



REPUBLIC OF KENYA



**Oyuko v Mireri (Land Case Appeal 34 of 2022)
[2024] KEELC 3534 (KLR) (8 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3534 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
LAND CASE APPEAL 34 OF 2022
GMA ONGONDO, J
APRIL 8, 2024
(FROM ORIGINAL ELC CASE NO E042 OF 2021 CM'S COURT HOMABAY)**

BETWEEN

SUSAN ATIENO OYUKO APPELLANT

AND

DAVID OBONYO MIRERI RESPONDENT

(An appeal from the original Environment and Land Case No. E042 of 2021 in Homa Bay Chief Magistrate's Court delivered on 3rd August 2022 by Hon. Tom Mark Olando, PM)

JUDGMENT

1. On 3rd August 2022, the trial court (Hon. Tom Mark Olando, PM) disposed of the original suit namely Homa Bay CMC Environment and Land Case No. E042 OF 2021 as follows;

“....I thus find that the plaintiff has not proved her case on a balance of probabilities and hereby dismiss the suit each party to bare their own costs.”
2. The appellant who was the plaintiff in the suit was dissatisfied thereby. Therefore, through Nancy Nyarige and Company Advocates, she lodged the present appeal by way of the memorandum of appeal dated 19th August 202 based on the grounds that;
 - a. The Learned trial Magistrate misdirected himself on several matters of law and fact.
 - b. The Learned trial Magistrate erred in the law of evidence in deciding the case against the weight of evidence and holding that the appellant had failed to prove her case on a balance of probability when the appellant in fact presented both documentary and oral evidence to prove her case.



- c. The Learned trial Magistrate erred in law of practice, procedure and evidence in failing to take into consideration the evidence adduced and presented by the appellant especially taking into consideration the Homa Bay County Land Registrar Report dated 23rd June 2021 clearly indicating where the access road was and its exact position.
 - d. The Learned Trial Magistrate erred in law in failing to consider section 18(2) of the Land Registration Act 2012 which place the responsibility of dealing with the dispute on the Land Registrar who had already filed a report confirming the existence of the access road and claimed by the Appellant and its position.
 - e. The Learned trial Magistrate erred in law, despite being supplied with Homa Bay County Land Registrar Report dated 23rd June 2021, in deciding that the only way the appellant could prove that the defendant had blocked the access road was by producing a map showing where the road was.
 - f. The Learned trial Magistrate erred in law in failing to consider the Homa Bay County land Registrar Report dated 23rd June 2021 when there was no contrary report or evidence presented by the respondent to negate and/or prove otherwise.
 - g. The Learned trial Magistrate misdirected himself in law in assuming that he was an expert and or a surveyor and thus assumed that had jurisdiction to infer that through a map he could locate where the access road was.
 - h. The appellants intend to file a supplementary and or amended memorandum of appeal upon receiving copies of the court proceedings.
3. Thus, the appellant prays to this Honourable court to quash the decision of the trial Magistrate set aside the decree, find that the appellant had proved her case on a balance of probability and further award costs to the appellant accordingly.
 4. The respondent through Seko Minayo and Company Advocates, opposed the appeal by his replying affidavit sworn on 4th March 2024 and urged the court to dismiss it with costs. He averred, inter alia, that the appellant failed to produce a map of the area to show an access road touching on the suit land Title No. Kanyada/Kotieno Katuma B/653 measuring approximately 0.03 hectares in area in line with sections 9 and 10 of the Public Roads and Roads of Access Act Chapter 399 of the Laws of Kenya. That the appellant's assertion is in breach of the respondent's right under Article 40 of the Constitution of Kenya, 2010. Therefore, the respondent urged the court to dismiss the appeal with costs.
 5. On 2nd October 2023, the court directed that the appeal be heard by way of written submissions.
 6. Consequently, the appellant's counsel filed submissions dated 28th January 2024 where reference is made to the trial court's judgment, the grounds of appeal which are merged and discussed together as grounds 1, 2 and 3, grounds 4 and 7 and grounds 5 and 6 in favour of the appellant. Counsel submitted that the respondent did not challenge the evidence produced by the appellant before the trial court and that the Land Registrar's report dated 23rd June 2021 confirmed that the access road was created and registered on 26th July 1993. That when the appellant bought the suit land 24 years later, the access road was in existence. That the appellant proved his case against the respondent on a balance of probability.
 7. Also, counsel was of the position that the trial court failed to take into consideration the Land Registrar's report dated 23rd June 2021 and other available evidence and instead assumed the role of the Registrar by pronouncing himself that the parties ought to have produced the map for the area



