



**Kairu v Mutunga (Environment and Land Appeal E018 of 2022)  
[2023] KEELC 21723 (KLR) (21 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21723 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT AND LAND APPEAL E018 OF 2022  
LG KIMANI, J  
NOVEMBER 21, 2023**

**BETWEEN**

**JUSTUS MACHARIA KAIRU ..... APPELLANT**

**AND**

**SAMMY MUSAU MUTUNGA ..... RESPONDENT**

*(Appeal arising from the ruling of Honourable M.K Mwangi Chief Magistrate sitting at Mwingi ELC Case E001 of 2022 delivered on 15th September 2022)*

**JUDGMENT**

1. Before the Court is an Appeal against the Ruling of Honourable MK Mwangi Chief Magistrate sitting at Mwingi ELC Case E001 of 2022 delivered on September 15, 2022. The trial court's ruling was in respect of an application dated May 10, 2022 and the Memorandum of Appeal dated October 5, 2022 sets forth twenty-five grounds of appeal.
2. In summary, the appellant states that the learned magistrate misdirected himself in finding that the suit was statute-barred and dismissing the suit under order 1 rule 10(2) of the *Civil Procedure Rules, 2010* without proving the elements established by law and failing to appreciate the protection under rule 2 of the *Constitution of Kenya (Protection of rights and fundamental freedoms) Practice and Procedure Rules 2013* and other statutes.
3. The appellant also faults the trial court for finding that he was appealing against the decision of the registrar whereas he was seeking a joinder of the registrar to completely settle all the matters in question and administer justice.
4. Further, the appellant states that the trial court erred in relying on evidence that was not there and he had not been served such as a fictitious letter from the Land Registrar and the District surveyor which was not about the present case and was not served.



5. The appellant calls upon this Court to safeguard his right to a fair hearing and his right to proprietorship for the interest of justice. He states that it is in the interest of justice for the information held by the registrar to be brought to court to help the court adjudicate and settle all the matters in question. He relied on the provisions of article 47(1) and (2) of the Constitution as well as section 4 of the Fair Administrative Action Act
6. It is therefore the appellants case that the trial court erred in not granting the orders sought when it has the powers and jurisdiction to do so when the wheels of justice tilt toward granting the orders sought, that the application had merit and was well grounded in law.
7. The appellant prays that the appeal be allowed and that the ruling of the subordinate court be set aside and to be awarded the costs of this appeal.

### **The suit before the trial court**

8. The suit before the trial court was instituted *vide* Plaintiff dated February 11, 2022 where the appellant was the plaintiff. He claimed to be the registered proprietor of land parcel No Mwingi/Kazanzu/1875 while the defendant is the registered owner of land parcel No Mwingi/Kazanzu/1874 and that the defendant has encroached onto his land, transferred beacons and put up a fence in part of his land.
9. He therefore prays that the Kitui County Surveyor together with the plaintiff's private surveyor visits the site and rectifies the boundaries between the two parcels of land and that the defendant be restrained permanently from interfering with his parcel of land and remove his fence therefrom.
10. The defendant on the other hand denied the allegations in the Plaintiff and stated that on February 9, 2022, by a request which was made by the plaintiff, the sub-county surveyor from Mwingi central sub-county visited the *locus* in the presence of both parties and carried out measurements on the ground and confirmed that there was no encroachment and prepared a report dated February 9, 2022.
11. The appellant herein made an Application under Notice of Motion dated May 10, 2022 seeking to enjoin the District Land Registrar Mwingi sub-county and the Senior surveyor from the Director of Service (Headquarters) as interested parties, an order that the said registrar provide all the documentary evidence on the disputed lands' boundaries and comply with his duty under section 18 and 19 of the Land Registration Act for the interest of justice.
12. Further, the appellant prayed for an order that the 1<sup>st</sup> and 2<sup>nd</sup> intended interested parties would bring their reports pertaining to this case and be subjected to testing and cross-examination during the hearing.
13. The trial magistrate delivered the Ruling on August 17, 2022 where he stated that the District Land Registrar Mwingi sub-county indeed exists but noted that the person referred to as senior surveyor from the Director of Service (headquarters) was not a specific person and held that it is not possible to enjoin an amorphous character to a suit while declining to enjoin the said senior surveyor.
14. The trial court also noted that according to sections 18(2) and 19 of the Land Registration Act, disputes pertaining to boundaries must be referred to the land registrar for resolution and that both parties had agreed for the land registrar to visit the suit land and resolve the boundary dispute. This was done and a report was prepared but the applicant was dissatisfied with the decision of the land registrar and seeks an appeal from this decision. It was noted that the applicant cited a violation of his rights and fundamental freedoms under article 47 and that the applicant was essentially seeking an order of *mandamus* in his Further Affidavit, which is a preserve of the superior court.



