



REPUBLIC OF KENYA



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**Ololo v Onyango (Environment and Land Appeal E017 of 2022)
[2023] KEELC 212 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 212 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E017 OF 2022
AY KOROSS, J
JANUARY 26, 2023**

BETWEEN

WILLIAM OLOLO APPELLANT

AND

FRANCIS EPHRAIM ONYANGO RESPONDENT

*(Being an Appeal and Cross Appeal from the ruling of the SPM, Hon. J.
Ong'ondo delivered on 27/10/2021 in Siaya ELC Case Number 63B of 2019)*

JUDGMENT

Introduction

1. The background to the dispute giving rise to this appeal, as expressed in the pleadings may briefly be stated thus: via a Complaint dated July 19, 2019, the Respondent; who was the Plaintiff in the lower court suit instituted a suit against the Appellant stating that he was the legal and registered owner of Central Alego/Hono/1723 'the suit property'. The Respondent averred that in March 2019, he discovered the Appellant had fenced off part of the suit property and blocked an access road. He alleged trespass and sought permanent injunctive orders, eviction of the Appellant, damages for trespass, costs and interests.
2. By the firm of Odhiambo Ouma and Company Advocates, the Appellant filed a Defence dated August 20, 2019 wherein he denied the averments made in the Complaint and stated he was a stranger to the allegations and put the Respondent to strict proof. He stated he had neither encroached onto, fenced off nor interfered with the suit property.
3. By a Reply to Defence dated September 18, 2019, the Respondent denied the averments made in the Appellant's Defence and reiterated the assertions made in the Complaint. Further, he stated that Siaya/Hono/1988 that was referred to in the Appellant's statement was not the subject of dispute and it did not feature in the area map.



4. On August 12, 2020, Parties' Counsels entered a consent on the following terms;
 - a. Siaya County Land Surveyor and Land Registrar do visit land parcels Central Alego/Hono/1723 and Siaya/Hono/1988 and establish their exact delineation and sizes;
 - b. The parties be at liberty to engage private surveyors to witness the exercise; and
 - c. The matter be mentioned in two months' time to confirm the surveyor's report had been filed.
5. The County Survey Office filed a report in accordance with consent order. On June 3, 2021, M/s Mathairo for the Respondent sought for its adoption alleging the report did not demonstrate a boundary dispute. The trial court ordered parties to file written submissions on the surveyor's report within 14 days.
6. As directed by the court, Counsels filed their respective submissions. The Respondent's submissions dated July 1, 2021 sought for adoption of the report as a judgment of the court whilst the Appellant's submissions dated August 23, 2021, sought for cross examination of the makers of the two reports; the County Surveyor's report and that of his private Surveyor. These submissions culminated in a ruling rendered on October 27, 2021 which is the subject of this appeal.
7. In the ruling, the trial magistrate adopted the County Surveyor's report as its judgment and ordered the Land Registrar to fix the boundaries of the suit property.

Appeal and cross appeal

8. Aggrieved and dissatisfied with the impugned ruling, the Appellant filed a Memorandum of Appeal on September 22, 2022 in which he raised six grounds of appeal:
 - a. The Learned Magistrate erred in law and fact in wholesomely adopting the report as a ruling of the court without realising it contained a serious error and concerned wrong parcels of land;
 - b. The Learned Magistrate erred in both law and fact by relying on a report unknown by the parties; the report whose maker was not summoned for cross examination;
 - c. The Learned Magistrate erred in law and fact in failing to make a finding on the central issue raised in the report;
 - d. The Learned Magistrate erred in law and fact in not considering the objection raised by the Appellant concerning the methodology used by the District Land Registrar in disregarding reference to any title or map of the suit lands;
 - e. The Learned Magistrate misdirected himself and therefore arrived at a decision that was erroneous; and
 - f. The Learned Magistrate erred in law and fact in failing to exercise his discretion judiciously in relying on a report that was not conclusive.
9. The Appellant prayed for the appeal to be allowed and for the trial court's ruling to be set aside.
10. The respondent too was partially dissatisfied with the decision hence filed an amended cross-appeal dated October 3, 2022 in which he proffered the following grounds of appeal;
 - a. The Learned Magistrate erred in law in giving an ambiguous ruling that did not address the orders sought in the Respondent's pleadings notwithstanding having established the Appellant breached Order 21 Rule 4 and 5 of the [Civil Procedure Rules](#);



- b. the Learned Magistrate erred in law in making a fact but failing to grant consequential orders as sought by the Respondent contrary to Order 21 Rule 4 and 5 of the [Civil Procedure Rules](#); and
 - c. the Learned Magistrate erred in fact and law by failing to factor in the Surveyor's findings that the Appellant's parcel number Siaya/Hono/1988 was non-existent in the registry index diagram number 19.
11. The Respondent prayed for his cross appeal to be allowed with costs, ruling to be partially be set aside, orders be allowed as prayed in the Plea and for this court to grant mesne profits.

