



REPUBLIC OF KENYA



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**Gitahi v Kamau (Environment and Land Appeal E21 of 2022)
[2023] KEELC 16534 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16534 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E21 OF 2022
FM NJOROGE, J
MARCH 23, 2023**

BETWEEN

ESTHER MUTHONI GITAHI APPELLANT

AND

SAMUEL MUNGAI KAMAU RESPONDENT

*(An appeal arising from the ruling of the Hon. J. Karanja (SPM) dated
16th May 2022 in the Chief Magistrate's Court, Naivasha in ELC No.
87 of 2019 Samuel Mungai Kamau Versus Esther Muthoni Gitahi)*

JUDGMENT

The Appeal

1. This is a judgment in respect of an appeal brought by way of a memorandum of appeal dated May 18, 2022 against the ruling of Hon J Karanja (SPM) in Naivasha CMCC No 87 of 2019. The appellant seeks that the ruling and order issued on May 16, 2022 be set aside and the preliminary objection dated September 1, 2021 be upheld. He also seeks costs of the appeal.
2. The background of the appeal is that vide the plaint dated October 19, 2015, the respondent filed Nakuru ELC No 301 of 2015 which was later transferred to the magistrate's court at Naivasha and given Naivasha CMCC No 87 of 2019. In the Plaint he sought that an order be issued that the parties do jointly engage a surveyor to point out the boundary beacons for plot No 495 situated in Industrial Area in Naivasha town and in default of the appellant complying with prayer No (a), the respondent be at liberty to engage a surveyor to put up the boundary beacons and the appellant be permanently restrained from interfering with the said beacons once put in place by the surveyor. She also sought costs of the suit and interest thereon.



3. The appellant filed a statement of defence dated October 4, 2019 where she denied the averments of the respondent in his plaint and later on filed a notice of preliminary objection dated September 1, 2021. The grounds enumerated on the preliminary objection are as follows:
 - a. That this Honourable Court lacks jurisdiction to hear this suit as it offends the express provisions of article 162(2)(b) of the [Constitution of Kenya](#) and Sections 18 and 19 of the [Land Registration Act](#) No 3 of 2012 for reasons that;
 - a. The subject of the plaint is a boundary issue which falls within the jurisdiction of the land registrar.
 - b. It is a settled principle of law that where there is an alternative statutory dispute resolution procedure for dispute resolution, it is only in exceptional circumstances that a court of law would entertain such a dispute before the alternative procedure is exhausted.
 - b. That in the exceptional circumstances the orders sought in the plaint ensue in judicial review proceedings against the registrar, which is not the case herein hence the orders sought in the instant plaint are untenable in law.
 - c. That the suit is fatally defective, misconceived and mischievous or otherwise an abuse of the court process and therefor unsustainable in the obtaining circumstances.
4. The preliminary objection was heard by way of written submissions and the court delivered its ruling on May 16, 2022 and dismissed the preliminary objection.
5. The grounds on the memorandum of appeal are as follows:
 - a. That the learned magistrate erred in law by completely misapprehending the basic doctrine of jurisdiction as pleaded by the defendant/ appellant and the principles governing the same, thereby arriving at an erroneous decision with the regard to the preliminary objection raised by the defendant/ appellant.
 - b. That the learned magistrate erred in law by completely disregarding the doctrine of exhaustion raised by the defendant/ applicant in the preliminary objection disregarding the statutory provision that the dispute resolution procedure in land boundary disputes laid out under sections 18 and 19 of the [Land Registration Act](#) No3 of 2012 the main dispute between the parties in the said suit as laid out in the plaint dated October 19, 2015.
 - c. That the learned magistrate erred in law and fact by holding that since parties had already subjected themselves to the jurisdiction of the court, then his court had the requisite jurisdiction to hear and determine the issues in dispute, hence, misdirecting himself on the legal principle that jurisdiction is donated by statute and cannot be arrogated or donated by the parties or the wishes or the parties or the court.
 - d. That the learned magistrate erred in law by disregarding the preliminary objection dated September 1, 2021 by the defendant/ applicant and held that the same has been raised late in the day, in total disregard of the legal principle that a preliminary objection can be raised at any time in the proceedings before judgement has been entered.
 - e. That the learned magistrate grossly misdirected himself on the law regarding filing and hearing of preliminary objections and hence arriving at the impugned erroneous decision that since



the plaintiff had testified, the defendant/ appellant was time barred from raising a preliminary objection.

