



REPUBLIC OF KENYA



**KENYA LAW**  
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**Fumo v Farah (Environment & Land Case 128 of 2018)  
[2023] KEELC 16516 (KLR) (21 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16516 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 128 OF 2018**

**NA MATHEKA, J**

**MARCH 21, 2023**

**BETWEEN**

**MOHAMED SWALEH FUMO ..... PLAINTIFF**

**AND**

**FATUMA FARAH ..... DEFENDANT**

**JUDGMENT**

1 The claim is that at all material times the Plaintiff and the Defendants are siblings and pursuant to Kadhi Succession Case No 21 of 2006 the Plaintiff is the registered owner of Plot No 6401 /I/MN while the Defendants are the beneficial owners of Plot No 6400/1/MN. That on or about the 2<sup>nd</sup> January 2013 the Defendants without any color of right or consent from the Plaintiff erected a four (4) bedroomed house on a 5 metre portion of the Plaintiff's property while the large portion is on a public access road. The Plaintiff avers that the Defendant's act amounts to trespass to the Plaintiff's Property. The Plaintiff further contends that the Defendant's action amounts to breach of his constitutional right to property envisaged in the *Constitution*. That the Plaintiff's claim against the Defendants is for vacant possession of the encroached parcel of land Plot No 6401/1/MN. The Plaintiff prays for Judgment against the Defendants for;

1. The Defendants act be declared trespass.
2. The Defendants be ordered to demolish the structure on the Plaintiff's plot of land and give vacant possession of the property to the Plaintiff.
3. Permanent Injunction be issued restraining the Defendant, her servants, employees or agent from entering the Property constructing or dealing with the Plaintiffs property in any manner without the Plaintiffs consent.
4. Costs of the suit and interest.



5. Any other order the court deems just and fair to grant.
2. The Defendant states that the Plaintiff is a beneficiary of a small share of the estate to be determined by the Kadhi's Court, as such he is not and has never been the owner of the whole property. The Defendant requests the Court to ask the Plaintiff to go back to the Kadhi's Court for an assessment of his share to be paid and he be evicted from the land. The Defendant further avers that they claim the portion or share awarded to the Plaintiff to be ascertained and or valued, and the amount to be paid to the Plaintiff. The Defendant claims the said portion or share of the whole property belonged to their father but was registered in the name of their late mother, as such the property belongs to the Defendants who share a mother but not the father. The Defendant prays for;
    1. That, the suit against the Defendant be dismissed with cost.
    2. That, the Plaintiff share be valued and the Defendants to pay off the Defendant.
    3. That the counter -claim be allowed and any other order as the court deems fit to grant.
3. I have considered the evidence that was adduced by PW1 Mohamed Swaleh the Plaintiff as well as his submissions in support of his case. I also take note that the Defendant did not take part in the trial despite being served with the hearing notice as evidenced in the Affidavit of service dated November 16, 2022. In paragraph 4 of the Amended plaint dated July 27, 2022, it is pleaded that the Defendant encroached on at least five meters into the Plaintiff's land and erected a house. While the Defendant in her counterclaim dated September 3, 2018 pleaded that the Plaintiff's portion ought to be assessed and ascertained. From a reading of both party's pleadings it is clear that their cause of action is anchored on the boundary between the two parcels of land. The Plaintiff has produced Certificate of Titles for both Plot No 6400/I/MN and Plot No 6401/I/MN. It can be seen from the titles that the registered proprietors for Plot No 6400/I/MN are Bakari Farah, Mohamed Farah, Muhaji Farah and Fatuma Farah (Defendant) while Plot No 6401/I/MN was vested onto Mohamed Swaleh Fumo (Plaintiff), Mwanashamu Swaleh Fumo, Maryam Swaleh Fumo and Esha Swaleh Fumo. Upon a further perusal of the two deed plans for the parcels of land it is clear to court that Plot No 6400/I/MN and Plot 6401/I/MN share a common boundary.
4. The jurisdiction of this court to hear and determine boundary disputes is in Section 18 and 19 of the [Land Registration Act](#) which provides that;
    - Section 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:



- 5 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, Cap. 299.

Section 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.”

- 6 From the above provision of the law, it is clear that this litigating at this Court is not the first instance for resolving a boundary dispute. A dispute relating to boundaries of a registered land is first heard by the Land Registrar. A party disputing a boundary ought to first make an application to the Land Registrar under Rule 40 of the Land Registration Rules to resolve a boundary dispute. It was held in Hon. Henry Kosgey vs Brian Cuthbert & another (2019) eKLR that;

Unless a boundary is determined by the Land Registrar, it is premature for a party to come to this court to ascertain its rights to the land. I do find that the plaintiff has moved to this court prematurely.”

- 7 The law has bestowed the Land Registrar with the powers to resolve boundary disputes and the court cannot wish that away. This court is not the first forum to approach in case of a boundary dispute, the suit herein is therefore incompetent and premature. Consequently, the amended plaint dated July 27, 2022 is dismissed with no order as to costs as the parties herein are siblings.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21<sup>ST</sup> DAY OF MARCH, 2023.**

**N.A. MATHEKA**

**JUDGE**

