



REPUBLIC OF KENYA



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Ohingo v Carmelini Nchoki Tado t/a Temudo School (Environment and Land Appeal E001 of 2022) [2025] KEELC 638 (KLR) (17 February 2025) (Judgment)

Neutral citation: [2025] KEELC 638 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E001 OF 2022
SO OKONG'O, J
FEBRUARY 17, 2025**

BETWEEN

EDWINA MONICAH OHINGO APPELLANT

AND

CARMELINI NCHOKI TADO T/A TEMUDO SCHOOL RESPONDENT

(Being an Appeal from the judgment and decree of the Hon. W.K. ONKUNYA SRM delivered at Kisumu on 14th December 2021 in Kisumu CMELC No. 71 of 2019)

JUDGMENT

Background

1. This appeal challenges the judgment delivered by Hon. W.K. Onkunya SRM on 14th December 2021 in Kisumu CMELC No. 71 of 2019 (hereinafter referred to as “the lower court”). The Appellant instituted the lower court suit against the Respondent through a plaint dated 11th June 2019. The Appellant averred that at all material times, her deceased husband, Solomon Wadoyi Ohingo was and still is the registered owner of the parcels of land known as Kisumu/Konya/4760, Kisumu/Konya/4761 and Kisumu/Konya/4762 (hereinafter referred to as “the suit properties”) situated at Konya within Kisumu County in the Republic of Kenya.
2. The Appellant averred that her deceased husband bought the suit properties sometimes in 1997. The Appellant averred that she was the widow and the administratrix of the estate of her deceased husband. The Appellant averred that the Respondent erected a fence along the suit properties and by so doing encroached and/or trespassed on the said parcels of land that rightfully belonged to the Appellant. The Appellant averred that the Respondent had not only encroached and trespassed on the suit properties but had also gone ahead to construct and/or erect structures on the suit properties.
3. The Appellant averred that she did not sell any portion of the suit properties to the Respondent and therefore the Respondent was a trespasser on land that rightfully belonged to her. The Appellant



sought judgment against the Respondent for; an order of permanent injunction restraining the Respondent, her servants, agents, workers, proxies, representatives and/or any other person acting with her authority from carrying out any construction or trespassing or encroaching on the suit properties, an order of eviction and costs of the suit together with interest.

4. The Respondent filed a statement of defence dated 7th June 2019 on 9th August 2019. The Respondent denied the allegations made against her in the plaint. The Respondent contended that the construction that she was undertaking was being carried out on the parcel of land known as Kisumu/Konya/3433 which was a subdivision of Kisumu/Konya/3334 which came from the original (parent) land parcel known as Kisumu/Konya/2670 which belonged to one, William Okal Obwoga.
5. The Respondent averred that the suit properties owned by the Appellant were subdivisions of the original parcel of land known as Kisumu/Konya/2671 which was in Kisumu Konya Registry Index Map Sheet No. 10 and was originally owned by Somaia Rajnikant Kasandas and Balwri S.J.S. Sambi. The Respondent averred that the original land parcel Kisumu/Konya/2670 from which land parcel Kisumu/Konya/3433 owned by the Respondent originated was in Kisumu Konya Registry Index Map Sheet No. 7.
6. The Respondent averred that the Appellant's suit was misplaced as the Appellant's parcels of land (the suit properties) did not share a boundary with the Respondent's parcel of land hence the issue of trespass could not arise. The Respondent averred that a joint survey by the Appellant's and the Respondent's surveyors confirmed that the Appellant's and the Respondent's parcels of land were not adjacent to each other and that the construction that was being undertaken by the Respondent was not on the suit properties. The Respondent prayed that the suit be dismissed with costs and the Appellant be ordered to compensate the Respondent for the damage to the building materials that was occasioned by the suit.
7. The lower court heard the parties and their witnesses. In a judgment delivered on 14th December 2021, the lower court found that the suit properties owned by the Appellant originated from land parcel Kisumu/Konya/2670 which was on Kisumu Konya Registry Index Map Sheet No. 10 while the Respondent's land parcel Kisumu/Konya/3433 originated from land parcel Kisumu/Konya/2670 which was on Kisumu Konya Registry Index Map Sheet No. 7. The court held that the suit properties and the parcel of land owned by the Respondent were separate and distinct from each other. The court held that the Appellant had not demonstrated on a balance of probabilities that the Respondent had trespassed on the suit properties. The court held that the Appellant had not demonstrated that her rights had been infringed by the Respondent to call for an explanation from the Respondent. The lower court found that the Appellant was not entitled to the reliefs sought in the plaint. The lower court dismissed the Appellant's suit with costs to the Respondent.

