



**Yamo v Yamo (Environment and Land Appeal E022 of 2023)
[2024] KEELC 7540 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7540 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E022 OF 2023
AY KOROSS, J
NOVEMBER 14, 2024**

BETWEEN

WYCLIFF YAMO YAMO APPELLANT

AND

KENNETH OKUMU YAMO RESPONDENT

*(Being an appeal from the judgment of PM Hon L.N.Sarapai
delivered on 24/11/2023 in Ukwala PM ELC Case No. 21 of 2019)*

JUDGMENT

Background of the appeal

1. In the lower court, the appellant was the plaintiff and the respondent the defendant. The parties are siblings and the parcel of land in dispute is land parcel no. Uholo/Sigomere/2992 (suit property) registered in the appellant's name but allegedly trespassed by the respondent.
2. In a plaint dated 10/06/2019, the appellant pleaded that in 2015, the respondent trespassed onto the suit property by cultivating on it and putting up a structure therein thus interfering with his quiet occupation. He therefore sought the following reliefs from the trial court: -
 - a. Permanent injunction against the respondent and his agents restraining them from interfering with the suit property.
 - b. Mandatory injunction against the respondent and his agents for them to render vacant possession of the suit property.
 - c. Costs of the suit.
3. By a defence dated 12/07/2019, the respondent vehemently denied the averments contained in the plaint, averred he was a stranger to the appellant's claim, and stated he occupied land parcel no. Uholo/



Sigomere/2798 (2798) which was adjacent to the suit property. He urged the trial court to dismiss the appellant's claim.

4. The matter proceeded to a hearing and the appellant testified as PW1 and his evidence was led by 2 witnesses. The respondent also testified as DW1 and called 2 witnesses.
5. In the course of the proceedings and by consent of the parties, an order was issued on 23/08/ 2019 for the land registrar and district surveyor of the Ugenya/Ugunja sub-county to visit the suit property and determine the boundaries and file a report. This report was filed on 11/09/2019 and it was adopted on 22/10/2019. After hearing the parties and their witnesses, a site visit was conducted on 12/05/2023.
6. The matter was thereafter reserved for judgment. In the impugned judgment, the learned trial magistrate was not persuaded the appellant had proved his case on a balance of probabilities and found the appellant's conduct wanting. In verbatim, the learned trial magistrate issued the following disposal orders: -
 - a. The plaintiff's suit is dismissed with costs to the defendants and interests at the rates of.
 - b. After scene visit of the parcel 2992 and the surrounding parcels born of all prior and original parcels of land in the names of Ibrahim Omaro Yamo be done as per index marks dating back to 2004 and
 - c. The costs of resume be jointly borne by the parties herein.
 - d. The plaintiff be thereafter render vacant possession or be evicted form the portion he has encroached and allow the defendant to enjoin the half of their parcels former homestead and upon which person which portion the defendant son's house still stands.
 - e. The defendant is ordered the costs of the suit and interest thereon at court rates for the date of this judgment.

Appeal to this court

7. This decision did not augur well with the appellant and he preferred an appeal before this court. The appellant filed his memorandum of appeal dated 18/12/2023 in which he raised the following 4 grounds of appeal which faulted the learned trial magistrate: -
 - a. Without jurisdiction, the learned trial magistrate erred in law and fact in usurping the powers of the land registrar and surveyor by personally determining the boundaries between the parties.
 - b. The learned trial magistrate erred in law and fact in deciding as she did, against the weight of evidence.
 - c. The learned trial magistrate erred in law and fact by issuing orders not sought by the parties, particularly by reverting land to a deceased person's name.
 - d. The learned trial magistrate erred in law and fact by relying on extraneous matters.
8. Accordingly, the appellant implored this court to allow the appeal, set aside the impugned judgment in its entirety, and dismiss the respondent's suit with costs to the appellant.
9. In the alternative, the land registrar and county surveyor determine the boundary dispute and file a report in court for purposes of adoption. He also prayed for the costs of the appeal.



Submissions.

10. As directed by the court, the appeal was canvassed by written submissions. The appellant's law firm on record M/s. D.K. Nabulindo & Co. Advocates filed written submissions dated 30/05/2024. In them, the appellant's counsel addressed all the grounds of appeal. Nonetheless, the respondent did not file any submissions.
11. Upon identifying and considering the issues for determination, this court will in its analysis and determination consider the appellant's submissions on the particular issue and also consider provisions of the law and judicial precedents his counsel relied upon to advance the arguments.