Parties' submissions

12. As at the writing of this judgment, the Appellant's Counsel had not tendered his written submissions. If at all they will be filed, this court will not consider them.
13. Mr Sala, Counsel for the Respondent, filed his written submissions to the appeal and the cross appeal dated October 25, 2022.
14. On the cross appeal, Counsel submitted that according to the land surveyor's report, the suit property existed in the Registry Index Map whereas that of Siaya/Hono/1988 did not.
15. Counsel stated that the introduction of the Appellant's private surveyor's report was an attempt to introduce new evidence and was therefore an abuse of court process and contemptuous.
16. According to Counsel, the trial court ought to have scrutinised the pleadings, County Surveyor's report and submissions of both parties before issuing orders in accordance with pleadings. Counsel highlighted the case of [Raila Amolo Odinga & another v IEBC & 2 others](#) [2017] eKLR. It was Counsel's submissions the Appellant had failed to challenge the County Surveyor's report.
17. On the 1st ground of appeal, Counsel submitted the Appellant did not establish how the report was flawed. According to him, the report could only be impugned by an expert. On the 2nd ground, Counsel submitted the Appellant's claim was unfounded as the survey was done by consent in the presence of both parties and their representatives. And the authors were public officers. On the 3rd ground, it was Counsel's submission the report filed by the Appellant's private surveyor was by an unknown person whose qualifications had not been verified; the court could not rely on it. On the 4th ground, Counsel submitted the Appellant had failed to produce a map or documentation to prove his case. Counsel submitted the 5th and 6th grounds of appeal were unfounded.
18. Counsel submitted the absence of Siaya/Hono/1988; which emanated from 1785 in the map sheet, denoted fraud and sought for revocation of the Appellant's title. In that regard, Counsel cited the case of [Dr Joseph Arap Ngok v Justice Moijo Ole Keiwua & 5 others](#) Civil Appeal Number 60 of 1997.
19. It was also Counsel's submission that contrary to the provisions of Order 29 (1)(b) of the [Court of Appeal Rules](#), the Appellant had introduced new evidence. Further, the Appellant had not demonstrated the surveyor's report was erroneous. Counsel cited the case of [Dorothy Nelima Wafula v Hellen Nekesa Nielsen & Paul Fredrick Nelson](#) [2017] eKLR.
20. Counsel submitted consent orders were binding on all parties and once recorded, they could be enforced except on grounds of coercion, misrepresentation or fraud. Counsel placed reliance on the Supreme Court of Kenya decision of [Geoffrey M Asanyo & 3 others v Attorney General](#) [2018] eKLR.
21. On the cross appeal, Counsel submitted the trial court's ruling was not in accord with Order 21 Rule 4 and 5 of the [Civil Procedure Rules](#). To buttress his case, he relied on the case of [South Nyanza](#)



Sugar Company Limited v Omwando Omwando [2011] eKLR where the court held that a judgment cannot be scanty. According to Counsel, the ruling of the trial court was ambiguous, did not grant consequential orders and did not settle the dispute between the parties. Counsel placed reliance on the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2007] eKLR.

Analysis and determination

22. As this is a first appeal, it is my duty to analyze and reassess the evidence on record and reach my own conclusions in the matter. This was put more aptly in *Selle -v- Associated Motor Boat Co.*, [1968] EA 123, thus:

‘Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. (Abdul Hameed Saif. vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)’

23. Having considered the lower court record, the memorandum of appeal, amended cross appeal, Respondent’s submissions and authorities cited, this court is of the considered view the issues falling for determination are: -

- I. Whether parties introduced new evidence on appeal;
- II. Whether the Learned trial court erred in law and fact in adopting the County Surveyor’s report as a ruling of the court and subsequently erred in issuing orders contrary to the report; and
- III. Whether the trial court erred in law in holding the County Surveyor’s report determined the issues in dispute.

