



REPUBLIC OF KENYA



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**Okeyo v Okoth (Civil Appeal E003 of 2024)**  
**[2024] KEELC 7525 (KLR) (12 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7525 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**  
**CIVIL APPEAL E003 OF 2024**

**BN OLAO, J**

**NOVEMBER 12, 2024**

**BETWEEN**

**FREDRICK OKEYO ..... APPELLANT**

**AND**

**CHARLES OKOTH ..... RESPONDENT**

*(Being an appeal from the Judgment of HON. LUCY AMBASI delivered in BUSIA  
CMC ELC CASE NO E85 OF 2020 on an un-disclosed date in February 2023)*

**JUDGMENT**

1. Charles Okoth (the Respondent herein) was the Plaintiff in the Subordinate Court Busia Chief Magistrate's Court Elc Case No E85 of 2020 wherein he impleaded Fredrick Okeyo (the Appellant herein) seeking judgment in the following terms with respect to the land parcel No South Teso/angoromo/6593 (the suit land) in the following terms:
  - a. A permanent injunction restraining the Appellant either by himself, agents, and/or servants or any of them whosoever from trespassing and continuing to trespass upon the Respondent's land parcel No South Teso/angoromo/6593.
  - b. An order of demolition of the semi-permanent house erected on the suit parcel and eviction of the Appellant.
  - c. Re-erection of the beacons at the cost of the Appellant.
  - d. Any other reliefs that the Honourable Court may deem fit to grant.
  - e. Costs and interests of the suit.
2. The basis of the Respondent's claim was that he is the registered proprietor of the suit land and had discovered on or about 29<sup>th</sup> February 2016 that the Appellant had started encroaching thereon



without his consent. Thereafter, the Appellant started constructing a semi-permanent house on a substantial portion of which was inside the suit land. The Respondent wrote to the Land Registrar Busia registering a land dispute which was determined on 27<sup>th</sup> November 2017 in favour of the Respondent and beacons were placed. However, the Appellant proceeded to up-root and destroy the said beacons thus necessitating the filing of the suit in the subordinate Court.

3. The Appellant filed a defence dated 9<sup>th</sup> October 2020 denying those allegations of trespass on the suit land. He averred that he had constructed his house within the boundaries of his land No South Teso/angoromo/6342 and at no point had he ever interfered with the Respondent's occupation or ownership of the suit land. He denied that the Appellant is entitled to the orders sought but admitted the jurisdiction of the trial Court to determine the dispute.
4. The matter fell for hearing before Hon Lucy Ambasi Chief Magistrate from 27<sup>th</sup> May 2021 upto November 2022. Having heard the Respondent and his witness James Ondima Onyinkwa the County Surveyor Busia as well as the Appellant who was the only witness in support of his case, the trial Magistrate found that the Respondent had proved his case. The trial Magistrate entered judgment in his favour as prayed in the plaint.
5. Aggrieved by that judgment, the Appellant filed an appeal to this Court seeking to set aside the orders of the trial Magistrate and that this Court allows the appeal by dismissing the Respondent's suit with costs.
6. The following five (5) grounds of appeal have been proffered:
  1. That the learned trial Magistrate erred in law and fact in failing to find and hold that the Court lacked jurisdiction to determine the suit before her.
  2. That the learned trial Magistrate erred in law and fact in entertaining a boundary dispute in the absence of a determination thereof by the Land Registrar.
  3. That the learned trial Magistrate erred in law and fact in basing her judgment on a survey report that was not conclusive.
  4. That the learned trial Magistrate erred in law and fact in failing to appreciate the pleadings and evidence adduced before her.
  5. That the learned trial Magistrate erred in law and fact in arriving at findings and a determination against the weight of the evidence before her.
7. The appeal has been canvassed by way of written submissions. These have been filed by Mr F. Omondi instructed by the firm of Omondi & Company Advocates for the Appellant and by Mr Okanda instructed by the firm of Otieno Okanda & Company Advocates for the Respondent.
8. This is a first appeal. My duty is to re-consider and re-evaluate the evidence on record and draw my own conclusions in deciding whether to uphold or set aside the judgment of the trial Court. In doing so, I must remember that unlike the trial Court, I neither saw nor heard the witnesses. I should therefore give due allowance in that regard and give my reasons for the decision which I make. In the case of *Peters -v- Sunday Post Ltd 1958 E.a. 424*, the Court set out that duty in the following terms:

“Whilst an appellate Court has jurisdiction to review the evidence to determine whether the conclusions of the trial Judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed



to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate Court will not hesitate to so decide.”

