



**Kandie v Chemuna t/a Avenue Butchery (Appeal E009 of 2023)
[2024] KEELC 5344 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5344 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KABARNET
APPEAL E009 OF 2023
L WAITHAKA, J
JULY 18, 2024**

BETWEEN

AMBROSE KIPSOI KANDIE APPELLANT

AND

JOSEPH CHESIRE CHEMUNA T/A AVENUE BUTCHERY RESPONDENT

*(Being Appeal from the Judgment of Hon. P. Koskey,
SPM Kabarnet in E & L Case No. 11 of 2017)*

JUDGMENT

1. By a Plaint dated 19th March 2012 and filed on 20th March 2012, the plaintiff (now respondent) instituted a suit in the lower court to wit Kabarnet CMC ELC Case No. 1 of 2017 seeking judgment against the defendant (now appellant) for a permanent injunction restraining the defendant, his servants, employees and/or agents from entering, alienating, interfering and/or dealing with the plaintiff's unsurveyed residential plot No.5 Kabarnet also known as plot No. 471 Kabarnet Municipality; costs of the suit and interest. In the alternative, the plaintiff sought a declaration that the defendant's actions complained off are unlawful.
2. The plaintiff's suit was premised on the grounds that at all times material to the suit, he was the lawful allottee of the suit plot; that his plot had been surveyed and Part Development Plan (PDP) and beacons shown to him; that he took vacant possession of the suit plot and leased part of it to Safaricom Limited to construct a communication mask.
3. The plaintiff complained that on or about 9th February 2012 the defendant without any colour of right, wrongfully, illegally and unlawfully entered into the suit plot and threatened to chase away his licensee's employees, servants and/or agents from the suit plot.
4. The defendant filed a statement of Defence and Counterclaim denying the allegations levelled against him and contending that the activities he is accused of having threatened to stop were being undertaken



on his parcel of land, plot No. 6 also known as plot number 475 Kabarnet which he acquired by way of allotment through an allotment letter dated 19th November 1998 and subsequent purchase; that he had been in open, peaceful, quiet possession and exclusive use of his plot until February 2012 when strangers began effecting development on his parcel of land purporting that it was plot No.5 belonging to the plaintiff.

5. By way of Counterclaim the defendant sought judgment against the plaintiff for a declaration that plot No. 6 belongs to him; a mandatory injunction compelling the plaintiff to remove the structures erected on his parcel of land; a permanent injunction to restrain the plaintiff by himself, his servants, employees and/or agents from entering, alienating, interfering and/or in any way dealing with his parcel of land, plot No.6; general damages and mesne profits amounting to Kshs. 2,847,551; costs of the suit.
6. As can be discerned from the pleadings filed before the lower court, the dispute presented before the court was whether the impugned construction by Safaricom Ltd pursuant to a lease granted by the plaintiff was being carried out on the plaintiff's parcel or the defendants parcel of land. To determine that issue, the court conducted a site visit before hearing the case.
7. According to proceedings of 24th February 2015, the surveyor took the court and the parties round the area in dispute. In its site visit report, the court indicates that there is a survey plan which extends to prison and the National Housing Corporation's (NHC) buildings and that the plaintiff agreed to avail another application and certified survey plan. The report also indicates that the County Surveyor was to avail a report on the interpretation of the survey plan and position on the ground.
8. The court record also indicates that on 2nd April 2019, the court conducted a second site visit and prepared a second site visit report. The report is as follows:-

“Observation at the scene

 1. The safaricom mast is on the plaintiff's claimed plot;
 2. The defendant claims the same plot but calls it by a different number;
 3. The plot is between two National Housing Corporation blocks;
 4. The safaricom mast is on the western side of the plot alongside the road entering GK prison, Kabarnet.”
9. After conducting the two site visits, the court retreated to open court and took the evidence of the parties and their witnesses.
10. Upon considering the totality of the evidence adduced by the parties, the trial court entered judgment in favour of the plaintiff and dismissed the defendant's defence and counterclaim.
11. Aggrieved by the decision of the trial court, the defendant appealed to this court on the grounds that the learned trial magistrate erred by:-
 1. Failing to appreciate that in cases that need ascertainment of boundaries on the ground, expert reports from the Land Registrar and the County Surveyor are mandatory;
 2. Failing to appreciate the importance of the expert report-surveyor's report dated 23rd March 2015;
 3. Relying on the site visit observations of 2nd April, 2019 made by her predecessor in the absence of an expert (surveyor) during the site visit;