- f. That the learned magistrate erred in law and fact by disregarding the facts in the plaint dated October 19, 2015 as disclosed by parties to the suit while handling the preliminary objection and hence arriving at an erroneous impugned ruling.
 - g. That the learned magistrate erred in law and fact by holding that since the suit was transferred from the ELC Nakuru -a superior court of record to the ELC Magistrate's Court at Naivasha, then the learned magistrate had the requisite Jurisdiction.
 - h. That the learned magistrate erred in law by failing to appreciate that his jurisdiction is provided by the statute and limited by the statute and the same is not assumed by parties or the facts to a suit and hence arriving at an erroneous impugned ruling.
6. The appeal was canvassed by way of written submissions. The appellant filed her submissions dated February 1, 2023 on February 14, 2023 while the respondent did not file any submissions.
 7. The appellant in her submissions identified the following issues for determination:
 - a. Whether or not the honorable Chief Magistrate's court has jurisdiction to entertain the dispute herein;
 - b. Whether the respondent herein exhausted the statutory dispute resolution mechanism before filing the said suit;
 - c. Whether or not the preliminary objection is merited.
 8. On the first issue, the appellant relied on section 13(2) of the *Environment and Land Court Act*, Section 18(2) and 19 of the *Land Registration Act* No 3 of 2012 and submitted that this court lacks the requisite jurisdiction to hear the suit. The appellant further submitted that the main issue in the present matter is a boundary dispute which falls under the jurisdiction of the Land Registrar. The appellant also relied on the cases of Re *Owners of the Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Ltd* [1989], *Reuben Kioko Mutyane v Hellen Kiunga Miriti & 6 Others* ELC No E002 of 2020 among other cases in support of her arguments.
 9. On the second issue, the appellant submitted that where alternative dispute resolution mechanisms have been provided for under statute, a party ought to exhaust the said mechanism before moving to court and to hold otherwise would be to erode public confidence with such organs. The appellant further relied on the cases of *Speaker of National Assembly v Karume* [1992] eKLR, *Muthinja Kabiru & 2 Others v Samwel Munga Henry & 1756 others* [2015] eKLR, Mui Coal Basin Local Community [2015] eKLR and submitted that the respondent ought to have moved the court under Section 18 of the *Land Registration Act* and demonstrate exceptional circumstances to obtain leave for filing the suit before exhaustion of the statutory mechanism.
 10. On the third issue, the appellant relied on the cases of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969], *Garden Square Ltd vs Kogo & another* [2003] eKLR and sought that the court allows the preliminary objection as the court has no jurisdiction to hear the suit. On the issue of costs, the appellant sought that the costs of the appeal be borne by the respondent.



Analysis and determination

11. After considering the appeal and the submissions, the only issue that arises for determination is whether the learned trial magistrate erred in law in determining that he had the jurisdiction to hear the suit as framed.
12. The appellant argues that Section 18 and 19 of the *Land Registration Act* gives the Land Registrar exclusive jurisdiction to deal with boundary issues and therefore the respondent ought to have approached the Land Registrar instead of filing the present matter.
13. The trial court in its ruling stated as follows:

“...it is a well-known fact and practice that magistrates are and have been gazetted by the honorable chief justice under section 26(3) and (4) of the *Environment and Land Court Act* to preside over and determine matter relating to land and which fall within a particular courts pecuniary jurisdiction.

The ELC (High Court) in Nakuru gave orders transferring the matter to be heard in the Chief Magistrate’s Court at Naivasha. Surely, the learned judge would not have made such orders if the court did not have jurisdiction and if it were ultra vires contravenes the constitution.

A preliminary objection by its very nature is meant or ought to be brought at the earliest opportunity before the commencement of the trial...the trial herein already commenced with the hearing of the plaintiff’s case. Already the plaintiff testified and was cross-examined by counsel for the defendant at length.

By proceeding thus far, the defendant had already acquiesced and conceded to the court’s jurisdiction. Had the objection been genuine and sincere, the application would not have been made this late in the day so to speak.

