter that dwelt on the unfixed boundaries to land in contravention of the law.
    2. The learned Magistrate erred in law and fact by treating the consent to have the District Land Registrar and District Surveyor to go to the ground as a complete bar to the Appellants from questioning the said officers resultant in accurate report that was prepared by some unknown person on behalf of the District Surveyor and she consequently arrived at an unfair decision.

3. The learned Magistrate erred in law and fact by relying on the District Surveyor's report as the sole determinant of the case and failed to take into account the relevant facts being, inter alia, lack of service on proper service, affording parties adequate time to avail their private surveyors, disregard of other relevant accurate Mutation Forms for the other subject parcels of land, relying on two different Mutation Forms in respect of one sub-division and she thereby arrived at an erroneous decision.

4. The learned Magistrate erred in law and fact by dismissing the 1st Appellant's counter claim in the face of overwhelming supporting evidence which controverted the defective surveyor's report and supported his said cross-action that remained un-answered by the Respondent, the County Land Registrar and the County Surveyor for keeping and relying on 2 defective and altered Mutation Forms in respect of one sub-division of land transaction that had created the suit parcel of land.

5. The learned Magistrate erred in law and fact by holding that the consent for the District Land Registrar and the District Surveyor to go to the ground and the resulting report could not be questioned even when it turned out that the other relevant Mutation Forms were never considered and when the report itself was based on a defective Mutation Form that failed to reflect the accurate position on the ground.

6. The learned Magistrate misdirected herself by failing to take into account the provision for production of controvertive evidence to the District Land Registrar and the District Surveyor's report in line with the Lower Court's order for the ground visit.

7. The learned Magistrate failed to take into account that the initial consent was premised on the belief that the District Land Registrar and the District Surveyor possessed accurate Mutation Forms that would inform a fair report but this was sufficiently vitiated by the glaring and unanswered defects in the said documents on which their inadequate report was founded.

8. The learned Magistrate erred in law and in fact by holding that the consent order for the ground visit also bound the 2nd Appellant who was never a party to the consent that was recorded in the Lower Court on 2/10/2015.

12. The appeal has been canvassed by way of written submissions and although on 7th December 2022 I directed that the submission be filed and exchanged with each party having 14 days to do so, only the Appellants counsel Mr. Obwatinya has filed his submissions. I must point out that although Mr. Obwatinya filed submissions on behalf of the Appellants, the record of appeal was filed by Mr Wanyama instructed by the firm of Wanyama & Company Advocates.

13. This is a first appeal. As a first appellate Court, my role is to re-examine the evidence on record and reach my own conclusion. And even as I re-evaluate such evidence which was before the trial Court, I must take account of the fact that the trial magistrate had the opportunity to see and hear the witnesses as they testified. The first appellate Court is also empowered to subject the whole evidence to a fresh and exhaustive scrutiny and determine whether the conclusion arrived at by the trial Court should be allowed to stand or be set aside - see Selle & Another -v- Associated Motor Boat Company Ltd & Others 1968 E.A. 123, Peters -v- Sunday Post Limited 1958 E.A. 424 among other cases.

14. In ground No 1, the Appellants take issue with the trial Magistrate for exceeding her jurisdiction by hearing a matter that dwelt with fixed boundaries to land. In his submissions on this issue, counsel for the Appellants has cited the provisions of Section 18 (2) of the *Land Registration Act* which reads:

> " 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."

Counsel then goes ahead to submit that:

> " In his prayer, the Plaintiff created a situation whereby he was seen as alleging both boundary and occupation of his land by neighbours but in the actual sense his was a pure boundary dispute given that the 1st, 2nd and 3rd Defendants/Appellants have long been in occupation of theirs even before the Plaintiff/Respondent bought his current land. The boundaries were in dispute as evidenced by different reports filed in Court by different Surveyors. Upon establishing that indeed there was a land dispute due to undetermined boundaries, the Court should have first and foremost downed tools totally by striking out the case for lack of jurisdiction to allow the Land Registrar determine them before allowing any litigation to go on ...
>
> The learned Magistrate therefore misdirected herself by refusing to down her tools on account of lack of jurisdiction and proceed to strike it out with costs."

As was stated in the locus classicus on the issue of jurisdiction in the case of Owners Of The Motor Vessel "lillian S" -v- Caltex Oil Kenya Ltd 1989 KLR 1:

"Jurisdiction is everything. Without it a Court has no power to make one more step. Where a Court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs it's tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

The issue of jurisdiction of a Court is so central in proceedings and can be raised at any state including on appeal – *National Social Security Fund Board Of Trustees -v- Kenya Tea Growers Association & 14 Others C.a. Civil Appeal No 656 of 2022* [2023 KECA 80 KLR].