4. Failing to appreciate that the site visit of 24th February 2015 was not conclusive or satisfactory to both parties hence there was need for another site visit which was never done until the close of the case by the parties;
 5. Failing to properly evaluate the evidence presented by all the witnesses.
 6. Failing to give reasons as to why she decided to disregard the surveyor's report (opinion), the only expert report in the case which was properly produced and admitted in evidence;
 7. Finding that the appellant failed to produce the letter dated 13th May 2012 in evidence whereas the same was produced on 3rd February 2023 by the Appellant;
 8. Failing to appreciate that the surveyor's report dated 23rd March 2015 and produced in evidence by DW2 is more than an expert opinion because it was dependent on other factors like PDP and Survey Plans which were admitted in evidence with concurrence acceptance of both parties;
 9. Failing to appreciate that without the input of the experts i.e the recommendation of the Land Registrar and the report by the area surveyor respectively the court lacked jurisdiction to entertain the matter touching on the boundaries of plot No. 471 and 475 Kabarnet Municipality in line with the provisions of section 18 of the *Land Registration Act*.
 10. Failing to appreciate that as of 19th November 1998, Avenue Butchery did not exist as a legal entity hence had no power to be allocated land/plot by the Commissioner of Lands; the allocation of land to it on 19th November 1998 was irregular and/or illegal;
 11. Failing to appreciate that as of 5th July 2018, Avenue Butchery was incorporated as a limited liability company hence a legal entity with powers to sue and be sued yet the respondent's pleadings were never amended to reflect that fact making the plaintiff's pleadings at variance with the ownership documents for plot No. 5 or parcel No. 471 Kabarnet Municipality.
 12. Failing to appreciate that upon registration of Avenue Butchery as a limited liability company it was mandatory for PW1 (director) and the advocates on record to be procured through a resolution of the directors or shareholders before they could represent the company in court.
 13. Making a conflicting finding on the appellant's allotment letter, that the PDP giving rise to plot No. 6 Ref No. RB328.01.21 is doubtful or not authentic whereas she concluded that the appellant is the owner of the same plot, plot No. 475 Kabarnet Municipality;
 14. Failing to disallow PW2 from producing the Town Planning Committee minutes (plaintiff's exhibit No.6).
12. The appellant also contends that the learned trial magistrate was biased against him.
 13. Pursuant to directions given on 21st May 2024, the appeal was disposed off by way of written submissions.

Appellant's Submissions

14. In his submissions dated 26th June 2024, the appellant gives an overview of the parties pleaded cases and the evidence adduced in support thereof and identifies the following as the issues for the court's determination:-
 - a. Whether the lower court had jurisdiction to hear and determine the suit presented before it?