- to help in determination of the dispute. To fortify the submissions, counsel cited sections 107 and 108 of the *Evidence Act* (Cap 80) as well as section 18 (2) of the *Land Registration Act*, 2016 (2012) and *George Kamau Macharia-vs-Dexka Ltd* (2019) KLR and *Paul Oranga Muma-vs-Dominic Muma Kworo* (2019) KLR, among others and urged the court to allow the appeal with costs to the appellant.
8. The respondent's submissions dated 4th March 2024 capture the grounds of appeal and the reply in opposition to the appeal and brief facts of the matter in dispute including that the appellant is the registered proprietor of the suit land while the respondent is the registered proprietor of land parcel number Kanyada/Kotieno Katuma B/1015 (The respondent's land). It was his submission that the appellant failed to produce Registry Index Map (RIM) and any other documentary evidence in support of the alleged blocked access road. That there was no compliance with sections 9 and 10 of the *Public Roads and Roads of Access Act* Chapter 399 of the Laws of Kenya and there was no application made to convert the alleged road into a public road. That Land Registrar's report made pursuant to section 18 (2) of the *Land Registration Act*, 2016 (2012), did confirm the existence of the road in dispute.
 9. To buttress the submissions, the respondent's counsel relied on, inter alia, *Dellian Langata Ltd-vs-Symon Thuo Muhia & others* (2018) eKLR that a road of access has a connotation of private use as well as *Alexander Ngotho Ngunyi & another-vs-John Ngugi* Court of Appeal at Nakuru Civil Appeal No. 123 of 2010 that there is no evidence in form of documents in support of the appellant's claim. Counsel submitted that there is no merit in this appeal which should be dismissed with costs and the impugned judgment be upheld accordingly.
 10. This being a first appeal from the trial court, I am duty bound to subject the entire evidence on record to a fresh and exhaustive re-evaluation and reappraisal and arrive at my own inferences of fact. Notably, this is a jurisdiction which should be exercised with caution bearing in mind that the trial court had the added advantage of having seen and heard the witnesses as they testified, while I am limited thereto. Nonetheless, I am entitled to depart from the trial court's findings if they are based on no evidence, or wrong principles of fact and or law or there has been a misapprehension of the evidence; see *Selle and another -vs-Associated Motor Boat Company Ltd* 91968) EA 123; *PIL Kenya Ltd-vs-Oppong* (2009) KLR 442.
 11. In the original suit, the appellant sued the respondent who was the defendant by a plaint dated 16th July 2021 for;
 - a. An adoption of the report by Homa Bay County Registrar dated the 23rd June 2021 and an order of declaration that the defendant has blocked the access road serving the suit land of the plaintiff.
 - b. An order for removal of the defendant's erected mabati structure from the access road.
 - c. An order of injunction stopping the defendant by himself and/or his agents from blocking the access road in any manner.
 - d. General damages at the rate of 12% per annum from the date of judgment until payment in full.
 - e. Costs of this suit together with interest thereon at 14% p.a from the date of filing suit until payment in full.
 - f. Such further or alternative relief as this Honourable Court deems fit to grant.
 12. The appellant claimed that she is the registered proprietor of the suit land while the defendant is the registered proprietor of the respondent's land which is separated with the suit land by an access road. That in the year 2016, the respondent having purchased a portion of the respondent's land, blocked the access road by erecting a mabati structure right there-on hence, made it part of the neighbouring



- land. That the matter was reported to the Homa Bay Land Registrar who caused visit to the site and survey of the it found that the respondent had blocked the access road. It then precipitated the suit.
13. The appellant (PW1) relied on her statement as part of her evidence, she told the court in examination in chief, inter alia, that the Land Registrar's report dated 23rd June 2021 (PExhibit 8) showed that there was 4 metres road. Under cross examination, PW1 stated that PExhibit 8 prompted her to lodge the original suit and that the respondent had fenced off the access road.
 14. PW2, Awuor Otieno, assistant chief of Arujo sub location testified that after PW1 complained to him about the access road, he invited the Land Registrar by a letter (PExhibit 5) to visit the disputed site.
 15. In his statement of defence and the counter claim dated 8th August 2021, the respondent denied the appellant's claim. In the counter claim, he stated that the access road had been illegally created to be passing inside the respondent's land without his knowledge and or consent. That the Department of Survey scheduled to re-open it on 14th February 2020 which infringes on the respondent's peaceful enjoyment of his property. At paragraph 19 thereof, he pleaded the particulars of bad faith, fraud and deceit namely tampering with an/or shifting the access road on the map to scale and creating or shifting on the access road onto the respondent's land. Thus, he prayed that the suit be dismissed with costs.
 16. In examination in chief, the Respondent (DW1) stated in part that he bought the respondent's land from Teresa Nicholas in 2014. That search does not indicate a road on the land.
 17. In the foregone, the issues for determination are as set out in the grounds of appeal which are condensed to;
 - a. Did the Land Registrar's report dated 23rd June 2021 (P Exhibit 8) finally resolve the issues of boundary in this dispute?
 - b. What are the just orders to grant in this appeal?
 18. The Land Registrar's findings as per P Exhibit 8 was that the road of access was created. It reads in part thus:

“During ground visitation on 27th may 2023 it was found that Mr. David Obonyo Mireri has blocked the road of access serving the parcels 652 and 653, he has put up a mabati structure right on the road blocking his neighbours (Henry Okoth and Susan Atieno Oyuko) This was the basis of the complainant raised by Susan Atieno Oyuko”
 19. Notably, P Exhibit 8 concludes;

“The 4 metre road of access was opened and demarcated on the ground. Mr. David Obonyo Mireir should remove immediately the mabati structure he has put on the road (blocking his neighbours) for peaceful co-existence with his neighbours ”
 20. The evidence of PW1 and PW2 revealed that the access road was fenced off by the respondent. That the Land registrar put demarcation of the same.
 21. During cross examination, PW2 stated that;

“The Registrar proceeded and put the demarcation of the road.....”



22. DW1 affirmed that he erected a mabati structure on the access road and that one could not tell that there is no road thereon. In cross examination, DW1 stated thus;
- “.....I have not seen the report from the registrar. I have a mabati structure build in 2014. You cannot tell if there was no road.....”
23. Sections 18 and 19 of the *Land Registration Act*, 2016 (2012) empower Land Registrars to establish, fix and determine boundaries of land including access road.
24. On that account, where there exists a clear procedure of redress of any particular grievance, the same to be adhered to since there are good reasons for such special procedures. The courts must exercise restraint in exercising their jurisdiction conferred by *the Constitution* and must give deference the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance; see Speaker of National Assembly-vs-James Njenga Karume (2008) 1KLR 425 and Albert Chaurembo Mumba & 7 others-vs-Maurice Munyao & 148 others Supreme Court Petition No. 3 of 2016 (2019) eKLR.
25. It is settled law that land boundary dispute falls within the domain of the Land Registrar under section 18 (2) of the *Land Registration Act*, 2016; See Azzuri Ltd-vs-Pink Properties Ltd (2018) eKLR.
26. Additionally, I support the considered view of Mutungi, J in the case of Andrew Marigwa-vs-Josephat Ondieki Kebati (2017) KLR that;
- “ a reference of the matter to the Land Registrar and County Surveyor who are the persons mandated..... the custodian of the records relating to land and have technical ability or capacity to determine, establish and fix boundaries of parcels of land as required under the *Land Registration Act*, 2012.....”
27. Sections 48 to 54 of the *Evidence Act* Chapter 80 of the Laws of Kenya provides for opinion evidence. No doubt, the Land Registrar’s report (P Exhibit 8) is opinion evidence herein.
28. It is a general rule that opinion evidence is not binding on the court which is at liberty to adopt or reject it depending on the facts and circumstances of the case before it; see Amosam Builders Developers Ltd-vs-Gachie & 2 others (2009) KLR 628.
29. In reaching the impugned judgment, the learned trial magistrate opined;
- “I find that there was no evidence that the defendant had blocked the road in the absence of the map for the area. I find that the plaintiff is not entitled to the prayers sought and the suit fails.”
30. Clearly, PExhibit 8 was not contested at the trial court. The same provided sufficient evidence as regards determination of the access road as stated by PW1 and PW2 and to a great extent, affirmed by DW1.
31. So, the learned trial magistrate had no sound reasons to reject PExhibit 8 in evidence. Further, the absence of the map of the area and as stated in paragraph 30 above, is curable under Article 159(2)(d) of *the Constitution* of Kenya 2010.
32. In the premises, the finding of this court is that the trial court’s finding is faulty at law. The appellant provides his claim against the respondent on a balance of probabilities. She is entitled to orders (a) (b) and (e) sought at the foot of the plaint.



33. Wherefore, this appeal is merited. The same is hereby allowed in terms of the orders sought in the memorandum of appeal dated 19th August 2022 as stated in paragraph 3 hereinabove.

34. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 8TH DAY OF APRIL 2024.

G.M.A ONG'ONDO

JUDGE

PRESENT

- a. Ms. N. Nyarige learned counsel for the appellant.
- b. Mr. Seko M learned counsel for the respondent.
- c. F. Mutiva, court assistant.