15. To determine whether this "was a pure boundary dispute" as submitted by counsel for the Appellants, this Court must examine the pleadings which were before the trial Court. In paragraph 3B of his amended plaint, the Respondent set out the basis of his claim as follows:

> 3B "That the 1st Defendant unlawfully, improperly and without consent of the Plaintiff has and being the registered owner of L.R NO Bukhayo/Mundika/6111 encroached onto the Plaintiff's parcel of land designated as L.R NO Bukhayo/Mundika/9128 by 5 metres to the front and 5 metres to the back and that this encroachment is characterized by a construction of illegal structures."

That is the thread which runs in his amended plaint. In paragraph 3D, he pleaded that the 2nd Defendant has put up his building on 7 metres of the suit land while in paragraphs 3F and 3G, he pleaded that the 3rd Defendant has encroached upon 7 metres of the suit land. And with regard to the 4th, 6th and 6th Defendants, he pleaded in paragraphs 3H and 3I that they allowed the other Defendants to create a road on the suit land. In his defence at paragraph 4 of his amended defence and counter-claim, the 1st Defendant who is the 1st Appellant herein pleaded that:

4: “The Defendant avers that he built a house and developed his plot several years ago and if this act offended the Plaintiff who mistakenly terms it as trespass, then the present claim is barred by the *Limitation of Actions Act* in view of the averment in the plaint and should be struck out.”

The 2nd Appellant and who was the 3rd Defendant in the trial Court did not file any defence nor testify. Therefore, while the Respondent alleged that the Appellants and others had encroached onto the suit land, the 1st Appellant pleaded that if the claim against them was one of trespass, then it was barred by the *Limitation of Actions Act*. The term encroachment is defined in Black’s Law Dictionary 10Th Edition as:

> “ An infringement of another’s right. An interference with or intrusion onto another’s property.”

On the other hand, the term trespass which is what the 1st Appellant used in his defence and counter-claim is defined in the same Dictionary as:

> “ An unlawfull act committed against the person or property of another; esp wrongful entry on another’s real property.”

It is clear from the above that the Respondent’s claim was one of encroachment/trespass on the suit land. He even went further to show by how many metres the Appellants and the other parties had encroached/trespassed onto his land. He could only have pleaded as he did if he knew the extent of his land. Indeed in the remedies sought, he asked for a re-routing of the Bulanda Junction Bwameni Road, an order of eviction and permanent injunction as well as general damages and mesne profits. Clearly, this was not a boundary dispute which would have necessitated the trial Magistrate to down her tools.

16. Secondly, both the 1st Appellant and the Respondent had pleaded that the trial Magistrate had the requisite jurisdiction to determine the suit before her. In his amended plaint, the Respondent pleaded in paragraph *13* that:

13: “This Court has jurisdiction”

And in his amended defence and counter-claim, the 1st Appellant pleaded in paragraph 5A that:

5A: “The Defendant states that this Honourable Court has subsequently been granted jurisdiction to hear the case herein.”

Prior to the amendment, the 1st Appellant had disputed the trial Court’s jurisdiction and pleaded in paragraph *5* that:

5: “The Defendant states that this Honourable Court lacks jurisdiction, pecuniary or otherwise, to hear and determine this dispute.”

Having admitted the jurisdiction of the trial Court to determine this dispute, the Appellants cannot now turn around and allege otherwise. They cannot approbate and reprobate at the same time. In any event, having considered the pleadings, herein, I am satisfied that this was a dispute of encroachment or trespass to the suit land and not a boundary dispute. The Respondent knew the boundary of his land and the extent of the encroachment or trespass thereon which he specifically pleaded. Further, there is no time limitation in cases of trespass to land – see Isaack Ben Mulwa -v- Jonathan Mutunga Mweke 2016 eKLR.

17. The ground challenging the trial Court’s jurisdiction to determine this suit is not merited. I dismiss it.

18. Grounds 2, 3 and 5 of the memorandum of appeal can be considered together. Therein, the trial Magistrate is assailed for, inter alia, treating the consent by the District Land Registrar and Surveyor as a bar to the Appellants from questioning the said officers, relying on the said report as the sole determinant of the case without affording the parties time to avail their own surveyors and relying on defective Mutation Forms, and holding that the said report could not be questioned even when it turned out that the said report failed to reflect the accurate position on the ground.

19. The record shows that on 1st October 2015 when the suit was being handled by Hon. H. N. Ndungu Chief Magistrate, the following consent order was recorded:

> "By consent, the District Surveyor and the Land Registrar do visit parcel No Bukhayo/ Mundika/9128, 9127, 6350, 6351 and 6111 to determining the boundaries between the Plaintiff and the Defendant. The District Surveyor and Land Registrar do file their report into Court within 30 days from today. Each party be at liberty to appoint a private surveyor to oversee the exercise. Costs of the surveyor and District Surveyor to be paid by the Plaintiff."