See *Selle & Another -v- Associated Motor Boat Company Ltd* 1968 E.a. 123 And Also *Mwanasokoni V- Kenya Bus Services* 1985 Klr 931 among other cases.

9. Grounds 1 and 2 of the memorandum of appeal can be considered together. Basically, the trial Magistrate is faulted for exercising jurisdiction which she did not have in the matter and specifically, in entertaining a boundary dispute which is the preserve of the Land Registrar. Jurisdiction is everything and as was held by Nyarangi J.A in the case of *Owners Of The Motor Vessel “lillian S” -v- Caltex Oil (kenya) Limited* 1989 Klr 1, a question of jurisdiction must be raised at the earliest opportunity and without it, the Court has no powers to make one more step and must down its tools. It is true that Section 18(1) and (2) of the *Land Registration Act* donates the power to determine a dispute involving boundaries to the Land Registrar. It reads:

18(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.”

18(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.”

On the issue of jurisdiction, counsel for the Appellant has stated as follows in paragraphs 18 and 20 of his submissions:

18: “On jurisdiction, the Registrar was never called as a witness. No written report from him was made available to the trial Court. There was therefore no evidence that the registrar ever determined the dispute. Indeed even an extract of the register to show that an entry on determination of the boundary was made by the register was not produced.”

20: “In the absence of evidence from the registrar and a report from him, it is our view that it was never proved that the dispute had ever been determined by the Registrar. This is more so given that the Appellant while admitting receipt of the summons aforesaid stated that he was invited to the site on 27<sup>th</sup> and not on 29<sup>th</sup> November 2017”.

On his part, counsel for the Respondent submitted at page 2 of his submissions that:

“The Busia County Surveyor who appeared to testify in favour of the survey report confirmed to Court that indeed he accompanied the Registrar to the site and that the Appellant was personally present. The surveyor further confirmed that the boundary was determined and beacons placed. At that point, the Registrar had satisfied his obligation vide Section 19 of the *Land Registration Act*.”

The respondent’s case was that the Appellant had trespassed onto the suit land and proceeded to move his fence into the plaintiff’s land on 29<sup>th</sup> February 2016. Upon discovering that encroachment, the Respondent lodged a boundary dispute with the Land Registrar Busia which was adjudicated in his favour and beacons were placed but the Appellant started erecting a semi-permanent house on a portion of the suit land after up-rooting and destroying the beacons. That is what is pleaded in paragraphs 4 to 8 of his plaint. In paragraph 3 of his statement dated 16<sup>th</sup> September 2020 and which he adopted as his evidence during the trial, the Respondent states:

“Through a letter dated 2<sup>nd</sup> March 2016, I registered a boundary dispute against the plaintiff at the Registrar of Lands Busia and summons dated 17<sup>th</sup> November 2017 were issued to the



plaintiff for adjudication which was indicated to take place on 27<sup>th</sup> November 2017. The adjudication was then done in my favour and a government surveyor then demarcated the boundaries by placing beacons thereon.”

However, in paragraphs 9 and 10 of his statement the Appellant denied that the boundary had ever been fixed. He says:

- 9: “No surveyor has ever visited the disputed site to demarcate boundary or address the alleged boundary dispute or to erect any beacons.”
- 10: “I am ready and willing to have the boundary dispute resolved by having a proper demarcation done procedurally by the relevant authorities at the plaintiff’s cost.”

Although the Appellant had listed both the Land Registrar and Surveyor as his witnesses, he did not call any of them to testify on his behalf. Instead, it was the respondent who called the surveyor James Ondimu Onyinkwa (pw2) to testify on his behalf and he produced a report dated 15<sup>th</sup> January 2018 as part of the Respondent’s documentary evidence. It reads in so far as is relevant to this issue as follows:

“Re: Surveyor’s Report On Boundary Dispute Between L. N. No S. Teso/angoromo/6593  
And 6342

The above refers.

Also refer to the site visit made in the company of the Land Registrar on 29<sup>th</sup> November 2017 as well as refer to a letter from the Assistant Chief Amerikwai, Sub Location dated 6<sup>th</sup> July 2016.”

It goes on to make the following conclusion and recommendation:

“Conclusion

The boundary was established and the house found to have encroached as indicated above. Also the euphorbia plant line was found planted inside the applicant’s land i.e S. Teso/ Angoromo/6593.”

