



**Akello Suing thro' Prince Ochise Akello (Holder of Power of Attorney
No. 125/11/13) v Yoya (Environment and Land Appeal E016 of 2021)
[2023] KEELC 15787 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15787 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E016 OF 2021
GMA ONGONDO, J
FEBRUARY 28, 2023**

BETWEEN

**FRANKLINE ODHIAMBO AKELLO SUING THRO' PRINCE OCHISE AKELLO
(HOLDER OF POWER OF ATTORNEY NO. 125/11/13) APPELLANT**

AND

HEZRON OTIENO YOYA RESPONDENT

*(Being an appeal from the judgment of Hon. Celesa Okore, Principal
Magistrate, delivered on 4th November 2021 and decree issued thereto
in Oyugis Law Court Environment and Land Case No. 52 of 2018.)*

JUDGMENT

1. The property in dispute in this appeal is Land Reference Number Central Kasipul/ Kamuma/4668 measuring approximately zero decimal one one hectares (0.11Ha) in area and situated within Homa Bay County (the suit land herein).
2. The appeal emanated from a suit filed by way of a plaint dated 27th August 2014 where the plaintiff/ appellants herein sought the following orders;
 - a. Declaration that the plaintiff is the registered and/or lawful owner of the suit land.
 - b. An order of eviction directed against the defendant, his agents and/or servants from the suit land and/or any portion thereof.
 - c. Permanent injunction restraining the defendant either by himself, agents, servants and/or anyone claiming under the defendant from entering upon, re-



entering, trespassing onto, building structures, interfering with and/or in any other manner dealing with the suit land and/or any portion thereof.

- d. General damages for trespass.
 - e. Interest on (d) hereof at court rates.
 - f. Costs of this suit be borne by the defendant.
 - g. Such further and/or other relief as the honourable court may deem fit and expedient so to grant.
3. PW1, Prince Ochise Okello, testified that the defendant has trespassed on the suit land, which belongs to the plaintiff/ appellant. The plaintiff relied on his bundle of documents dated 27th August 2014 to wit: a copy of the green card in respect of L. R. No. Central Kasipul/Kamuma/3020, a copy of the mutation in respect of L. R. No. Central Kasipul/Kamuma/3020, a copy of the title deed to the suit land, a copy of the certificate of official search in respect to the suit land, a copy of the Registry Index Map in respect of Kamuma Registration Section, a copy of the power of attorney, a copy of demand notice dated 14th October 2013 and a copy of response to demand notice dated 7th November 2013 (PExhibits 1 to 8 respectively). During cross-examination, PW1 denied that the plaintiff has blocked access road to the defendant's parcel. He averred that the defendant encroached on to the suit land in 2013 and not in 2001.
 4. The plaintiff's brother, Noel Ajok Akello (PW2), relied on his statement dated 23rd September 2020 which was adopted as part of his testimony. During cross-examination, PW2 stated that the plaintiff lives in Mombasa and does not visit home often hence the need for the power of attorney. That the defendant has trespassed onto the suit land and constructed two permanent structures thereon which he has rented out to tenants.
 5. PW3, Kimjoltize Otieno Akello, relied on his statement dated 23rd September 2020 which was adopted as part of his evidence. In cross examination, PW3 stated that the suit land is their ancestral land, which is registered in the name of the plaintiff herein. That the defendant does not live on the suit land.
 6. The defendant denied the claim through a statement of defence dated 1st October 2014 and filed on 2nd October 2014. He urged the court to dismiss the plaintiff's suit with costs.
 7. DW1, Jared Aduonga, Land Surveyor, testified that there was no encroachment as alleged by PW1. That the defendant had not built structures on the plaintiff's land but rather on his own parcel of land. That the suit land is a creation of parcel number 3020 which was initially owned by Joel Opap Okello (deceased). That the family of the plaintiff raised issues after the real owners died. He noted that the map gives a position that contradicts the ground position. Therefore, he recommended that a resurvey of the land be conducted to resolve the issue. On cross-examination, the witness stated that the map is not an authority on boundaries and that it is subject to amendments.
 8. DW2, Hezron Otieno Yoya, the respondent herein relied on his statement dated 29th September 2017 as part of his evidence. He stated that his land is parcel number 4304 which was a subdivision of parcel number 2800. That he purchased the same for Kshs. 85,000/- on 24th December 2001 from one James Obongo Osewe (deceased) and built five door rental houses thereon. He produced in evidence a copy of the sale agreement, mutation form, a copy of the title deed, a copy of search and a copy of the surveyor's report (DExhibits 1 to 5). He averred that his parcel has not encroached on the suit land, though the two parcels share a boundary.