I. Whether the appellant and respondent introduced new evidence on appeal

24. Contrary to the Mr. Sala’s Submissions, *Court of Appeal Rules* do not apply to this court. Section 78 (1) (d) of the *Civil Procedure Act* and Order 42 Rules 27, 28 and 29 of the *Civil Procedure Rules* are the legal basis upon which additional evidence can be adduced on appeal. See also the Supreme Court of Kenya decision in *Mohammed Abdi Mohamud v Ahmed Abdulabi Mohamad & 3 Others* [2018] eKLR. The decision of *Dorothy Nelima Wafula v Hellen Nekesa Nielsen & Paul Fredrick Nelson* (Supra) had this to say concerning the principles of adducing new evidence at an appellate stage;

‘The often-cited cases in this regard include, *Mzee Wanje & 93 Others V A.K Saikwa* (1982-88) 1KAR 462, *Joginder Auto Service Ltd V Mohammed Shaffique Civil Appeal* (Application No. Nai. 210 of 2000, *Karmali Tarmohamed & Ano V. I. H Lakhani* (1958) EA 567, which are to the effect that, before the Court can permit additional evidence to be adduced under rule 29, it must be shown, one, that it could not have been obtained by reasonable diligence before and during the hearing; two, that the new evidence would probably have had an important influence on the result of the case if it was available at the time of the trial, and finally, that the evidence sought to be adduced is credible, though it need not be incontrovertible. It is agreed that these are only general principles and certainly not the only ones.’

25. Though the respondent has alleged the appellant had introduced new evidence on appeal, from the court record, the appellant did seek to cross examine the County Surveyor which was disregarded by the trial court. Additionally, the private surveyor’s report is in the court record although it was neither produced nor considered. It is my finding that the Appellant did not introduce new evidence on appeal.



26. In contrast, the Respondent introduced new evidence at the appellate stage; alleged fraudulent acquisition by the appellant of Siaya/Hono/1988 and mesne profits. The Respondent has neither sought leave to adduce new evidence nor has he laid a basis upon which this court should allow such new evidence. I am constrained from entertaining the Respondent's new evidence.

II. Whether the Learned trial court erred in law and fact in adopting the County Surveyor's report as a ruling of the court and subsequently erred in issuing orders contrary to the report

27. Order 21 Rule 1 of the [Civil Procedure Rules](#) states that once a case has been heard, then the court shall pronounce judgment. A judgment must include a concise statement of the case, the points for determination, the decision and reasons for the decision.

28. Pursuant to Section 59 (C) of the [Civil Procedure Act](#), parties to a suit may at the court's direction or in their own discretion refer a dispute to an alternative dispute resolution mechanism for settlement and once a settlement is reached, the settlement shall be adopted as a decision of the court. Such settlement is not appealable. This provision of law states thus;

‘59C. Other alternative dispute resolution methods

- (1) A suit may be referred to any other method of dispute resolution where the parties agree or the Court considers the case suitable for such referral.
 - (2) Any other method of alternative dispute resolution shall be governed by such procedure as the parties themselves agree to or as the Court may, in its discretion, order.
 - (3) Any settlement arising from a suit referred to any other alternative dispute resolution method by the Court or agreement of the parties shall be enforceable as a judgment of the Court.
 - (4) No appeal shall lie in respect of any judgment entered under this section.’
29. In its ruling, the trial court stated inter alia, before the matter took off parties agreed and entered into a consent where the land registrar was tasked to prepare a surveyor's report... the surveyor's report show(sic) that the disputed portion is part of the parcel no 1723. The report is adopted as a judgement of this court and it finally determines the matter.’
30. From the prayers couched in the plaint, there is no specific prayer for determination of a boundary dispute. However, from the consent order that was not set aside, it is evident the parties became alive the issue in dispute could be a boundary dispute and they entered a consent as earlier stated. The consent was to establish the size and delineation of the suit property and Siaya/Hono/1988. They did not seek for the Land Registrar to fix the boundaries as envisaged by Section 19 of the [Land Registration Act](#).
31. In compliance with the consent order that was adopted as an order of the court, the Land Registrar and County Surveyor conducted a site visit and tendered their reports to court. The Respondent was satisfied by the reports and sought for their adoption; the court adopted the County Surveyor's report. The procedure adopted by the parties and the court was in line with Section 59 (C) of the [Civil Procedure Act](#) albeit the fact that it was a ruling and not a judgment.
32. On the other hand, the Appellant in his submissions before the trial court argued that the County Surveyor's report contradicted his private surveyor's report and consequently, the makers of the documents should be cross-examined. This argument was contrary to the consent order as the parties' private surveyors were merely to be witnesses during the site visit. The trial court did not err in disregarding this argument by the Appellant.