“Recommendation

It is highly recommended that the parties to the dispute respect the boundary as shown and any emerging issues from the establishment be addressed appropriately by the relevant authorities.”

That report was produced by the respondent during the trial. And when he was cross-examined by Mr Omondi, the surveyor confirmed that the Land Registrar was present and in his evidence in chief, he said the Appellant was present. The report was signed by the surveyor only but as is clear from the first paragraph thereof, the Land Registrar was present when the boundary was established. There is no evidence to suggest that the surveyor had any reason to falsify the report showing that the Land Registrar was present when he was not. That boundary having been established way back in 2017, what transpired thereafter could only be a trespass or encroachment but not a boundary dispute. Trespass is defined as follows in Black’s Law Dictionary 10<sup>th</sup> Edition:

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



It is also instructive to note that the demand letter addressed to the Appellant by the Respondent's counsel is dated 25<sup>th</sup> August 2020 asking him to vacate the suit land. It reads in paragraph 2 as follows:

“That you have encroached onto our client's parcel No S. Teso/angoromo/6593 without his permission, consent and authority by erecting a semi-permanent house on a substantial portion of it and are continuing to dwell in it without any colour of right.”

This further confirms that the boundaries to the suit land had long been established by the time this suit was filed on 17<sup>th</sup> September 2020. The Land Registrar Busia was involved in that exercise as is required by law. Therefore, what happened after that was essentially a claim of trespass to land which was a matter properly within the jurisdiction of the trial Magistrate.

10. Finally, in paragraph 9 of his defence, the Appellant pleaded thus:

9: “Jurisdiction is admitted”

The Appellant cannot approbate and reprobate at the same time. This Court is therefore satisfied that the trial Magistrate was determining a claim of trespass to land whose boundaries had earlier already been determined by the Land Registrar and the complaint about usurpation of jurisdiction is not well founded and can only be an afterthought.

11. Grounds 1 and 2 of the memorandum of appeal are devoid of any merit and are dismissed.

12. In ground NO 3, the trial Magistrate is faulted for basing her judgment on a survey report that was not conclusive. In paragraph 28 of his submissions, counsel for the Appellant states that:

“Lastly, the report itself is insufficient. The very last paragraph of the report states that map sheet 33 did not reflect the actual ground position and could not be relied on for boundary re-establishment. In Court PW2 concluded that the report could not prove encroachment.”

Counsel then goes on to add in paragraph 29 of the submissions as follows:

“In Muranga Elca No 11 Of 2023, James Gitau Ndegea & Another -v- Lydia Waigwe Gichuki, the judge held that without a proper determination, demarcation and fixing of boundaries, it should be improper to order eviction and demolition of any structures. In the instant case it is our view that without evidence from the Registrar and the express admission by PW3 on the inadequacy of map sheet 33, it was unjust to order demolition of the Appellant's house and eviction. The Respondent did not prove encroachment.”

On that issue, counsel for the respondent made the following submission on page 3:

“Evidence has been tendered here confirming that both the Appellant and Respondent as well as owners of adjoining parcels were invited to the boundary dispute hearing by the Registrar and that the boundary was determined and beacons placed. This was confirmed by the plaintiff before the trial Court as well as the County Surveyor.”

As stated earlier in this judgment, the report dated 15<sup>th</sup> January 2018 is clear that both the Land Registrar and surveyor visited the suit land on 29<sup>th</sup> November 2017. The Respondent stated during the hearing in the subordinate Court that he had no notice of the surveyor visit the suit land on 29<sup>th</sup>



November 2017 although he has summoned on 27<sup>th</sup> November 2017 but the Surveyor did not attend, when he was cross-examined by MR OMONDI about the visit to the suit land, the Surveyor said:

“The Land Registrar and I convened the meeting. I have documentary of service on the defendant but he attended the site meeting. No proceedings for 27/11/2017. My report refers to 29/11/2017. It does not mention who attended. I do not have evidence in Court he attended but it is in the proceedings. A map sheet was used NO 33 which is the one for that area. My report states the map sheet did not reflect the actual ground situation. South Teso/Angoromo/6341 mentioned in the report. I do not know if he was present. It had a path not a surveyed road. The path was part of the problem. There was a path on the suit land does not boarder on any land. Owner of 6341 needed be involved if his path was removed it would resolve the problem. E.g. map sheet NO 38 which I did not have on that day. My report would not have been different if I had map sheet NO 38.”

