



REPUBLIC OF KENYA



Wambui (Sued as the administrator of the Estate of Simon Peter Kiragu (Deceased) v Gathari (Environment and Land Appeal 9 of 2020) [2023] KEELC 16620 (KLR) (28 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16620 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL 9 OF 2020**

**JM MUTUNGI, J
MARCH 28, 2023**

BETWEEN

ALICE WAMBUI (SUED AS THE ADMINISTRATOR OF THE ESTATE OF SIMON PETER KIRAGU (DECEASED) APPELLANT

AND

PETER MAINA GATHARI RESPONDENT

(Appeal from the Judgment of the Chief Magistrate's Court at Nakuru (Hon. J.B. Kalo – CM) delivered on 24th February, 2020 in Nakuru CMCC No. 17 of 2013)

JUDGMENT

1. The Appellant who was the Defendant in the Lower Court has appealed to this Court against the Judgment of the chief Magistrates Court at Nakuru delivered by Hon JB Kalo CM on February 24, 2020 in Nakuru CMCCC NO 17 of 2013. By the Judgment the Learned Trial Magistrate found that the Appellant had encroached onto the Respondent's land parcel Nakuru Municipality Block 29/1970(Rhoda) and ordered the eviction of the Respondent and demolition/removal of any structures on the portion encroached. The Trial Magistrate also awarded the Respondent special damages in the sum of Kshs 6,300/- together with Interest and the costs of the suit.
2. The Appellant being dissatisfied with the Judgment has appealed to this Court against the Judgment on the following grounds set out in the Memorandum of Appeal dated March 6, 2020 and filed on the same date:-
 1. The Learned Trial Magistrate erred in law in arriving at the finding that the Appellant had encroached onto the Respondent's land and road reserve.
 2. The Learned Trial Magistrate erred in law and fact by basing his Judgment on the District Surveyor's report when the saw was disputed by the Appellant.



3. The Learned Trial Magistrate erred in law and fact in that he disregarded and failed to consider the weight of the evidence of the Appellant and other witnesses.
 4. The Learned Trial Magistrate erred in law and fact by failing to consider the submissions filed by the Appellant.
3. The Appellant prayed that the Judgment of the Lower Court be set aside and that the costs of the Appeal and of the Lower Court be borne by the Respondent.
 4. In the case before the Lower Court, the Respondent by way of Plaint dated January 11, 2013 and amended on June 18, 2018 ostensibly to reflect the substitution of Simon Peter Kiragu(deceased) with his personal legal representative Alice Wambui Kaburu averred that the Appellant had trespassed and encroached onto his land parcel Nakuru Municipality Block 29/1970(Rhoda). He averred further that the Appellant had proceeded to develop permanent structures on the disputed portion and had encroached on the road of access. The Respondent prayed for:-
 - a. An order of eviction and demolition of the Defendant's structure that has encroached on the Plaintiff's land and the road reserve.
 - b. A permanent injunction restraining the Defendant by himself, his servants, agents and/or representative from entering, trespassing, dealing and/or interfering with the Plaintiff's parcel of land herein above quoted.
 - c. Special damages of Kshs 12,500/-.
 - d. Costs of this suit.
 - e. Any other or further relief that this Honourable Court may deem fit and just to grant.
 5. The Appellant *vide* a statement of Amended defence dated June 21, 2018 denied that he had encroached and/or trespassed onto the Respondent's land and/or had denied him access to his parcel of land. The suit was heard before the Subordinate Court. The Plaintiff, the Land Registrar (PW2) and the County Surveyor (PW-3) testified in support of the Plaintiff's case. The Defendant, a Private surveyor, and a neighbour testified in support of the Defendant's case.

Brief Evidence By The Parties.

6. The Respondent testified as PW1 and it was his evidence that he was the owner of land parcel Nakuru Municipality Block 29/1970(Rhoda) measuring 0.0492 Hectares while the Appellant owned land parcel Nakuru Municipality Block 29/1969 and that the plots border each other.
7. The Respondent's and the Appellant's land parcels bordered each other. The Respondent testified that on 25/2/2012 when he visited his plot he found the Appellant was constructing a building on their common boundary which he stated had encroached onto his parcel of land. The Respondent informed the Appellant of the encroachment and later when he took measurements it was revealed that the Appellant's building had encroached onto the Respondent's land by about 3 meters. The Respondent stated he reported the matter to the Chief who referred them to the Land Registrar where he duly made a complaint respecting a boundary dispute. He stated he made the requisite payment of Kshs 6,300/- to enable the Land Registrar and the Surveyor to visit the disputed boundary site.
8. The Respondent stated in his evidence the Land Registrar and the Surveyor visited the site, heard the parties, took measurements and prepared the reports. He stated that both the Land Registrar and the Surveyor in their reports affirmed that the Appellants had encroached onto his land parcel by 3 metres.