9. DW3, Mathew Okoth Achola, a neighbor to the defendant, relied on his statement as part of his evidence. In cross-examination, he averred that the defendant's buildings are not on the suit land.
10. DW4, Moses Odiwuor Oloo, also a neighbor to the defendant, relied on his statement dated 29th September 2017 as part of his evidence.
11. By the impugned judgment rendered on 4th November 2021, the court found that the plaintiff had failed to prove his case on a balance of probabilities. Therefore, the plaintiff's suit was dismissed.
12. The trial court's findings attracted this appeal which was commenced by way of a memorandum of appeal dated 1st December 2021 by the appellant acting in person, and premised on grounds 1 to 13 which include:
 - a. The learned trial magistrate erred in law and facts by relying on the retired County Surveyor's Report (DW1) dated 17th September 2019 which she had ruled out in her Ruling dated 13th August 2020 which she ruled and ordered that the very county surveyor's report have poured cold water on the efforts to solve this matter and as a result it cannot be relied upon to conclusively solve this matter. Amazingly she ended up using the same report in making judgment.
 - b. The learned trial magistrate erred in law and facts by making bias (sic), shallow and/or partisan judgment by not considering the two expert reports from Rachuonyo District Land Registrar's and Surveyor's office dated 15th February 2019 and 4th June 2019 respectively which favours me the appellant herein. Neither did she mention orders that were issued to Rachuonyo District expert officers by the court.
 - c. The learned trial magistrate erred in law and facts by failing to be keen to notice that the respondent alleged parcel is Central Kasipul/ Kamuma 4304 and not Central Kasipul/Kamuma 4303 as repeatedly indicated in her judgment page 2, neither did she bother to mind that the acquisition of the respondent title deed was by way of fraud following the abundant evidences corroborated before court, even though the matter before court was not about ownership but the issue of ownership was raised among the agreed issues so it had to be addressed among the issues which she declined to tackle properly.
13. On that basis, the appellant has sought the orders infra:
 - a. The judgment and decree of the learned trial magistrate be set aside and/or quashed so that this case can be judged by facts and evidences by ELC court.
 - b. That this matter be finalized in this court since there is no trust in the particular lower trial court if any case the case be remanded.
 - c. That all the prayers/orders sought in the lower court by the appellant be awarded to the appellant herein as prayed in the plaint.
 - d. Costs of this appeal be borne by the respondent.
 - e. Such further and/or other orders be granted as this honourable court may deem fit and expedient.



14. The appeal was heard by way of written submissions following this court's orders of 18th July 2022.
15. By the submissions dated 12th August 2022 and filed on even date, the appellant stated that the respondent trespassed onto the suit land in 2013 and constructed permanent structures thereon. That DW1's report, which the court relied on in reaching a determination, was full of anomalies, untruthfulness, lies and/or falsifications, biasness, outdated doctored mutations and drawn sketch which does not reflect both what is on the ground and what is in the map.
16. The appellant lamented that the trial magistrate erred in failing to take into consideration the reports that were prepared by the Land Registrar and Land Surveyor of Rachuonyo South/North Sub-County and dated 8th February 2019 and 4th June 2019 respectively. That the trial court further barred the two experts from testifying. Thus, he urged the court to allow the instant appeal with costs. The appellant relied on various authorities, including the case of *Odongo Fitina -vs- Odaba Fitina & 2 others* (2022) eKLR, to fortify the submissions.
17. The respondent filed submissions dated 30th September 2022 on 12th October 2022 through the firm of O. M. Otieno and Company Advocates and identified four issues for determination, to wit: whether the trial magistrate erred in law and fact in finding that the respondent's parcel had not encroached onto the appellant's parcel of land, whether the trial magistrate erred in law by failing to consider Land Registrar and Surveyor's Report dated 8th February 2019 and 4th June 2019 respectively, whether the Learned Trial Magistrate was biased in her judgment and reasoning and whether the trial magistrate erred by failing to look at the appellant's submissions and as a result arrived at a wrong conclusion.
18. Counsel submitted that the appellant and the respondent's parcels of land originated from different parcels. That on one hand, the respondent's land, Central Kasipul/Kamuma/4303, originated from various subdivisions of Land Parcel Number Central Kasipul/Kamuma/2434 and came into being on 8th February 2001. The respondent purchased it and had it registered in his name on 10th September 2003. That on the other hand, the suit land herein originated from subdivisions of Land Parcel Number Central Kasipul/Kamuma/506. That the suit land came to be on 29th July 2005 and was registered in the name of the plaintiff on 29th May 2013. That therefore, the respondent's parcel could not have encroached onto the suit land since it was created first.
19. Further, counsel stated that the appellant did not oppose the application to have the County Surveyor revisit the site. That in any event, the Report by Land Registrar dated 8th February 2019 indicated that the area is prone to disputes and recommended at para 2 of page 2 of the Report, that a resurvey of that area ought to be conducted. Counsel also submitted that the trial magistrate did not exhibit any bias towards the appellant. That if there was any bias, then the appellant ought to have made an application to have the trial magistrate recuse herself from hearing the suit. That submissions of parties are not binding on the court.
20. In that regard, the issues for determination herein are as captured in the grounds of appeal and compressed thus:
 - a. Whether the appellant has demonstrated that this appeal is tenable and
 - b. Whether the appellant is entitled to the orders sought in the memorandum of appeal.
21. I have carefully considered the parties' respective pleadings, the trial court's proceedings inclusive of evidence as well as the judgment of the learned trial magistrate. It is the duty of this court to reconsider the evidence on record and come to its conclusions and inferences; see *Selle and another -vs- Associated*