I fear it would appear that the defendant is seeking a short cut rather than having the matter determined substantively on merit. The objection therefore, must and does fail and is accordingly dismissed...”

14. As indicated before, the orders sought by the respondent in his plaint are that the parties should engage a surveyor to point out the boundary beacons for plot No 495 situated in industrial area in Naivasha. This makes the suit a boundary dispute.
15. Section 18 and 19 of the *Land Registration Act* provide as follows:

18.(1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

- (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.
- (3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:



Provided that where all the boundaries are defined under section 19 (3), the determination of the position of any uncertain boundary shall be done as stipulated in the [Survey Act](#).

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.

16. The court in the case of [Bernard Otieno Alosi & Another v Kepha Omulo Opap & 3 Others](#) [2017] eKLR held as follows:

“It is evident that the law recognizes that the Court lacks the technical ability to determine disputes relating to boundaries and that explains why the Land Registrar and the surveyor are given that mandate expressly under the law since they are the ones who possess the technical ability to do so.”

17. Section 18 and 19 of the [Land Registration Act](#) requires that any disputes that relate to boundaries be first dealt with by the Land Registrar. On March 10, 2016, before the matter was transferred to the Chief Magistrate’s Court at Naivasha this court ordered that the District Surveyor Nakuru to go to the ground and establish or re-establish the boundaries of the two parcels of land and to file a report within sixty days. On July 21, 2016 the said order was amended and the Sub-County Surveyor Naivasha ordered to undertake the survey.

18. The said report was filed but the respondent’s advocates expressed their reservations about it. On February 23, 2017, the court further ordered the County Surveyor Nakuru to go to the ground and write a supplementary report. The parties did not pursue the filing of the supplementary report by the County Surveyor Nakuru.

19. A perusal of the appellant’s list of documents dated October 4, 2019 indicates that she had annexed a copy of the sub-county Surveyor’s report dated 8/11/2016. The said report points out that both the appellant and the respondent were present when the site visit was done. It is this court’s view that the said report is vague and not clear on whether there was encroachment or not.

20. It is my view that Section 18 of the [Land Registration Act](#) applies in this matter as this is a boundary dispute and so it falls within the jurisdiction of the Land Registrar. The appellant’s preliminary objection therefore has merit.

21. It is also my view that the learned magistrate erred in dismissing the appellant’s preliminary objection solely for the reasons that the ELC Court at Nakuru would not have transferred the matter if it did not have jurisdiction instead of considering the preliminary objection on merit.

22. As noted before, the Surveyor’s report is ambiguous and cannot therefore assist the trial magistrate to effectually determine the boundary dispute. There are no details given in that report as to whether



the encroachment claimed by the respondent had occurred or not. It has been the practice in this court where the issue of section 18 and 19 of the [Land Registration Act](#) have been raised, to have the proceedings stayed pending the determination of the boundary issue by the County Land Registrar and the County Surveyor and an order is normally made that the two officers do visit the site and prepare a report that may help the court in determining if the orders sought by any of the parties should be granted.

23. In this case, it should be observed that there is an order of injunction set out by the respondent in the plaint which has to be finally addressed by the trial court and which the land registrar and the county surveyor are incapable of granting even if he resolved the boundary issue by placement of beacons and fixing of boundaries.
24. In view of the foregoing and in order to meet the ends of justice, this court orders that the proceedings before the trial magistrate in Naivasha CMCC No 87 of 2019 be stayed and the matter shall be referred to the Nakuru County Land Registrar and County Surveyor for preparation of a comprehensive report on the boundary dispute between the suit properties herein which may enable the conclusive resolution of the present dispute.
25. To expedite the trial in the court below and in order to ensure compliance with an order in the record that has not to date been complied with, I order that the Nakuru county land registrar and the county surveyor shall visit the plot nos 495 and 496- industrial area Naivasha and re-establish the boundaries between the two parcels of land and file a report in the trial court within sixty (60) days of this judgement.
26. In their report they shall expressly indicate whether there is any encroachment by the appellant as alleged by the respondent.
27. The costs of the present appeal and of the preliminary objection in the court below are hereby awarded to the appellant.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 23RD DAY OF MARCH 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU.