9. The Land Registrar, Charles Birundu (DW-2) testified and produced the report made by the Land Registrar who visited the site. He affirmed that the report showed that the Appellant's land parcel No 1969 had encroached onto the Respondents Parcel No 1970 by 3 Metres. PW 3 Janet Wacuka Wangui, a Surveyor at Nakuru District Surveyor Office testified that she had in the company of the Land Registrar visited land parcels Nakuru Municipality Block 29/1969 and 1970 at Rhoda, Nakuru to solve a boundary dispute. The surveyor stated they took measurements on the ground which they compared with the scale distances in the Registry Index Map (RIM). She testified that their findings were that the building on land parcel 1969 had encroached into parcel 1970 along the boundary by 3 metres on the ground. The witness produced the Surveyors report which depicted all the measurements the team had taken.
10. The Appellant, Alice Wambui who substituted the original Defendant before the Subordinate court disagreed with the report prepared by the Land Registrar and the District Surveyor. She stated on the day of the visit her husband was feeling unwell and he left before the Land Registrar and the Surveyor arrived at the site. She stated the Land Registrar and the Surveyor declined to postpone the exercise and went ahead to carry on the survey without her consent. She refuted the assertion that her plot No 1969 had encroached onto the Respondent's plot No 1970. The Appellant stated the Land Registrar prepared a report which indicated her husband's plot had encroached onto the Respondent's plot which she claimed was not factual. The Appellant stated she invited a Private Surveyor who testified as DW1 to prepare a report for her respecting the disputed boundary. She affirmed that as per DW1's report her husband's plot was slightly bigger on the ground than on the Registry Index Map (RIM).
11. DW1 Dickson Wahome Wambia a licensed Land Surveyor was called as a witness by the Appellant. He testified that he visited the disputed boundary site for parcels 1969, 1970 and 1971 on behalf of the Appellant and took ground measurements and prepared a report. He stated the parcels were as a result of a subdivision of one parcel of land. He stated he took various measurements scaled from the available Registry Index Maps. He said he found that parcels 1970 and 1971 agreed with the scaled measurements but land parcel 1969 belonging to the Appellant was slightly bigger on the ground which was not unusual since the boundaries were general boundaries and not fixed boundaries. He opined the variance he found on the ground was within the acceptable marginal error. The witness stated parcel 1970 has a road of access that was 5 metres on the ground though on the Registry Map it was 6 Metres. The witness compared his report with the Mutation Form used to subdivide the original parcel Nakuru Municipality Block 29/1184 to produce parcels 1969, 1970 and 1971 and observed that on the ground parcel 1969 was bigger by 3 metres but averred that the 3 metres were not part of parcel 1970.
12. The Defendant further called a neighbour, Francis Mageto Omwoyo (DW-3) as a witness. He testified that he was the owner of land parcel Nakuru Municipality Block 29/1971. It was his evidence that the Appellant had not blocked the Respondent's access and that the Appellant had not encroached onto the Respondent's plot. He affirmed the Land Registrar had given them notification that they would visit on 19/7/2012 and that he was present when the Surveyor carried out the survey though Simon Kiragu was not present. He stated the Defendant (Kiragu's wife) was present when the Surveyor carried out the survey and she had consented to the survey being undertaken.
13. On evaluation and analysis of the evidence adduced by the parties and consideration of the submissions of the parties the Learned Trial Magistrate reached the decision that he did which has provoked the instant appeal. This Court is under a duty and indeed under an obligation to re-evaluate the evidence adduced before the Lower Court in order to determine whether the determination arrived at by the Lower Court was justified. The Court is free to make its own findings on the facts and make its own conclusions but must be cautious that it did not have the benefit of seeing the witnesses when they



testified. The Court of Appeal in the Case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* (1968) EA 123 enunciated the principle that ought to guide an Appellate Court on a first Appeal as follows:-

“This court is not bound necessarily to accept the findings of fact by the Court below. An Appeal to this court is by way of retrial and the principles upon which this court acts in such an Appeal are well settled. Briefly put they are that this 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”.

