



REPUBLIC OF KENYA



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**Anyanga v Oyunga (Environment and Land Appeal 69 of 2021)  
[2023] KEELC 276 (KLR) (27 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 276 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL 69 OF 2021  
A OMBWAYO, J  
JANUARY 27, 2023**

**BETWEEN**

**SAMUEL ODONGO ANYANGA ..... APPELLANT**

**AND**

**WINNIE ACHIENG OYUNGA ..... RESPONDENT**

*(Being an Appeal from the Judgment /Decree of the Honourable Chief Magistrate H.M Nyaberi at Winam in CMCC ELC Case No. 14 of 2018 delivered on 22nd September, 2021)*

**JUDGMENT**

**Brief Facts**

1. The Respondent herein by way of a Plaint dated May 23, 2017 filed this suit where she averred that she is the registered owner of all that parcel of land known as Kisumu/Kasule/1858. It was the Respondent's case that the Appellant without lawful justification trespassed on her property and illegally erected permanent structures.
2. The Respondent further averred that she had purchased the said property from Josephat Murithi Gatimu and executed all transfer documents. She prayed for the following orders:
  - a. An order of permanent injunction directed at the defendant, his agents, servants and/or employees from trespassing on the plaintiff's property known as Kisumu/Kasule/1858.
  - b. An order of permanent injunction directed at the defendant, his agents, servants and/or employees from restraining him from selling, alienating, disposing of or in any way interfering with land title number Kisumu/Kasule/1858.
  - c. General damages for trespass
  - d. Costs of the suit and interest from date of filling suit till payment in full.



- e. Any other or further remedy this court deems just and expedient to grant.
3. The Appellant filed a Defence in which he denied the claim and put the Respondent to strict proof and prayed that the suit be dismissed with costs.
4. The suit was heard and Judgment was entered in favour of the Respondent together with costs.

### **Grounds of Appeal**

5. Aggrieved by the decision of the lower court, the Appellant herein filed a Memorandum of Appeal which was based on the grounds that the Learned Trial Magistrate erred in both fact and law by:
  1. The Learned trial Magistrate erred in law and fact by proceeding to wrongly evaluate the evidence tendered and proceeded to allow the plaintiff's suit when there was no evidence presented to prove the same.
  2. The Learned trial Magistrate totally misdirected himself in the evaluation of the evidence produced before him and arrived at a wrong decision thereby occasioning a miscarriage of justice.
  3. The learned trial magistrate erred in finding that the defendant had trespassed and built on the plaintiff parcel of land when the same was not proved by evidence presented in court.
  4. The learned trial magistrate erred in law in issuing eviction orders when none was prayed for in the plaint.
  5. The learned trial magistrate erred in law by suo motto raising and arguing new issues in his judgment not raised by any party during the proceedings and proceeding to find that the defendant had trespassed onto the plaintiffs land yet they hold different titles and are positioned differently on the RIM and thus the issue of trespass could not arise.
  6. The Judgment is contrary to provision of Order 21 of the *Civil Procedure Rules* and provisions of the *Evidence Act*.
  7. The decision was against the weight of evidence tendered.
6. The Appellant prayed for orders that the Appeal be allowed and:
  - a. The Judgment of the Lower Court be set aside and in its place, make an order dismissing the primary suit.
  - b. The costs of this Appeal be awarded to the Appellant.
7. The Appeal was canvassed by way of written submissions.

### **Appellant's Submissions**

8. The Appellant filed his Submissions on July 26, 2022 and identified one issue for determination:
  - i. Whether the Appellant is entitled to the orders in the Memorandum of Appeal filed.
9. He argued his appeal in two parts; Grounds 1, 2 and 3 jointly and Grounds 4, 5, 6 and 7 jointly.
10. On the first three grounds, the Appellant submitted that the learned trial magistrate failed to consider the evidence tendered during the hearing. That the magistrate erred in both law and fact thereby allowing the Respondent's claim and granting the orders sought. It is the Appellant's submission that the evidence showed that the Respondent's parcel Kisumu/Kasule/1858 is separate and distinct from



that of the Appellant being Kisumu/Kasule/3202. He stated that the two parcels are not neighboring each other to occasion actions of trespass by the Appellant.

