



**Esquire Investment Limited v Kajiado Land Registrar & another (Environment and Land Appeal 20 of 2019) [2023] KEELC 20036 (KLR) (26 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20036 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND APPEAL 20 OF 2019  
MN GICHERU, J  
SEPTEMBER 26, 2023**

**BETWEEN**

**ESQUIRE INVESTMENT LIMITED ..... APPELLANT**

**AND**

**PRIME STEELS MILLS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**KAJIADO LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This ruling is on the Notice of Motion dated 25/2/2022. It seeks the following orders.
  1. That the application be certified urgent and be heard *ex-parte* in the first instance.
  2. That the firm of Guandaru Thuita & Company Advocates be allowed to take up the conduct of the case on behalf of second Respondent in place of Macharia –Mwangi and Njeru advocates as per the consent dated 24/2/2022.
  3. That there be a stay of execution of the decree issued herein on 17/1/2022 pending the hearing and determination of this application.
  4. That this court does review its judgment and order of 17<sup>th</sup> January, 2022 and revise its findings substituting the first Respondent’s report with that of the surveyor.
  5. That the award of costs in favour of the Appellant be reviewed.
2. The motion which is brought under Order 9 Rule 9(b) and Order 45 Rule 1 of the *Civil Procedure Rules* and Sections 1A, 3A and 80 of the *Civil Procedure Act* is based on four grounds which include the following.
  - a. The court made a ‘finding’ that boundary disputes in accordance with Section 18(2) of the *land Registration Act* are to be determined by the Registrar and not a surveyor.



- b. The court fell into an obvious error apparent on the face of the record when it allowed the prayer in terms of paragraph 3(a) to the effect that the Registrar's decision be set aside and the surveyor's report be adopted as the correct decision.
  - c. The court fell into an error apparent on the face of the record when it failed to consider adequately the decision of the Senior Land Registration Officer.
  - d. Though the second Respondent had filed a notice intending to appeal, the same has since been withdrawn to allow the filing of the application for review.
3. In addition to the above, the operations manager of the second Respondent, Chetankumar Rameshbhai Patel, has sworn a supporting affidavit dated 26/2/2022.

4. The gist of the above material is as follows.

Firstly, the court erred by relying on the decision of the surveyor instead of the decision of the Senior Land Registration Officer. This is therefore an error apparent on the face of the record.

Secondly, under Section 18(2) of the *Land Registration Act*, it is the Land Registrar and not the surveyor who has the authority to determine boundaries.

Finally, since the second Respondent has already withdrawn a notice of intention to appeal, then this court has power to review its decision of 17/1/2022.

5. The motion is opposed by the Appellant and its managing director, Ramji Devji Varsani, has sworn a replying affidavit dated 8/3/2022 in which he replies as follows.

Firstly, the second Respondent has filed a similar application in the court of Appeal being Civil Application No E038 of 2022 and this therefore offends the sub judice rule under Section 6 of the *Civil Procedure Act*.

Secondly, the current application does not meet the threshold set out in Order 45 Rule 1 *Civil Procedure Rules* to warrant review.

Thirdly, there is no error apparent on the face of the record because the Land Registrar was wrong in failing to correct the glaring disparity in length of the two parcels whereas one parcel was longer by more than 12 meters while the other was shorter by the same length.

Finally, encroachment was proved by all the surveyors including second Respondent's and the findings of the court were therefore well founded.

For the above stated reasons, the Appellant prays for the dismissal of the second Respondent's application.

6. Counsel for the parties filed written submissions on 16/6/2022 and 21/6/2022 respectively. They raised the following issues.

- a. Whether the application is sub-judice?
- b. Whether there is an error apparent on the face of the record?

7. I have carefully considered the motion in its entirety including the affidavits by both sides, the annexures, the submissions and the issues raised therein. In addition to the above, I relooked at the entire record. I make the following findings.

On the first issue, I find that it is not proper for the second Respondent to seek review when there is a pending appeal. I am satisfied, prima facie, that there is a pending appeal which is Civil Application No



E038 of 2022 at the Court of Appeal at Nairobi as per annexure Number RDV-1 dated 11/2/2022. The second Respondent did not file any supplementary affidavit to rebut this evidence adduced by the Appellant. It was incumbent upon them to file and serve a notice of withdrawal of appeal in the face of the annexure by the Appellant.

Order 45 Rule 1 *Civil Procedure Rules* does not envisage that a party can pursue both an appeal and an application for review. It provides;

- 1(i) Any person considering himself aggrieved –
  - a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred...may apply for a review of judgment to the court which passed the decree...”

Since an appeal and review are as per the above rule mutually exclusive, the current application is bad in law on this ground.

8. On the second issue, I find no error apparent on the face of the record. It cannot be true to say that the court failed to consider adequately the decision of the Senior Land Registration Officer. The court dealt with this issue at paragraph 10 of the judgment dated 17/1/2022 when it said,

“...I find that the first Respondent did not make a fair determination of the boundary dispute. It was obvious that the encroachment of the Appellant’s land by the second Respondent was way outside the margin of error dated by the law...”

It was not fair at all to let the status quo remain while the Appellant lost a huge chunk of land without just cause or compensation. The first Respondent had discretion and was duty bound to rectify this glaring injustice”.

9. At paragraph 6 of the judgment the court enumerated the instances in which it would interfere with a finding of fact by the trial court. This is when the trial court misapprehends the evidence or where the court is shown to have acted on wrong principles.

In this case, it was found that the Land Registrar failed to rectify a glaring wrong whereby two parcels of land with almost equal road frontage length of about 98 metres each had a disparity of more than 20 metres. While the second Respondent’s land was 104.3 metres long, the Appellant’s was 83.2 metres long. The surveyors were in agreement on the disparity. Yet the Land Registrar did not find it necessary to correct the obvious disparity. She said;

“...in my opinion, if a wall had already been erected at the time of purchase of parcel 111, then it implies that the buyer accepted the size as it was. Further to this, from my observation, owner of parcel 111 has landscaped boundary wall implying acceptance of the current boundary. I therefore rule that the status quo be maintained”.

This is the glaring injustice that the court could not allow to stand. The owner of L.R. 111 was the Appellant. He had complained to the Land Registrar of the encroachment. Yet the registrar was saying that the same complainant had accepted the status quo. He had not accepted this status quo. That is why he was before the Land Registrar.



10. Regulation 40(4) of the *Land Registration (General) Regulations 2017* in the second schedule of the *Land Registration Act* provides as follows.

“(4) In determining a boundary dispute lodged in accordance with paragraph (1), the Registrar shall be guided by the recommendation of the officer responsible for survey of land”.

What the above provision means is that the Land Registrar cannot go against the recommendation of the surveyor unless there is a good reason for doing so. The findings of the land Registrar did not have anything on why she had to differ with the recommendations of the surveyor.

11. On costs, I find that they follow the event. No reason has been given by the second Respondent as to why this court should deviate from this general law found in Section 27 of the *Civil Procedure Act*.

12. For the above stated reasons, I dismiss the motion dated 25/2/2022 save for prayer 2. Costs to the Appellant.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**M.N. GICHERU**

**JUDGE**