A report dated 2nd December 2015 was subsequently prepared and signed by the County Surveyor Busia and filed in Court on 23rd December 2015. There is nothing on the record to suggest that any of the parties applied to cross-examine the County Surveyor on the said report and that such request was declined by the trial Magistrate. It cannot therefore be correct for the Appellants to claim that the trial Magistrate treated the said report "as a complete bar to the Appellants from questioning the said officers" as has been alleged in ground No 2. It is also alleged in the same ground that the said report "was prepared by some unknown person on behalf of the District Surveyor." The report is duly signed by one George Kimani For The County Surveyor Busia County and if the said person was not authorised to sign such report, nothing would have been easier than for the Appellants to apply to the Court to summon the said County Surveyor. The complaint that the parties were not afforded time to avail their private surveyors is an issue which should have been raised during the exercise which, as per the report, was conducted on 16th November 2015 pursuant to the consent order. The consent order clearly stated that the parties were at liberty to bring on board their own private surveyors and if they did not take advantage of that window, the Appellants cannot now complain that they were not given adequate time to avail them. In any event, the trial Magistrate was not hearing any appeal against the said consent order or the report by the surveyor. It is not therefore proper for the Appellants to plead, as they have done in paragraph 5 of their memorandum of appeal, that the trial Magistrate erred in law and fact by "holding that the consent for the District Land Registrar and the District Surveyor to go to the ground and the resulting report could not be questioned ..." Once parties agree to submit their dispute to experts, as happened in this case, such a consent order can only be set aside if obtained by fraud or collusion or an agreement contrary to the policy of the Court or if the consent was given without sufficient material facts or misapprehension or ignorance of facts of for reasons which would enable the Court to set aside an agreement – Hirani -v- Kassam 1952 19 E.A.C.A 131. In any event, I have looked at the said report and there is nothing to suggest that any private surveyors turned up during the exercise and were denied audience. There is also nothing to suggest that the Surveyor who prepared the report had any motive to file doctored documents.

20. Grounds 2, 3 and 5 are also dismissed.

21. In ground No 4, the trial Magistrate is faulted for dismissing the 1st Appellant's counter claim "in the face of overwhelming supporting evidence which controverted the defective surveyor's report ...". In his counter claim, the 1st Appellant pleaded that the Respondent had unlawfully caused alterations to and manipulated documents being Mutation Forms thereby creating faulty documents. Among the

remedies which the 1st Appellant sought was the cancellation of the Respondent's title to the suit land. In his attempt to prove his counter-claim the 1st Appellant and the other Defendants called as their witness Cornelius Wanjala Nyongesa (DW4) who introduced himself as a Surveyor with the firm of Geo Sum Ltd. However, when he was cross-examined by Mr Ashioya counsel for the Respondent, he could not produce any document to show that he was a surveyor. Indeed his report dated 28th October 2019 and which he produced as part of the 2nd Defendant's documentary evidence does not describe him as a surveyor. It is difficult therefrom to describe evidence tendered by a witness who could not demonstrate that he is a surveyor and who did not even sign the report identifying himself as such, to be "overwhelming supportive evidence which controverted" the consent report by the County Surveyor. It is no wonder therefore, and rightly so in my view, that the trial Magistrate did not find either the oral testimony of Cornelius Wanjala Nyongesa (DW4) nor his report, to be credible evidence. It must also be remembered that the trial Magistrate, unlike this Court, had the opportunity to see and hear the said witness as he testified. The threshold for cancellation of a title, which is set out in Section 26 (1) of the *Land Registration Act*, was clearly not met by the Appellants.

22. Ground No 4 of the memorandum of appeal is also dismissed.

23. In ground No 6 and 7, the Appellants fault the trial Magistrate for failing to take into account the provision for production of controverting evidence to the District Land Registrar and Surveyor's report in line with the Lower Court's order for a site visit and also that the initial consent was premised on the belief that the District Land Registrar and Surveyor possessed accurate Mutation Forms that would inform a fair report but which was vitiated by the glaring and un-answered defects in the said report.