33. The trial court adopted the County Surveyor's report as a judgment of the court. It is evident the term judgement was a typographical error. I say so because the header of the decision evidences it was a ruling and this ruling did allude parties had entered a consent well before the suit was heard and determined on merit. This typographical error is curable by Section 99 of the *Civil Procedure Act*. It is my finding that the term judgement in the ruling was a typographical error.
34. I have scrutinized the County Surveyor's report and it did not make a finding that the Appellant had encroached on the suit property. The trial court erred in finding that the Appellant had encroached on the suit property.

III. Whether the trial court erred in law in holding that the County Surveyor's report determined the issues in dispute

35. The material before this court does not demonstrate the suit was purely boundary dispute or a claim for trespass; they were entwined. The determination of the boundary dispute could either affirm or disaffirm the Respondent's claim of trespass. If a boundary dispute was not established, then the suit would have had to proceed for hearing.
36. Depending on the outcome of such a boundary dispute by the Land Registrar and County Surveyor and fixing it in accordance with Section 19 of the *Land Registration Act*, the trial court could either endorse the reports as a judgment of the court (See the decision of Mutungi J in *Andrew Marigwa v Josephat Ondieki Kebati* [2017] eKLR), proceed with the hearing of the suit on merit (See the Court of Appeal decision of *Menkar Limited v Ratilal Ghela Samat Shah* & 2 others [2019] eKLR) or strike out the suit for want of jurisdiction (Section 18(2) of the *Land Registration Act*). In the latter, the provision of law states as follows;

‘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.’
37. The terms of the consent order could not succinctly settle the dispute between the parties and I say so for two reasons; firstly, the consent was limited to establishing the size and delineation of the suit property and Siaya/Hono/1988 and, secondly, the Registry Index Map for land parcel no. Central Alego/Hono/1785 from which Siaya/Hono/1988 emanated from after several prior subdivisions had not been amended thus its location was not established.
38. The trial court appreciated the non-settlement of the dispute when it stated inter alia; ‘...the land registrar is further ordered to proceed to the ground and fix the boundaries of parcel number 1723...’
39. Despite this position, the trial court stated ‘The report is hereby adopted as a judgment of this court and consequently determines the matter.’
40. It is my finding the trial court erred in finding the suit had been determined by the County Surveyor's report.
41. Upon considering all the foregoing reasons, I am convinced that it would be a proper exercise of my discretion to interfere with the impugned ruling. In the end, the appeal and cross appeal are found to be meritorious. I hereby issue the following orders;
 - a. The ruling delivered on October 27, 2021 is hereby varied by substituting the term “judgment” with the term “ruling”.



- b. At the appellant's cost, the Registry Index Map for land parcel no. Central Alego/Hono/1785 shall be amended within 60 days from the date of this judgment to reflect land parcel no. Siaya/Hono/1988.
- c. Once Order (b) above has been complied with and pursuant to the provisions of Sections 18 and 19 of the *Land Registration Act*, the Land Registrar, Siaya at the appellant and respondent's costs shall within 60 days from the date of compliance, cause to be defined by survey, the precise position of the boundaries in respect of land parcels known as Central Alego/Hono/1723 and Siaya/Hono/1988 and a report shall be filed before the trial court.
- d. Once a report has been filed, the trial court shall issue further directions.
- e. In the circumstances of this appeal and cross appeal, a fair order on costs is to order which I hereby do that each party bears their own costs.

DELIVERED AND DATED AT SIAYA THIS 26TH DAY OF JANUARY 2023.

HON. A. Y. KOROSS

JUDGE

26/01/2023

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

In the Presence of:

Mr. Ouma for appellant present

Mr. Sala for respondent

Court assistant: Ishmael Orwa