- b. Whether Avenue Butchery had capacity to own land before it was incorporated as a body corporate?
 - c. Whether failure by the plaintiff to change his pleadings to reflect the new status of Avenue Butchery after incorporation amounted to departure from the plaintiff's pleaded case;
 - d. The authenticity of PDP attached to the appellant's letter of allotment;
 - e. Whether the learned trial court erred by departing from the opinion of the surveyor concerning the location of the safaricom mast;
 - f. Whether the trial court failed to evaluate the entire evidence as required by law.
15. On whether the trial court had jurisdiction to hear and determine the issue presented before it, it is contended that the suit preferred before the lower court was for determination of the boundary between Plot No. 5/471 and 6/475. Based on the provisions of section 18 of the [Land Registration Act 2012](#), it is submitted that the entire trial in the lower court was premature and a nullity.
 16. The appellant points out that the respondent's letter of allotment, dated 19th November, 1998 was issued to Avenue Butchery, a business name; and based on the decisions of [Karathe Kiarie & 2 others vs Administrators of the Estate of John Wallace Mathare \(deceased\) & 5 others](#) (2013) eKLR; [Thome Dynamics Ltd & another vs. Nzioka & 12 others; County Government of Nairobi & another \(Interested Party\)](#) (2024) KEELC 3258 KLR Neutral Citation (2024) KEELC 3258 KLR submits that as at 19th November, 1998, Avenue Butchery was incapable of being allocated plot No. 5/471 as it was a none existent entity.
 17. It is the appellant's case that issuance of an allotment letter to Avenue Butchey, an unregistered entity, was tainted with irregularities and illegalities hence null and void ab initio.
 18. The appellant pointed out that Avenue Butchery was incorporated into a limited liability company on 5th July 2018, during the pendency of the suit and contends that the suit ought to have been amended to accord with the changed status of the allottee of plot No.5/471, Avenue Butchery.
 19. Because at the time the case was heard, the ownership of plot number 5/471 had changed from Avenue Butchery to Avenue Butchery Ltd. The appellant submits that the proceedings conducted after Avenue Butchery was incorporated, without amending the pleadings to accord to the changed status of Avenue Butchery Limited, were a nullity as they were conducted without the real plaintiff.
 20. Based on the decision in [Affordable Homes Africa Ltd vs. Henderson & 2 others](#) (2004) eKLR and [East African Portland Cement Ltd vs. Capital Markets Authority & 4 others](#) (2014) eKLR, the appellant submits that upon incorporation of the business name, Avenue Butchery to Avenue Butchery Limited, there was need for the company to pass a resolution authorizing the plaintiff (PW 1) and the firm of M/s M.K Chebii & Co. Advocates and M/s Chepkilot, Kiptoo & Co. Advocates to represent it.
 21. On authenticity of the PDP attached/referenced in the appellant's allotment letter, the appellant refers to the decision of the trial court to the effect that there was disconnect between the allotment letter and the PDP and submits that the learned trial court failed to consider the explanation given by the Surveyor, D.W.2 concerning how the disparity is resolved.
 22. Concerning the disparity in the appellant's allotment letter and the PDP referenced, the appellant further submits that the allotment letter issued to him was not an issue for determination by the court as ownership of plot No. 6/475 was not in dispute. According to the appellant, evidence of the Land



- Registrar was required to clarify whether or not the disparity in the appellant's PDP was an excusable error.
23. The learned trial magistrate is said to have condemned the appellant without ascertaining the genuinity or otherwise of the PDP in question and without evidence of the relevant experts, Land Registrar and Surveyor.
 24. On whether the learned trial court erred by departing from the opinion of the surveyor, the appellant contends that the learned trial magistrate departed from the expert opinion of the Surveyor without cogent and sound reasons. The appellant points out that the surveyor's report was produced without objection and based on the decision in the case of *Kimatu Mbuvi vs. Augustine Munyao Kioko* (2001) eKLR, maintains that the learned trial magistrate erred by departing from the opinion of the surveyor, which was in his favour.
 25. As to whether the learned trial magistrate evaluated the entire evidence on record as required by law, it is submitted that she did not. In that regard, it is contended that the trial magistrate failed to adress herself to the question as to whether the court had jurisdiction to hear and determine the suit presented before it yet the defendant had in his pleadings denied the court's jurisdiction. The appellant maintains that the issue before the lower court was on determination of a boundary dispute, which issue the court had no jurisdiction to hear and determine.
 26. The appellant takes issue with production of the minutes of the Town Planning Committee by Dominic Kiprop Chelelgo, PW 2. In that regard the appellant submits that the learned trial magistrate erred by overuling his objection to production of the minutes by PW 2. The appellant faults the decision of the learned trial court allowing PW 2 to produce the minutes in question yet was neither the maker, nor the custodian of the minutes. However, the appellant acknowledges that PW 2 was in attendance in the meeting where the minutes were taken.
 27. According to the appellant, the minutes ought to have been produced by the Chairman of the Town Planning Committee, Mr. Henry Cherogony or the Town Clerk. It is the appellant's case that the respondent failed to lay a basis for production of the minutes by PW 2.
 28. Arguing that it is highly possible that the trial court might have not found in favour of the plaintiff/respondent if the minutes were not admitted in evidence, the appellant faults the trial court for allowing production of the minutes in evidence by PW 2.
 29. On the authenticity of the PDP attached to the appellant's allotment letter, the appellant submits that the trial magistrate erred by concluding that it was contradictory without taking into account the explanation offered by the Surveyor, DW 2. The appellant also asserts his contention that the learned trial magistrate erred by departing from the report of the Surveyor without cogent reasons for doing so.