11. The Appellant relied on Sections 107 and 108 of the *Evidence Act* and the case of Presidential Election Petition No 1 of 2017 between *Raila Amollo Odinga & Another V IEBC & 2 Others* [2017] eKLR. It was submitted that the Respondent had to show through admissible evidence that the Appellant had trespassed and built on her parcel of land. It was stated that if the evidence adduced was to the satisfaction of the court, then it becomes the Appellant's burden to adduce evidence rebutting the allegations and demonstrate that he did not trespass.
12. The Appellant submitted that the trial Magistrate misdirected himself to the evidence tendered especially that by the private surveyor and ignoring the report by the county surveyor. It was stated that the two reports filed in court were contradictory in nature and the learned magistrate ought not to have placed reliance on one without critically analyzing both reports and give reasons why the one by PW2 is more reliable than the one by DW2.
13. He further stated that due to the contradictory nature of the said reports, it was obvious that the issue of the Appellant trespassing on the Respondent's parcel does not arise and remains unproved. He cited Section 3(3) of the *Evidence Act*. The Appellant submitted that the trial magistrate ought to have critically considered the evidence by both the plaintiff and defendant's witnesses to arrive at a just and fair conclusion. He further stated that at no point did the Respondent prove trespass as the surveyors report indicated that the two parcels are separate and distinct. The Appellant submitted that evidence showed that the buildings belonged to him.
14. On Grounds 4, 5, 6 and 7, the Appellant submits that the Respondent never made a prayer for eviction in her plaint and as such should not be rewarded. That the trial magistrate erred in law and fact in issuing eviction orders when none had been prayed for. It was the Appellant's submission that the courts are under obligation to parties in a suit in that the orders given are to be clear, precise and pleaded. He stated that the trial court acted suo motto by raising and arguing new issues not pleaded. He relied on the case of *Political Parties Dispute Tribunal & another V Musalia Mudavadi & 6 Others Ex parte Petronila Were* [2014] eKLR and submitted that there was no evidence that the trial magistrate involved the parties or their advocates before concluding his judgment and issuing eviction orders.
15. In conclusion, the Appellant submitted that the Appellant's suit parcel of land and that of the Respondent have different titles and positioned differently on the RIM. Further, that no proof of trespass has been made and as such the trial court erred in law and fact in awarding the prayers as sought in the lower court suit.
16. The Appellant therefore prayed that Judgement of the lower court be set aside and in its place make an order dismissing the Plaintiff's suit and that costs be awarded to him.

### **Respondent's Submissions**

17. The Respondent filed her submissions on November 25, 2022 and identified the following issues for determination:
18. She urged this court to compare the two experts' reports by PW2 at page 112 of the record and DW2 which is not attached to the record but the submissions. The Respondent stated that PW2's report proved trespass from the subdivision history of the Respondent's title Kisumu/Kasule/1858 from the mother title Kisumu/Kasule/1256 as the first subdivision that came up with two plots 1858 and 1857. That the Appellant's plot 1857 underwent several subdivisions while 1858 remained intact. That



the Appellant's title number is Kisumu/Kasule/3202 irregular in shape measuring 0.05ha but on the ground the Appellant was occupying the Respondent's title 1858. She added that PW2 also verified from the expert's report, RIM, mutation forms, searches, sketch maps and ground visits.

