



**Mugo v Njamiu (Environment and Land Appeal 25 of 2019)  
[2023] KEELC 22588 (KLR) (20 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 22588 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND APPEAL 25 OF 2019**

**A KANIARU, J  
JUNE 20, 2023**

**BETWEEN**

**ROSEMARY RWAMBA MUGO ..... APPELLANT**

**AND**

**NICHOLUS NJAGI NJAMIU ..... RESPONDENT**

**JUDGMENT**

1. This appeal arose from what is stated to be “Ruling / Directions” delivered and / or given by the lower court (M. N Gicheru, Chief Magistrate – as he then was) on 16/9/2019 in CMCC No 163 of 2014. The ruling/ directions essentially amounted to the lower courts acceptance of the findings of the land registrar as a full settlement of the lower court suit. The appellant was not satisfied with the position taken by the court, hence this appeal.
2. In the lower court, the respondent – Nicholas Njagi – had impleaded two parties – Patrick Njeru Njamiu And Mugo Njiru – alleging, among other things, fraudulent collusion by both to deprive him of a portion of land from land parcel No Ngondori/ Kiriari/445. Patrick Njeru Njamiu was the respondents brother and was sued as first defendant. It appears clear that he did not defend the suit. Mugo Njiru on the other hand was the second defendant and is now deceased. The appellant herein – Rosemary Rwamba Mugo – is his wife and legal representative. In this appeal, Patrick Njeru Njamiu is not a party. It appears clear from the court records that the late husband of the appellant owned land parcel No Ngandori/ Kiriari/448 which had a common boundary with the respondents land parcel no Ngandori/ Kiriari/445.
3. In the lower court, the respondent, as plaintiff then, had complained that the appellant had fraudulently colluded with his brother (who was 1<sup>st</sup> defendant in the suit) and deprived him of a portion of land. The appellant’s late husband had filed a defence denying the respondent’s entire claim. In the defence, the appellants late husband made reference to a boundary fixed during demarcation in 1958 which according to him was the proper boundary.



4. In the course of proceedings in the court however, an order was made for the land Registrar and/ or surveyor to visit the site and file a report in court. That was done and the court subsequently decided to adopt the report as its decision. Evidently, the exercise by the lands Registrar and/ or surveyor changed the alleged 1958 boundary to the detriment of the appellant. The appellant insisted on being heard by the court but the court declined. This is what provoked the appeal before the court.
5. The appeal has seven (7) grounds as follows:
  1. The learned chief magistrate erred in law in denying the appellant her right to be heard and call witnesses.
  2. The learned chief magistrate erred in law and fact in denying the appellant the right to cross – examine the respondents evidence and in particular issues of fraud which he had alleged in his pleadings.
  3. The learned chief magistrate erred in law and fact in adopting the land registrar’s report dated 5.7.2022 as the final order of the court before giving the appellant an opportunity to cross-examine the maker of the report.
  4. The learned chief magistrate misdirected himself in holding that the case had been referred to the land registrar by consent of the parties yet the land registrar had only been directed to ascertain the status of the parcels of land on the ground.
  5. The learned chief magistrate erred in law and in fact by finding that he did not have jurisdiction to entertain the matter but nevertheless proceeded to adopt the land registrar report as judgment of the court and thereby effectively conferring jurisdiction upon himself.
  6. The learned chief magistrate erred in law and in fact in failing to consider that the appellants late husband – Mugo Njiru – the original 2<sup>nd</sup> defendant was already deceased which the registrar and surveyor visited the parcels of land in issue or about April 2002 and the appellant had at the time not been substituted in his place and could not therefore fully participate in the exercise.
  7. The learned chief magistrate erred in law and fact in failing to consider that it would be grossly unjust to have the title deeds for parcels of land Nos Ngandori/ Kiriari/ 3844 (resultant subdivisions of Ngandori/ Kiriari/448) amended by reducing their respective sizes without giving the appellant and other beneficiaries of the estate of the late MUGO NJIRU an opportunity to be heard.
6. The appellant wants the court to allow the appeal, set aside the lower court ruling/ directions, order that full hearing be conducted, and that costs be awarded to her.
7. The appeal was canvassed by way of written submissions. The appellants submissions were filed on 23.2.2023. The submissions commence by reiterating the grounds on which the appeal is anchored. The background surrounding the matter is also provided and this is done together with references to some critical incidents or moments that shaped the outcome of the case. More particularly, reference was made to the court order dated 2.10.2002 issued on 25.10.2002 by consent of both sides directing the land registrar, Embu, and the district land surveyor, Embu, to visit land parcels Nos Ngandori/ Kiriari/ 445 and 448 to establish their sizes as per entries in the land registrar and also the actual sizes as appearing on the ground. A further requirement was that it be ascertained whether there had been interference with the boundaries.
8. According to the appellant, the visit to the land was made while her late husband, who was plaintiff then, was already deceased and while she herself had not yet become the legal representative of his estate.