- Motor Boat Co. Ltd. and others* (1968) EA 123 and *Williamson Diamonds Ltd. -vs- Brown* (1970) EA 1.
22. It is noted that the learned trial magistrate set out the parties' respective cases, framed three issues for determination, analysed them and arrived at her decision based on reasons. So, the impugned judgment complied with order 21 rule 4 of the [Civil Procedure Rules](#), 2010.
23. Sections 18 and 19 of the [Land Registration Act](#) 2016 (2012) gives the Registrar authority to fix boundaries to registered land. Further, the determination of the position of any uncertain boundary shall be done as stipulated in the [Survey Act](#), Chapter 299 Laws of Kenya.
24. The appellant laments that the trial magistrate erred in law by failing to consider the Land Registrar and Surveyor's Reports dated 8th February 2019 and 4th June 2019 respectively. That the same contradicted the County Surveyor's Report, which the court relied on in arriving at the impugned Judgment.
25. At page 4 of the impugned judgment, the trial magistrate noted thus:
- “...I choose to go with the County Surveyor's Report dated 17th September 2019, because it supersedes all the other reports filed herein... unlike the other reports filed herein, the author appeared before court to validate and/or authenticate his report...”
26. Clearly, the above reports are opinion evidence. The law on opinion of an expert witness is well established; See Sections 48 to 54 of the [Evidence Act](#), Chapter 80 Laws of Kenya. Indeed, expert evidence is a piece of evidence to be considered alongside other evidence on record and is not binding to the court in any way.
27. Moreover, I approve the stand point taken in *Shah and Another vs. Shah and Others* [2003] 1 EA 290 where Ombija, J. expressed himself in part:
- “...The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so...If there is a conflict of expert opinion, with experts appearing for both parties, resolution of conflicting evidence or the acceptance of the evidence of one expert in preference to the opinion of the other, is the responsibility of the court...”
28. I am therefore, satisfied that the learned trial magistrate rightly exercised the discretion of the court in considering the opinion evidence.
29. The appellant contends that learned trial magistrate erred in failing to interrogate how the respondent acquired title to land parcel number Central Kasipul/ Kamuma 4304. The appellant asserts that the respondent acquired the title deed to the said land through fraud.
30. It is pretty clear that the issue of how the respondent acquired land parcel number Central Kasipul/ Kamuma 4304 was not for determination at the trial court. Be that as it may, the burden of proving the existence of fraud on the part of the respondent lay on the appellant in accordance with the provisions of Sections 107 to 109 of the [Evidence Act](#), Chapter 80 Laws of Kenya.
31. Thus, it is this court's considered view that the evidential burden of proof at the trial court did not shift to the respondent herein to adduce evidence to prove that he lawfully acquired title to land parcel number Central Kasipul/ Kamuma 4304; see [Raila Amolo Odinga & Another vs. IEBC & 2 Others](#) (2017) eKLR.



32. Sections 107 to 109 of the *Evidence Act* (supra) provide that he who alleges must prove. On that account, did the appellant discharge this duty before the trial court and in this court?
33. In *Kirugi and Another v Kabiya & 3 Others* [1987] KLR 347, the Court of Appeal held thus,

“The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.”
34. Considering the totality of the evidence availed in this case, and applying the relevant legal principles as even noted in the trial court’s judgment above, it is clear that the appellant who was the plaintiff before the trial court did not prove his case to the requisite standard. Further, the grounds of appeal are quite untenable.
35. It is therefore, the finding of this court that the learned trial magistrate’s judgment is sound at law. I hereby uphold the same.
36. In the result, the instant appeal originated by way of a memorandum of appeal dated 1st December 2021 and filed herein on even date, is hereby dismissed with costs.
37. Orders accordingly.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 28TH DAY OF FEBRUARY 2023.

G.M.A ONG’ONDO

JUDGE

PRESENT

- a) Mr. Ogari holding brief for Mr. O.M Otieno, learned counsel for the respondent.
- b) Fiona, court assistant.