19. The Respondent submitted that the report concludes that the buildings erected by the Appellant are not on his plot title 3202 which is smaller in size but on the Respondent's plot number 1858 measuring 0.1ha. She further submitted that the said findings were correct in law by the trial court which termed them as key evidence in determining the issue of trespass. It was stated that the expert evidence cannot be treated in isolation of other evidence on record but must be tested and compared with other evidence on record as testified by PW4. The Respondent stated that the expert evidence must be supported by some material expert quality and analytical reasoning that backs the findings. That this allows the court appreciate the evidentiary probability of the opinion as done by PW2 in comparison to DW2.
20. She submitted that the court is not bound by expert opinion but it compares the opinion together with other surrounding evidence. The Respondent relied on the case of *NM V Ndungu Isaac* [2020] eKLR and submitted that the trial court which heard the witnesses is most likely legally deemed to be in a more advantageous position in seeing and weighing the live evidence than the present appeal court. She submitted that there is no error of law or fact by the learned magistrate and the scale must weigh heavily against the judgment of the trial court being upset.
21. The Respondent relied on the case of *William Kabogo V George Thuo* [2010] eKLR and submitted that the burden of proof in civil cases is establishing a case of 51% as against 49% of opposing party. On general damages of Kshs. 150,000, the Respondent submitted that upon finding trespass and erecting structures, the trial court was bound to award damages as a matter of right without proof of special losses. She further relied on the case of *Paul Thuo Njambi V James Waweru Muturi* [2017] eKLR and submitted that the registration of the Respondent as proprietor of Kisumu/Kasule/1858 under section 24 of the *RLA*, vested in her as the absolute owner. That it is trite in law that a trespasser is bound to give way and possession to the title holder.
22. It was the Respondent's prayer that this court dismisses this Appeal with costs.

### **Analysis and Determination**

23. The Appellant filed this Appeal on grounds that the Learned Trial Magistrate erred in law and in fact by failing to consider the relevant evidence before him and by finding that the defendant had trespassed and built on the plaintiff parcel of land when the same was not proved by evidence presented in court.
24. I have looked at the pleadings, the evidence on record and submissions of both parties and the following issues need to be determined:
  - i. Whether the Trial Magistrate failed to consider and analyze the evidence tendered by the two experts in arriving at his finding.
  - ii. Whether the Respondent proved trespass.
  - iii. Whether the Trial Magistrate acted *suo motto* in issuing eviction orders when none was prayed for.
25. On the first issue, the Appellant in his submissions stated that the trial Magistrate misdirected himself to the evidence tendered by the private surveyor and ignoring the report by the county surveyor. He argued that the two reports filed in court by PW2 and DW2 were contradictory in nature and the learned magistrate ought not to have placed reliance on the report by PW2 without critically analyzing both reports. It is clear from the evidence on record that the Respondent is the registered proprietor of



parcel no. Kisumu/Kasule/1858 while the Appellant the registered proprietor of parcel no. Kisumu/Kasule/3202. The trial magistrate established that the main issue was the records held at the survey office as well as the actual position of the two land parcels. The above was to be determined by an expert report and the trial magistrate issued a consent order to have the County Surveyor survey the land parcel no. Kisumu/Kasule/1858 was issued on January 29, 2019.

26. DW2's report established that the parcel 1858 is a distinct plot both on the map and on the ground and that its actual position was positively identified on the ground with a homestead of several semi permanent structures. The County surveyor also made a general observation to the effect that the Respondent seemed not certain of the correct ground position of her plot. He noted that she adamantly insisted on a different location which after interpretation from the map, it pointed to parcel number Kisumu/Kasule/2395.
27. PW2's report from the Respondent's private surveyor established that from the RIM, parcel 3202 is on the left while 1858 is on the right. He also observed that the new building is on the right of line A1-A2 of the plan which is an access.
28. The trial court in its judgment majorly highlighted the report by DW2 the County Surveyor and the finding by PW2 that the buildings are on the Respondent's plot 1858 and not plot 3202 owned by the Appellant.
29. It is a fact that the two witnesses were indeed critical in determining the exact location of the Appellant's building. This court has looked at the two reports and appreciates that the two have been done by land experts as agreed by both parties. It is on record that on July 30, 2018 both parties by consent agreed to have the County surveyor locate and survey land parcel no 1858. The report was done and on June 17, 2019, the Respondent not satisfied with the surveyor's report opted to engage a private surveyor on the ground that most issues raised were not covered.
30. The Appellant did not object to the engagement of a private surveyor by the Respondent. I have perused both reports by PW2 and DW2 and find that that the trial court did not consider the observation by DW2's report to the effect that the Respondent seemed not certain of the correct ground position of her plot which pointed to parcel number Kisumu/Kasule/2395. However, I also find that the report by DW2 was not conclusive unlike that by PW2. DW2 despite giving the said observation should have gone further to establish whether the Appellant's structures were in fact constructed on the Respondent's suit property and give the correct boundary location. I therefore find that the trial court did in fact consider the evidence by both expert witnesses as well as the report done by them.
31. In *Azzuri Limited vs Pink Properties Limited* [2018] eKLR the court held that any survey report must meet the general boundary survey standards and methodology.
32. The court in *Josephat Mburugu vs Silas Mwiti Mugwika* [2022] eKLR cited with approval *Elizabeth Wambui Githinji & 29 Others vs Kenya Urban Boards Authority & 4 Others* [2019] eKLR where the court held that,