Issues for determination

12. Being a 1st appeal, the power of this court is set out in Order 42 Rule 32 of the Civil Procedure Rules. Being steered by the principles enunciated in the well-cited case of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, this court will not interfere with the impugned judgment save this court satisfies itself the learned trial magistrate misdirected herself and thus arrived at an erroneous decision, undoubtedly exercised her discretion wrongly and occasioned injustice by such erroneous exercise.
13. Turning to the matter at hand, I have carefully considered the records, appellant's submissions, provisions of law relied upon, and judicial precedents cited. This court has condensed the grounds of appeal into the following: -
 - a. Whether the learned trial magistrate erred in relying on her site visit and extraneous factors in arriving at her decision.
 - b. Whether the learned trial magistrate erred in not finding the respondent was a trespasser.
 - c. Whether the learned trial magistrate erred in granting orders not sought by the parties.
 - d. What orders should be issued?

Analysis and Determination

14. The issues that have earlier been identified as arising for determination shall be considered consecutively.
 - a. Whether the learned trial magistrate erred in relying on her site visit and extraneous factors in arriving at her decision.
15. Order 18 Rule 11 of the Civil Procedure Rules empowers courts to conduct site visits. This provision of law states as follows: -

“The court may at any stage of a suit inspect any property or thing concerning which any question may arise.”
16. The Court of Appeal decision of *Sojanm Springfields Limited v Githinji & 4 others* [2024] KECA 953 (KLR) adopted site visit principles that were established by the Tanzania Court of Appeal in *Kimomidimitri Mantheakis v Ally Azim Dewji & others* (Civil Appeal No 4 of 2018) [2021] TZCA 663 (3 November 2021) (Korosso, Kwariko, Mugasha, JJ.A.) which consolidated the guiding principles thus:-

“In the light of the cited decisions, for the visit of the locus in quo to be meaningful, it is instructive for the trial Judge or Magistrate to: one, ensure that all parties, their witnesses,



and advocates (if any) are present. Two, allow the parties and their witnesses to adduce evidence on oath at the locus in quo; three, allow cross-examination by either party, or his counsel, four, record all the proceedings at the locus in quo; and five record any observation, view, opinion or conclusion of the court including drawing a sketch plan if necessary which must be made known to the parties and advocates, if any.”

17. From the record, it is apparent during the site visit of 12/05/2023, both parties and their learned counsels were present. The trial magistrate disclosed to them the purpose of the visit which was to verify the testimonies of the parties on the claim of trespass and appreciate the extent of encroachment for purposes of differentiating between “the historical natural boundary and the one claimed by the plaintiff and the one indicated in the surveys report”.
18. The learned trial magistrate then made the following observations: -
 - “The court observes the structures, notably the old entirely the homestead planted and the defendants (sic) fence house.”
19. In the impugned judgment, the trial magistrate not only heavily relied on these observations but also other extraneous observations that are not contained in the record such as beacons, a river, and alleged original landmarks.
20. Drawing from *Kimnidimitri (Supra)*, I must conclude the learned trial magistrate fell in grave error in the manner in which she conducted the site visit as it fell into the risk of unfairness and prejudice as evidenced by the grounds of appeal and impugned judgment.
21. Significantly, a site visit is usually a hearing locus in quo yet in this case, the parties had already testified and closed their cases. They were not recalled or cross-examined during the site visit. In other words, they were not given a chance to adduce evidence.
22. Further, the disparity between the observation report and the impugned judgment is obvious. The only logical conclusion this court arrives at is that the learned trial magistrate inadvertently failed to record all her observations, opinions, and deductions or make known to the parties the report that emanated from the site visit. As a result, I find this ground of appeal merited.
23. In the end and just as the Court of Appeal decision of *Kenya Bureau of Standards v Kwale International Sugar Company Limited & 4 others [2022] KECA 937 (KLR)*, I must find that the site visit adopted by the learned trial magistrate was tainted with unfairness and prejudice.
24. Therefore, all procedures followed after the site visit were irregular and the impugned judgment cannot stand. In the circumstances, the proceedings before the trial court are nullified and the judgment and decree quashed.
25. This finding disposes the appeal and there is no need to consider grounds (b) and (c) of appeal that either touch on the merits of the appeal or dispositive orders of the trial court.
26. The parties’ respective cases as pleaded before the trial court remain undecided. It is trite law costs follow the event and because of the close relations between the parties, each party shall bear their respective costs. Ultimately and on issue (d) I hereby issue the following disposal orders: -
 - a. The proceedings before the trial court are nullified.
 - b. The judgment and decree are hereby quashed.
 - c. The trial of the case be expedited for hearing before another hon. judicial officer.



d. Each party shall bear their respective costs of the appeal.

Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 14TH DAY OF NOVEMBER 2024.

HON. A. Y. KOROSS

JUDGE

14/11/2024

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

In the Presence of:

Miss Nabalindo for the appellant

Miss Nyambeki for the respondent

Court assistant: Ishmael Orwa