The appeal

7. The Appellant was aggrieved by the decision of the lower court and preferred the present appeal. In its Memorandum of Appeal dated 14th January 2022, the Appellant challenged the lower court's judgment on the following grounds;
 1. That the learned magistrate erred in law and fact in delivering the judgment while she was not in full possession of all the information that was necessary in aiding her render the judgment.
 2. That the learned Magistrate erred in fact and law in relying on an inconclusive report that failed to adhere to the court orders that she had issued on 21st April 2021.



3. That the learned Magistrate erred in law and fact by failing to resolve the question that the Appellant had raised and wanted resolved.
 4. That the learned Magistrate erred in law and fact in rendering a judgment yet the land registrar had not written and produced his report; that by the land registrar failing to produce a report and opinion on the complaint raised, to establish whether the Respondent had trespassed or encroached on the land by constructing on it and occupying it.
 5. That the learned Magistrate erred in law and fact in addressing and pronouncing a judgment in favour of the Respondent because even if the court were to go by the county surveyor's report that was provided without the court order, the balance of probabilities still lay heavily in favour of the Appellant, for it was very clear from the county surveyor's report that the Appellant held titles for the suit properties that had been trespassed and/or encroached onto by the Respondent.
 6. That the learned Magistrate erred in law and fact in neglecting to address the question of the boundaries of each parcel of land yet during the site visit it was clear that there were no established boundaries that would have then helped the court to resolve the question of encroachment and eviction on each parcel of land and to what extent the encroachment had occurred.
 7. That the learned Magistrate further erred in law and fact in overlooking the intention of the site visit which was to determine the ownership of the structures that were erected on the suit properties found on Map Sheet No.10.
 8. That the learned Magistrate erred in law and fact in considering a report that was filed which was inconclusive and did not specifically highlight the area where the Respondent was occupying therefore trespassing and/or encroaching on the map sheets hence the same failed to resolve the question of encroachment and the magnitude of the encroachment in meters.
 9. That the learned Magistrate erred in law and fact when the report that was tabled before her failed to demonstrate the acreage of each parcel of land and where each acreage was located which would then have guided her in delivering a just and conclusive judgment.
 10. That the learned magistrate erred in law and fact in failing to consider that the ground should conform with the title for the court to determine the issue of encroachment.
8. The Appellant prayed that the appeal be allowed, the judgment dated 14th December 2021 delivered in Kisumu CMELC No. 71 of 2019 be set aside and the Respondent be ordered to remove or pull down any structures erected on the suit properties, that in the alternative, the land registrar and the district surveyor be ordered to conduct a re-survey of the parcels of land in question being Kisumu Konya /4760, 4761, 4762, 5499 and 5500 with a view to establishing the boundaries of the said parcels of land and further establishing ownership of the structures on each parcel. The Appellant also prayed for the costs of this appeal.

The submissions

9. This court directed that the appeal be argued by way of written submissions. The parties complied with the court's directions and filed their submissions. The Appellant filed submissions dated 18th April 2024 in which the Appellant abandoned grounds 1, 2, 4, 6, 8, 9 and 10 of appeal and argued grounds 3, 5 and 7. The Respondent filed submissions dated 4th March 2024.



Analysis and determination

10. I have considered the pleadings filed in the lower court, the evidence that was tendered, and the judgment of the court. I have also considered the grounds of appeal put forward against the judgment and the submissions by the advocates for the parties. I am of the view that the only issue arising for determination in this appeal is whether the lower court erred in its finding that the Appellant had failed to prove on a balance of probabilities that the Respondent had trespassed or encroached on the suit properties owned by her deceased husband.
11. This being a first appeal, the court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions although it has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified before the lower court. See, *Verani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd* [2004] 2 KLR 269 and *Selle v. Associated Motor Boat Co. Ltd.* [1968] E.A 123 on the duty of the first appellate court. An appellate court will however not ordinarily interfere with the findings of fact by the trial court unless they were not based on evidence at all, or on misapprehension of the evidence or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, *Peter v. Sunday Post Ltd.* [1958] E.A 424 and *Makube v. Nyamuro*[1983] KLR 403.
12. I have carefully reviewed the case that was presented before the lower court by the Appellant against the Respondent, the defence filed by the Respondent and the evidence that was tendered before the court. I am unable to fault the lower court's judgment. In *Kurshed Begum Mirza v. Jackson Kaibunga* [2017] eKLR, the court stated as follows:
 - (16) Turning to the second issue; according to section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.
13. The Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:
 - “13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.
 14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.” (emphasis added)
14. In *Miller v. Minister of Pensions* [1947] 2 All ER 372, Lord Denning J. stated that:

Thus proof on a balance of preponderance or probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained”.
15. The burden was on the Appellant to prove that the Respondent had encroached on the suit properties and put up structures thereon. The Respondent denied the claim. The Respondent claimed that her construction works were being carried out on land parcel Kisumu/Konya/3433. The Respondent



contended that the suit properties were subdivisions of the original land parcel Kisumu/Konya/2671 while her land parcel Kisumu/Konya 3433 originated from the subdivisions of the original land parcel Kisumu/Konya/2670. The respondent averred that the suit properties and land parcel Kisumu/Konya 3433 were in different Kisumu Konya Registry Index Map Sheets and as such did not share a boundary that could give rise to the alleged encroachment on the suit properties. The Respondent averred that while the suit properties were on Kisumu Konya Registry Index Map Sheet No. 10, land parcel Kisumu/Konya No. 3433 occupied by the Respondent was on Kisumu Konya Registry Index Map Sheet No. 7.

16. The lower court took evidence in court and proceeded to the site where it also took some evidence. The court was not satisfied with the evidence that it obtained at the site. On 26th August 2019, the lower court ordered the County Land Registrar and County Surveyor to visit the disputed parcels of land namely, Kisumu/Konya/2670 and Kisumu/Konya/2671 and carry out a ground survey in order to determine in which diagram sheet the parcels of land fell and where the suit properties fell with respect to Kisumu/Konya/2670 and file a report within 30 days. Pursuant to the said order, the Nyanza Region Regional Surveyor filed a report of the site visit in court under cover of a letter dated 19th May 2021. His findings were that land parcel Kisumu/Konya/2670 had been subdivided into land parcels Kisumu /Konya/ 3344, 3345 and 3346. Land parcel Kisumu/Konya/3344 had been divided into land parcels Kisumu/Konya/3433,3434 and 3435 which fell on Kisumu Konya Registry Index Map Sheet No.7. He also found that land parcel No. Kisumu/Konya/2671 had been subdivided into Kisumu / Konya /4758, 4759, 4760, 4761 and 4762 which were all on Kisumu Konya Registry Index Map Sheet No. 10.
17. The Appellant failed to produce evidence showing that the construction works that the Respondent was undertaking on land parcel Kisumu/Konya 3433 which was on Kisumu Konya Registry Index Map Sheet No.7 had encroached or spilled over to the suit properties which were on Kisumu Konya Registry Index Map Sheet No.10. There was nothing in the notes that the court took at the site that suggested that the Respondent's construction was being undertaken on the suit properties. The evidence given by the surveyors and the area residents at the site was not useful at all. The exhibits produced by the Appellant were of no assistance either. They supported the Respondent's case that the suit properties and the parcel of land on which the Respondent was carrying out construction were on different Kisumu Konya Registry Index Map sheets. There was no evidence that there was an overlap of one Kisumu Konya Registry Index Map Sheet over the other. The court was justified in relying on the report by Nyanza Region Regional Surveyor forwarded to the court under cover of a letter dated 19th May 2021 on the issue of the location of the suit properties and land parcel Kisumu/Konya/5499(subdivision of Kisumu/Konya/3433) that the Respondent occupied. The evidence produced by the Respondent showed that the suit properties and land parcel Kisumu/ Konya/3433 that gave rise to land parcel Kisumu/ Konya/5499 occupied by the Respondent were separate and distinct parcels of land and in fact, there was a road of access between the said parcels of land. I agree with the lower court that from the totality of the evidence that was before the court, the Appellant failed to prove that the Respondent had encroached on the suit properties. The Appellant was therefore not entitled to the reliefs she sought in the lower court. The Appellant's suit was properly dismissed. The Appellant had urged this court to consider making an order for a re-survey of the disputed parcels of land. First, no explanation was given as to why that mode of settlement of the dispute was not adopted in the first place. Secondly, the Appellant does not require an order from the court to carry out a re-survey of her parcel land.



Conclusion

18. In the final analysis, I find no merit in the Appellant's appeal. The appeal is dismissed with costs to the Respondent.

DELIVERED AND SIGNED AT KISUMU ON THIS 17TH DAY OF FEBRUARY 2025

S. OKONG'O

JUDGE

Judgment delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Nyanga for the Appellant

Ms. Anyango h/b for Mr. Yogo for the Respondent

Ms. J.Omondi-Court Assistant