Respondent's Submissions

30. In his submissions dated 1st June 2024, the plaintiff/respondent submits that the learned trial magistrate did not err by allowing the case in his favour and dismissing the appellant's Defence and Counterclaim. In that regard, the plaintiff/respondent submits that the learned trial magistrate considered evidence from all the witnesses and documentary evidence provided.
31. The plaintiff/respondent points out that the appellant produced a letter of allotment which did not match with the details captured in the PDP used to allocate the land to defendant/appellant. Based on



the case of *African Line Transport Co. Ltd v the Hon Attorney General* (2007) eKLR it underscores the importance of a PDP in land allocation. In that case the Court stated:-

“ A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey who undertake the surveying. Once the surveying is complete, it is referred to the Director of Survey for authentication and approval. Thereafter a Land Reference Number is issued in respect of the plot..”

32. Concerning the appellant’s contention that plot No.5/471 was issued to a none existent entity; and the appellant’s contention that the plaintiff’s pleadings ought to have been amended to reflect the new status of Avenue Butchery after the firm was incorporated into a limited liability company, the respondent submits that it was not in dispute who owned plot No. 5/471 hence the issue of allotment of the plot to the respondent or his firm or company was not a matter for determination before the lower court.
33. According to the respondent, the dispute before the court was whether the plaintiff and/or his licensee, Safaricom Limited had encroached on the appellant parcel of land, plot No.6/475.

Analysis and Determination

34. In exercise of the duty vested in this court as a first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard see *Selle & Another vs. Associated Motor Boat Co. Ltd* (1968) EA 123 and *Mwanasokoni vs. Kenya Bus Service Ltd* (1982-88) 1 KAR and *Kiruga vs. Kiruga & Another* (1988) KLR 348.
35. A review of the pleadings filed in the lower court shows that the dispute preferred before the lower court was on ownership of plot No. 5 also known plot number 471 and plot No.6 also known as plot no 475, both situated in Kabarnet Municipality.
36. Plot number 5 is in the name of Avenue Butchery, the plaintiff’s business name, while plot number 6 is in the name of the defendant.
37. The dispute presented in court particularly concerns the identification of which plot a Safaricom mast is erected. Is it on the plaintiff’s parcel of land-plot No.5/471 or the defendant’s parcel-plot No.6/475.
38. Whilst, the plaintiff’s allotment letter was issued to Avenue Butchery, the plaintiff’s business name, it is noted that the issue of irregularity or illegality in issuance of the plot to Avenue Butchery was never raised in the pleadings before the lower court and was not one of the issues presented before the lower court for determination. That being the case, I find and hold that it cannot be taken up as a ground of appeal as the appellant has done. The same holding applies to the contention that the plaintiff ought to have changed his pleadings to reflect the changed character of his business, Avenue Butchery to Avenue Butchery Limited. The legal character of the plaintiff was never taken up as an issue for determination by the lower court. It cannot be taken up as an issue on appeal as it would be tantamount to departing from the parties pleaded case on appeal.
39. Arising from the foregoing determination, I also find and hold that the contention by the appellant that a resolution of the company was required to authorize PW 1 to testify on behalf of the company and to authorize the plaintiff’s advocates to act on behalf of the company cannot be taken up in appeal as it does not flow from the parties pleaded case and/or a determination of the lower court.