9. The appellant further submitted that upon the report of land registrar being filed, she made attempts to be heard by the court but she was not successful. She faults the lower court for denying her hearing and for treating the dispute between the parties as merely a boundary issue. She needed, she said, to cross-examine the land registrar on his report. To emphasize the right of hearing, she cited the case of INM VS AJMN (2022)eKLR and quoted the cases of Onyango Oloo Vs Attorney General (1986 – 1989) EA 446 and Ridge Vs Baldawin (1964) AC (1963) 2 ALL ER 66 as highlighted in that case.
10. The respondent's submissions were filed on 24.2.2023. The respondent gave a background to the dispute. He then considered the grounds of appeal into two which, simply stated, was whether the appellant was denied the right of hearing and whether the lower court was wrong in adopting the land registrars report as its final order. On the right of hearing, the respondent submitted that there was no denial of hearing at all as the appellant participated in all the proceedings. She was said to have been represented by a counsel of her choice at all times.
11. On whether the trial court was wrong in treating the dispute as a boundary matter, it was submitted that it is the land registrar's office which has exclusive jurisdiction to handle boundary issues and that the report from that office was made pursuant to an order entered by consent of both parties. The case of Willis Ocholla Vs Mary Ndege (2016) eKLR was cited to emphasize the issue of the exclusive jurisdiction of the land registrar in land boundary disputes.
12. I have considered the appeal as filled, rival submissions, and the lower court record made available to this court. Ordinarily, this is a matter in which the case of Selle & another Vs Associated Motor Boat company Ltd (1968) EA 123 would be appropriate to invoke in order to get guidance on how to handle a first appeal. But I realize that Selle's case (Supra) envisages a situation where the matter brought on appeal has been heard and determined through a well considered judgment. It is not very much so in this matter. No hearing took place. Infact some of the grounds relate to denial of the right of hearing to the appellant. No proper judgment in law was also delivered. For these reasons Selle's case does not apply as appropriately as it should.
13. The respondent in this appeal was the plaintiff in the lower court matter. If I understand well his complaint in the lower court, he pleaded that his brother, who was 1<sup>st</sup> defendant and administrator of the estate of their late father, which estate included land parcel No Ngandori/kiriari/445, had fraudulently colluded with the 2<sup>nd</sup> defendant, who was husband to the appellant and owner of the neighbouring land parcel No Ngandori/ Kiriari/448, to deprive him of a portion of land from land parcel No 445. The respondent therefore wanted the court to find that his brother, 1<sup>st</sup> defendant, was in breach of trust; that the appellant's late husband, 2<sup>nd</sup> defendant then, had fraudulently increased or expanded his land; a rectification of the problem; general damages arising from breach of an alleged statutory duty; and costs of the suit plus interest.
14. The appellant's late husband had filed a defence in which he denied the respondent's claim and also pleaded, inter alia, that the respondent was extending his dispute with his brother, who was first defendant, to him. He also pleaded that there has an old boundary put in place way back in 1958 which both sides had respected all along.
15. It seems clear to me that the land registrar and land surveyor, visited the site twice and the end result was adjustment of the boundary in a manner that affected the appellant adversely. The lower court treated the reports of the lands office as having conclusively determined the matter and therefore went ahead to adopt the reports as its decision. The appellant insisted that she wanted to be heard and twice asked for hearing but the court declined her requests. As can be seen in the grounds of appeal – see grounds 1, 2 3 and 7 – the appellant is mainly complaining that she was denied a hearing.



16. The respondent on the other hand seems to be satisfied with the outcome. And this is notwithstanding that he had alleged fraud, asked for damages, and prayed for other orders all of which required proof through hearing. These are also prayers which also the report from the lands office adopted as decision of the court had not addressed.
17. In law no person should be judged without a fair hearing in which a good opportunity is given to respond to evidence. As the party adversely affected by the outcome, the appellant's side of the story needed to be heard. The refusal or omission by the lower court to hear her was a grave error in my view.
18. There is also another flaw noticeable regarding the manner the lower court handled the matter. It is clear that the lower court treated the entire matter as a boundary dispute yet it is clear from the pleadings – and more particularly from the plaint filed by the respondent – that the matter was more than that. Infact, the respondent was alleging that the appellant's late husband had fraudulently colluded with the respondents own brother to take away a portion of land from him. Even the points of reference as captured in the first court order directing the lands office to visit the site show clearly that the matter was more than a boundary dispute. The lands office was not only to establish the boundary but also determine the acreage of the two parcels of land mentioned in the suit. The aspect of determining acreage was obviously meant to address the issue of the portion which the appellants late husband was alleged to have fraudulently taken. The matter was therefore not a simple boundary dispute. Even a prima facie look at the pleadings as filed clearly show it was more than a mere boundary issue.
19. Over- simplifying the matter as a boundary dispute led to another error namely; the lower court found it had no jurisdiction to handle the matter as it is the land's office which is mandated by law to handle a boundary issue. In my view, the position taken by the lower court was wrong. The issue of boundary was necessary to be looked into in order to enable the court to determine the entire suit including the issues that were not related to the boundary. But the jurisdictional conundrum does not end there. For it is clear that inspite of the lower court finding that it had no jurisdiction to handle the matter as it was a boundary dispute, it still proceeded to adopt the land registrar's report as its own decision. This seems to be a contradiction of sorts. If the court had no jurisdiction, where did it get the power or authority to adopt the land registrar report as its decision? The fact of the matter is that the land registrar's report was not supposed to be the decision; it was a means to a decision.
20. My considered view is that the appellant has demonstrated the merits of the appeal. I say so for the reasons aforesated. I therefore allow the appeal and order that the matter goes back to the lower court for full hearing. Each side to bear its costs of the appeal.

**JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 20<sup>TH</sup> DAY OF JUNE, 2023.**

In the presence of Akotsi for Rose Njeru for Appellant, Ms Ngige For Kathungu For Respondent and Leadys – Court Assistant

**ANTONY KANIARU**

**JUDGE- ELC, EMBU**

**20.6.2023**