The Court of Appeal further in the case of *Abok James Odera & Associates vs John Patrick Machira T/ A Machira & Co Advocates* (2013) eKLR stated thus as regards the duty of the Court on first Appeal:-

“This being a first appeal, we are reminded of our primary roles as a first Appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the Learned Trial Judge, are to stand or not and give reasons either way. See the case of *Kenya Ports authority vs Kusthon (Kenya) Ltd* 2000 2EA 212 wherein the Court of Appeal held, inter alia, that on a first Appeal from the High court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions.”

14. The parties argued the appeal by way of written submissions. I have reviewed the record, the evidence tendered, and have considered the submissions of the parties. The Four grounds of Appeal as set out in the Memorandum of Appeal by the Appellant can be categorised under two heads:-
 - i. Whether the Learned Trial Magistrate’s Judgment went against the weight of the evidence presented?
 - ii. Whether the Learned Trial Magistrate erred in relying on the District Surveyor’s report in reaching the decision that he did?
15. In the course of the trial there was no dispute that both the Appellant and the Respondent owned adjacent parcels of land being Nakuru Municipality Block 29/1969 measuring 0.0831 Ha and Nakuru Municipality Block 29/1970 measuring 0.0492 Ha (Approx) respectively. The two parcels of land together with land parcel Nakuru Municipality Block 29/1971 resulted from the subdivision of land parcel Nakuru Block 29/1184 (Ronda) as per the Mutation Form annexed to the report of the District surveyor and the Land Registrar. Before the Subordinate Court, the dispute was whether or not the Appellant had encroached onto the Respondent’s land parcel 1970. This translated to the positioning of the boundary between the two land parcels. The matter therefore was one that required the positioning of the boundary between the two parcels of land to be ascertained. The land being registered land under the provisions of the *Registered Land Act* (Cap 300 Laws of Kenya) now repealed and replaced by the *Land Registration Act*, 2012, the mandate to deal with the issue of the boundary dispute was vested on the Land Registrar acting in concert with the County Surveyor. For the obvious reason that the court lacks the technical capability to establish and/or determine boundary disputes, that function has been vested upon the Land Registrar and the Surveyor who are the custodians of land records and have the technical capability to undertake such exercise.
16. Where there is necessity to have the parcel boundary of any registered land established the Land Registrar can invoke the provisions of Section 19 of the *Land Registration Act*, 2012 to have the boundaries of such land established and fixed. Section 19 provides as follows: -

19.



- (1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.
- (2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.
- (3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.

The Court under Section 18(2) of the [Land Registration Act](#), 2012, has no jurisdiction to deal with disputes relating to boundary in regard to registered land. Section 18(2) of the [Act](#) provides: -

“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”. (emphasis Added).

Kemei, J in the case of [George Kamau Macharia vs Dexka Ltd](#) (2019) eKLR observed as follows concerning the application of Sections 19 and 18 of the [Land Registration Act](#), 2012.

“15 From the above provisions of the Law, it is manifestly clear that the above section gives the mandate to the Land Registrar to resolve boundary disputes of land with general boundaries. Registry Index Map (RIM) only indicates approximate boundaries and the approximate situation on the ground. Even if this court was to hear and determine the matter it will still require the input of the Land Registrar. The framers of Section 18(2) of the [Land Registration Act](#) placed this matter before the Land Registrar who has the technical advice and resources of the District Surveyor to determine and ascertain the boundaries. It is Trite Law that where the Law has given a legal obligation to a Department of Government, it is important to let that Department proceed to meet its legal obligations. In this case the Office of the Land Registrar is mandated to deal with the general boundary dispute first before the same is escalated to the Court “

17. In the present matter it is clear that the Land Registrar and the Surveyor once the dispute relating to the positioning of the boundary was reported to them, they visited the site as envisioned under Section 19 of the [Land Registration Act](#), 2012 and prepared a report. This was the report the Trial Magistrate relied upon in reaching the decision that he did. The Trial Magistrate in my view properly disallowed the report by the Private Surveyor who was engaged by the Appellant and who made his report without any involvement of the Respondent. The impartiality of the Surveyor engaged by the Appellant cannot be vouched. His fidelity and allegiance was on the party who had engaged and was paying him to do the job.