40. As pointed out above, the issue presented before the court for determination was whether or not the Safaricom communication mast erected pursuant to a lease executed between Safaricom Ltd and the plaintiff was on the plaintiff's plot, plot No.5 or 471 or on the defendant's plot No.6/475.
41. Whereas determination of that issue required expert evidence from the land Surveyor and/or the Land Registrar, I do not agree with the appellant's claim that the dispute was exclusively a boundary dispute that required to be determined by the Land Registrar under section 18 of the [Land Registration Act](#). In arriving at that decision I have been persuaded by the decision in the case of [James Anali Alary v. John A.A Ikokonyi](#) (2022) eKLR where the court observed:-
- “This case is presented as seeking orders for rectification of the boundary dispute but in my opinion and i so hold that it is a claim for land “illegally” occupied by the defendant hence the orders as prayed cannot issue.”
42. I have also been persuaded by the decision in the case of [Munyalu v. Musyoka](#) (Environment and Land Appeal 19 of 2021)(2022) KEELC 3247 (KLR) 26 July 2022 (Judgment) where the court held:-
- “ELC is not completely divested by the provisions of the [Land Registration Act](#) especially where the issue in dispute are not confined to ascertainment of boundaries alone but as in this case involves compensation for trespass and special damages for damages and destruction to vegetation and continued farming and planting on the disputed portion of land”.
43. On whether the trial court was justified in departing from the opinion of the surveyor, it is noteworthy that the court is not bound to accept the opinion of an expert. In that regard, see the case of [Shah and another vs. Shah and others](#) (2003) 1 EA 290 where it was held:-
- “the opinion of the expert is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so”.
44. Similar holding was arrived at in the case of [Parvin Singh Dhalay vs. Republic](#) (1997) eKLR where it was held:-
- “it is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so...”
45. In the circumstances of this case, the trial court is faulted for rejecting the opinion of the surveyor to the effect that the Safaricom mast, which forms the borne of contention in the suit hereto, is constructed on the defendant's plot No. 6/475 and not plot No.5/471 belonging to the plaintiff/respondent.
46. I have carefully read and considered the report of the Surveyor tendered in evidence alongside the totality of the evidence adduced in the lower court. I note that the Surveyor did not provide any basis for determining that the mast is erected on the defendant's parcel. For instance, he did not take any measurements on the ground which could form the basis of his determination. In his testimony before court, the Surveyor informed the court that the plaintiff's plot is situated in a place occupied by National Housing Corporation which account, based on the totality of the evidence adduced before



it, the lower court found to be unbelievable. The trial court also found disparities in the defendant's letters of allotment and the PDPs in respect thereof.

47. Whilst the disparities in the defendant's documents relied on to prove his entitlement had a bearing on the case, the defendant did not offer acceptable explanation on those disparities. Instead he informed the court the disparities once noted, should be reported to the Commissioner of Lands for clarification. He also contends that the evidence of Land Registrar was required to determine whether or not the disparity was a mere error. That was not done. There was no evidence tendered before the court that the disparities flagged out were mere errors.
48. The trial court, was upon consideration of the totality of the evidence adduced before it, satisfied that the mast in question is erected in the plaintiff's/respondent's parcel of land.
49. Having carefully reviewed the totality of the evidence adduced in the lower court and the explanation offered by the lower court as to why it rejected the opinion of the surveyor, I find and hold that the defendant/appellant has not made up a case for interference with the decision of the lower court.
50. The upshot of the foregoing is that I find the appeal to be lacking in merits and I dismiss it with costs to the plaintiff/respondent.
12. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KABARNET THIS 18TH DAY OF JULY 2024

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:

Mr. Chepngoswo holding brief for Mr. Mwaita for the Appellant.

Mr. Chepkilot for the Respondent.

Court Assistant: Ian.