...like in all other professions, the highest standard and competency was required, by surveyors save for permissible errors in measurements which are acceptable so long as there was an effort to comply with the *Survey Act* and the Rules made thereunder."
33. On the second issue, having established that the report by PW2 was conclusive, it therefore follows that the Respondent proved trespass. PW2 despite confirming that the buildings were constructed on the



- Respondent's land, he went further to provide google maps, RIM, mutation forms and measurements of the suit property.
34. The Respondent's claim was for trespass and on encroachment on his parcel no 1858 by the Appellant who it was alleged had erected building structures or building on his land. It was incumbent upon the Respondent to table evidence to prove the exact measurements and boundaries of his plot no 1858 vis a vis plot no 3202 owned by the Appellant. It was not enough for the Respondent to allege trespass without producing any expert reports to establish if indeed there had been any encroachment by the respondent.
  35. The burden of proof was upon the Respondent to establish if indeed there was trespass. In absence of documentary evidence backing the Respondent's pleadings and oral evidence including ownership of her plot my finding is that in agreement with the trial court, the Respondent proved her claim of trespass to the required standard.
  36. On the final issue, it is general practice that courts would only determine a case on the issues that flow from the pleadings and that judgment would be pronounced on the issues arising from the pleadings or from issues framed for court's determination by the parties. It is also a principle of law that parties are generally confined to their pleadings unless the pleadings were amended during the hearing of the case. The Appellant argued that the trial court acted suo motto in issuing eviction orders when none had been prayed for by the Respondent.
  37. In the case of *Galaxy Paints Co Ltd versus Falcon Guards Ltd* EALR [2000]2EA 385 it was held that:

...the issues for determination in a suit generally flow from the pleadings and a court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the courts determination."
  38. Also, in the case of *Green Field Investment Limited versus Baber Alibhai Mawji* civil appeal No 155 of 2004 (UR) the court held that

...a court of law cannot pick issues literally from the air and purport to make determination on them. It is the pleadings which determine the issues for determination."
  39. In the case of *Odd Jobs versus Mobile* [1970]EA 476 the court held inter alia that:

a court may base its decision on an unpleaded issue if it appears from the course followed at the trial the issue has been left to the court for decision."
  40. Applying the above principle on the learned trial magistrate's *suo motto* introduction of the issue of eviction orders in his judgment, this court finds that the Respondent ought to have specifically pleaded and sought for eviction orders in her plaint before it could be interrogated by the trial court. Alternatively, even though not pleaded, if it had been raised in the cause of the trial, evidence tendered on them, submission made on them and then left for the court to determine, the trial court would have been right in issuing the eviction orders. In view of the principles of case law outlined above, I agree with the submission by the Appellant that the learned trial magistrate fell into an error when he suo motto introduced and granted an eviction order, when it had not been specifically pleaded. Furthermore, this had not been raised in trial or in any of the parties' submissions.
  41. In the upshot, this Appeal partly succeeds on ground 4 of the Appellants Memorandum of Appeal. The judgment of the trial court on granting eviction orders is hereby set aside.



**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU THIS 27<sup>TH</sup> DAY OF JANUARY 2023.**

**A. O OMBWAYO**

**JUDGE**