24. The answer to the above is that the parties consented to the Land Registrar and District Surveyor visiting the suit land and filing a report. They cannot now challenge the competency of the said officers, who are experts in their field, in executing their mandate as was required of them. Once filed, the report became part of the record which the trial Magistrate was obliged to take into account in her judgment. And as is now clear, the attempts by the Appellants to discredit that report through the evidence of Cornelius Wanjala Nyongesa (DW4) fell flat on it's face during the trial. The Surveyor's report dated 2nd December 2015 was evidence of an expert. It is true that the trial Magistrate relied on the said report to arrive at the decision the subject of this appeal. In his amended plaint, the Respondent had alleged in paragraph 3D that the 2nd Defendant, who is not a party herein and who is the proprietor of the land parcel No Bukhayo/Mundika/9127 had constructed buildings thereon which are 7 metres into the suit land. And in paragraph 3F, he alleged that the 3rd Defendant who is the 2nd Appellant herein and the proprietor of the land parcel NO Bukhayo/Mundika/6351 had put up buildings which encroached into 5 metres of the suit land. In the report dated 2nd December 2015, the County Surveyor makes the following conclusion which I shall cite in extenso:

> " Conclusion
>
> There is a shift of 4m on the ground starting from Bulanda road and Bwameni road.
>
> It is evident that both parcels No 6111 and 6351 have constructed on plot No 9128 by 5m on the front side and back side.
>
> Else where plot No 9127 has encroached plot No 9128 by 7 metres.
>
> That the boundaries of the neighbouring parcels NO 2008 is intact and the boundaries for of (sic) the neighbouring parcel No 2974 is zig zag instead of a straight line."

The trial Magistrate was entitled, as she did, to act on such evidence. As far back as 1995, the Court of Appeal had stated in Dhalay -v- R 1995 – 1998 E.A. 29 that:

> " Where the expert who is properly qualified in his field gives and opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such an opinion could ever be rejected. But if a Court is satisfied on good and cogent ground(s) that the opinion though it be that of an expert, is not soundly based, then a Court is not only entitled but would be under a duty to reject it." Emphasis mine.

In KImatu Mbuvi T/a Kimatu Mbuvi & Bros -v- Augustine Munyao Kioko C.a. Civil Appeal No 2003 of 2001 2007 I E.A 139, the Court reiterated that whereas an expert's opinion not binding on the Court it will be given respect particularly where there is no contrary opinion. In the circumstances of this, the trial Magistrate cannot be said to have erred in law or fact by accepting the surveyor's report and basing her judgment on it.

25. Grounds NO 6 and 7 are hereby dismissed.

26. Finally, in ground No 8, the trial Magistrate is assailed for holding that the consent order direct at the Land Registrar and Count Surveyor also bound the 2nd Appellant who was never a party to the consent. I have looked at the proceedings in the trial Court and the pleadings herein. It is true that by the time the consent order was being adopted by the trial Court on 1st October 2015 directing the Land Registrar and Surveyor to visit the land parcel No Bukhayo/Mundika/9128, 9127, 6350, 6351 and 6111 and file a report the 2nd Appellant and who was the 3rd Defendant in the proceedings before the subordinate Court had not yet been enjoined in the suit. He together with the 2nd, 4th, 5th and 6th Defendants were only enjoined in the proceedings following an amendment to the plaint on 7th November 2018. Therefore, the 2nd Appellant and who is the registered proprietor of the land parcel No Bukhayo/Mundika/6351 was not a party to the said consent. However, the record shows that the 2nd Appellant testified either on 15th October 2019, 31st October 2019 or 15th December 2019. Unfortunately the record of the trial Magistrate as to when exactly the 2nd Appellant testified is not clear. Court proceedings are permanent records and must be clear. This Court cannot over emphasize that fact. I cannot say the same about when exactly the 2nd Appellant testified. That notwithstanding, it is clear at least that though he testified on a date and month which is not certain, the year in which he testified was 2019. By that time, the consent order and the resultant report were part of the record. Most importantly, when he was cross-examined by MR ASHIOYA counsel for the Respondent, he said:

> " 6351 is my land. I know County Surveyor came to the ground pursuant to a Court order. I was happy with his findings but I did not file an appeal."

Again the record is not clear. Perhaps it is a typographical error and the 2nd Appellant meant that he was not happy with the report but did not appeal. What is clear however, is that by the time the 2nd Appellant testified, he was aware about the Surveyor's report but did not challenge it's contents. Therefore, the fact that the consent order was recorded when he was not yet a party to the proceedings is really of no consequence because he did not have any issues to raise over the resultant report. That ground of appeal can only be an afterthought and must be dismissed.

27. The up-shot of all the above is that having considered this appeal, I find it devoid of merit. It can only be for dismissal. I therefore make the following disposal orders in this appeal:

    1. The appeal is dismissed.

2. The Appellants shall meet the Respondent's costs.

BOAZ N. OLAO

JUDGE

25TH JULY 2024

JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 25TH DAY OF JULY 2024BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES.

Right of Appeal

BOAZ N. OLAO

JUDGE

25TH JULY 2024

Explanatory notes:

This Judgment was due on 13th February 2024. However, I was away from the station attending to my ailing step-mother who subsequently passed away. Then I proceeded on a pre-scheduled annual leave upto 1st July 2024. That explains the delay in the delivery of this judgment. The same is highly regretted.

BOAZ N. OLAO

JUDGE

25TH JULY 2024