When he was re-examined by Mr. Okanda, the surveyor said:

“The path is on 6342 and does not touch on the disputed land. The defendant had encroached onto the plaintiff’s land. Map 33 was not sufficient to prove encroachment. The defendant was present at the surveyor (sic).”

As is clear from the surveyor’s testimony during the trial, although he did not have map sheet NO 38 during the survey exercise, that would not have made any difference to his report. He was also emphatic that the Appellant was present during the survey exercise. Notwithstanding all the above, the report prepared by the surveyor following an exercise conducted by him and the Land Registrar is emphatic in its conclusion that there was encroachment on the suit land as already stated earlier in this judgment. The Land Registrar and Surveyors are experts. Their evidence as contained in the report dated 15<sup>th</sup> January 2018 is expert evidence and the trial Magistrate accepted it and the finding that the Appellant had encroached onto the suit land as is clear from paragraph 17 of the impugned judgment. As far back as 1995, the Court of Appeal had stated in the case Of Dhalay -v- R 1995-1998 E.A 29 that:

“Where the expert who is properly qualified in his field gives an 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 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

Although the Appellant had also listed the Land Registrar and County Surveyor as his witnesses, he did not call them to controvert the evidence of the Respondent and the County Surveyor. The trial Magistrate was therefore entitled to rely on the report dated 15<sup>th</sup> January 2018 in making the finding which she did that trespass had been established on the part of the Appellant. This Court does not see any reason to depart from that finding which clearly shows that there was conclusive evidence that the Appellant had constructed his house on the suit land.

13. Ground NO 3 is therefore for dismissal.
14. Grounds NO 4 and 5 take issue with the trial Magistrate for failing to appreciate the pleadings and evidence and making a determination against the weight of the evidence before her.
15. As is clear from the pleadings filed in the subordinate Court, the thrust of the Respondent’s case was that the Appellant had trespassed onto the suit land, destroyed the beacons and erected a semi-



permanent building on a portion thereof. All those averments were denied by the Appellant. In paragraphs 24 and 25 of his submissions, counsel for the Appellant has stated thus:

24: “The long and short of it is that the suit before the trial Court was premature. It is trite law that where the law prescribes a dispute resolution mechanism, that mechanism must be followed before Court action. The Court in such circumstances should renounce jurisdiction and down tools. The suit fell short of Section 18(2) aforesaid.”

25: “Even if the Court had jurisdiction, it is our view that the Respondent did not prove his case. The Respondent was bound to prove on a balance of probabilities that the Appellant had trespassed into his land.”

I have looked at the impugned judgment. On the issue of want of jurisdiction by the trial Magistrate to determine the case before her, she addressed that issue at paragraph 18 of her judgment and was satisfied that from the report filed herein, the boundary to the suit land had earlier been determined prior to the encroachment. Then at paragraph 19 the trial Magistrate said:

19: In the circumstances, I respectively differ with the defence submissions that this Court is being called upon to settle a boundary dispute and hold and find that the same was resolved in accordance with the law by the Land Registrar.”

Other than relying on the report, the trial Magistrate was satisfied that the Respondent had led evidence to prove that the Appellant had encroached onto the suit land. At paragraph 18 of the impugned judgment, the trial Magistrate cited the report and said of the Respondent’s testimony:

18: “This was also in tandem with his testimony that the Defendant had indeed encroached on the sit land and built mud house thereon.”

Then from paragraphs 20 to 23 of the judgment, the trial Magistrate stated that she was satisfied that the Respondent had proved his case against the Appellant and was entitled to all the remedies sought in his plaint. From my own re-evaluation of the evidence adduced before the trial Magistrate, I am not persuaded that she did not appreciate the pleadings or that she made findings and a determination against the weight of the evidence. On the contrary, I am satisfied that she properly analysed the evidence before her in light of the issues which she had been called upon to determine and did not err either in law or fact in arriving at the decision which she did. I see no reason to set aside the judgment.

16. Grounds no 4 and 5 are equally for dismissal.

17. With regard to costs, they follow the event. There is no good reason to interfere with the orders of the trial Cost.

18. The up-shot of all the above is that this appeal is devoid of merit. It is accordingly dismissed with costs both here and in the Court below.

**BOAZ N. OLAO**

**JUDGE**

**JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 12<sup>TH</sup> DAY OF NOVEMBER 2024.**

Right of Appeal