18. In the case of *Amosam Builders Developers Ltd vs Betty Ngendo Gachie & 2 Others* (2009) eKLR the Court held that where there was conflict of opinion by experts representing opposing sides, the Court has the responsibility to determine the matter one way or the other and was not bound to accept any of the experts' opinion.

The Court of Appeal in the case expressed itself as follows:-

“In the case before us there is a conflict of opinion by the experts called by both sides. It was the responsibility of the Trial Court to come to a decision one way or the other after analysing all the evidence before it. In a case as this where evidence of experts is conflicting a decision one way or the other depends on the credibility of witnesses.”

19. The Learned Trial Magistrate in discounting DWI's evidence who was Appellant's expert witness observed that the Appellant did not involve the Respondent or anyone else when the survey by DWI was undertaken and therefore the Survey was not consented to and could not bind the respondent. In contrast the Land Registrar and the Surveyor notified all the parties in regard to their visit to deal with the Boundary dispute. The Learned Trial Magistrate gave the following reasons for accepting the report by the Land Registrar: -

- a. Parties consented to the process.
 - b. Parties were given the opportunity to participate in the exercise.
 - c. There was no basis for the Appellant to discredit the process undertaken by the Land Registrar.
 - d. The report was prepared by dint of section 14 of the *Land Registration Act*.
 - e. The Survey conducted by DWI was solely at the instance of the Appellant and the Respondent was not involved, consulted nor did he consent to it.
20. The Appellant in support of her submission that the Trial Magistrate erred in placing reliance on the survey carried out by District Surveyor in concert with the Land Registrar to the exclusion of the Survey carried out by the Appellant's Surveyor cited the case of *Azzuri Limited vs Pink Properties Ltd* (2017) eKLR where Angote, J held that the Registry Index Maps only indicate the approximate boundaries and the approximate situation on the ground. However, in the same case, Angote, J underscored the point that where there was a boundary dispute relating to registered land it was the Land Registrar who had the mandate to have the dispute determined. He observed thus:-

“85 Because general boundaries are identifiable by using existing physical features, and by interviewing the owners of the adjacent plots, the Law requires disputes relating to such boundaries to be handled by the Land Registrar, and not by Surveyors or even the Court

The Judge further stated:-

“86. Indeed, under Section 19 of the *Land Registration Act*, the Land Registrar cannot fix boundaries which are general in nature unless and until he gives notice to the owners and occupiers of the land adjoining the boundaries in question of his intention to ascertain and fix the boundaries.”



21. This Court sitting in Kisii in the case of *Andrew Marigwa vs Josephat Ondieki Kebate*(2017) eKLR considered the role of the Land Registrar in disputes relating to boundaries. The Court stated thus:-
- “Recognising the instant suit related to a boundary dispute which definitely the Court lacked the technical ability to deal with, the Court made a reference of the matter to the Land Registrar and the County Surveyor who are the persons mandated under the Act to deal with disputes relating to boundary. The Land Registrar is the custodian of the records relating to land, have the technical ability or capacity to determine, establish and fix boundaries of parcels of land as required under the *Land Registration Act*, 2012.”
22. In the instant matter I am satisfied that the Respondent properly sought the intervention of the Land Registrar as it was evident what was in issue was the positioning and delineation of the boundary between the Respondent’s and the Appellant’s parcels of land. The Land Registrar in my view upon receipt of the Respondent’s complaint acted in compliance with Section 19 of the *Land Registration Act*, 2012 and gave notice to the parties who he considered may be affected and he accordingly visited the site on appointed date in the company of the Surveyor and duly carried out the exercise as required under Section 19 of the *Act*. The Learned Trial Magistrate rightly appreciated the Land Registrar’s role and properly rejected the report by the Surveyor (DWI) called as a witness by the Appellant. I find no basis upon which I could fault the Learned Trial Magistrate in his findings.
23. The upshot is that I find no merit in the Appeal and I dismiss the same with costs to the Respondent.

JUDGMENT DATED, SIGNED AND DELIVERED THIS 28TH DAY OF MARCH 2023.

JOHN M. MUTUNGI

ELC - JUDGE