15. The trial court therefore held that it cannot arrogate itself jurisdiction where none exists. The trial court also noted that the appellant sought joinder of the interested parties and at the same time substantive orders and that the substantive orders sought would amount to the interested parties suffering without the advantage of having been heard. He therefore dismissed the application with costs.

### **Appellant's written submissions**

16. The appeal was heard by way of Written Submissions and the appellant who appears in person filed Written Submissions dated July 21, 2023 and further Submissions in reply to the respondent's dated October 9, 2023. He gave the history of the boundary dispute submitted between his parcel of land and the respondent's land. He submitted that he sought the assistance of the land registrar who was not helpful and thus filed the suit before the trial court. He stated that if the court does not intervene, his land parcel Mwingi/Kazanzu/1875 will be grabbed/stolen openly and noted the importance of enjoining a government surveyor since he has a recognizable stake of helping to effectually and completely adjudicate all the matters in question. He states that the surveyor in the Mwingi sub-county is already engaged as the defendant's witness and he will suffer prejudice if the same defence witness is used to determine questions that arise in this land dispute.
17. The appellant contended that during the said land registrar visit, the land registrar sent one of his subordinates named Elijah to do the work in his absence and that a registrar cannot delegate his duty to other civil servants. He stated that the court could exercise supervisory jurisdiction before the case commences and that he would suffer great prejudice if he lost his case and his piece of land.
18. He submits that the trial magistrate misdirected himself in finding that he was appealing against the decision of the registrar of land when there was no such decision to be appealed against.
19. He also submits that the registrar of lands has a stake in helping the court to effectually and completely adjudicate all matters in question and relied on the provisions of order 1 rule 10 (2) and orders 52 rules 3 and 4 of the *Civil Procedure Rules, 2010* and sections 1A and 3A of the *Civil Procedure Act*.
20. He further faulted the trial magistrate for not finding that he was bound by the above provisions of the law which is prejudicial. He states that documents such as maps, mutation forms, measurements and the registrar's report would have been produced if the registrar if he was enjoined as a 1<sup>st</sup> interested party.
21. With regards to the senior surveyor, the appellant submits that surveyors play a very crucial role in providing the necessary spatial information.
22. He also submits that he was not served with the said registrar's report and there was no final judgment on the boundary dispute that the court relied on to dismiss his application.
23. The other point that the appellant raises is that the learned magistrate misdirected himself for not observing that the district surveyor was not allowed by the law to hold a hearing on boundary resolution. Further, he contends that the senior surveyor is not an amorphous character and that the trial magistrate could have understood that he is not a lawyer but the surveyor is important and has a recognizable stake.
24. The appellant relied on the case of *Patriotic Guards Ltd v James Kipchirchir Sambu* (2018)eKLR where it was held that the joinder of an interested party is at the discretion of the court as well as the case of *Meme vs Republic* (2004)1EA 124 among other cases.
25. He submitted that the interested parties being creatures of the law are tasked with constitutional and statutory mandates to serve the republic of Kenya and have a standing in this matter according to the definition of an interested party in the *Black's Law Dictionary*.



26. The appellant invokes the supervisory powers of this court under articles 165(3) and (6) to order the registrar to revisit the issue of boundary as per the law. He also relied on articles 47, 33 (3), 35 (2), 20 (1), 21 (1) and 22 of the the [Constitution of Kenya](#) and section 9 of the [Fair Administrative Actions Act](#). The appellant therefore submits that he stands to suffer great prejudice as he will lose part of his land and lose a court case without the input of the two intended interested parties

### **Respondent's submissions**

27. Counsel for the respondent submitted that prayers 1 and 3 of the appellant's application dated May 10, 2022 are vague and ambiguous and the court was clear and right to disallow the same because it would amount to giving orders in vain as there is no such office of the senior surveyor from the director of service(headquarter).
28. Further, it was submitted that the other prayer is an order of judicial review in the nature of *mandamus*, which orders the magistrate court has no such jurisdiction to issue and that the court cannot arrogate jurisdiction upon itself.
29. The respondent's submission therefore is that the appeal lacks merit and is an abuse of court process and should be dismissed with costs.

### **Analysis and Determination**

30. This being the first appeal court's duty is summarized by the Court of Appeal in *Selle & another v Associated Motor Boat Company & others*, [1968] EA 123 where the court stated that the first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal.
31. The court has considered the grounds raised in the Memorandum of Appeal herein and the submissions made by the Appellant in person and Counsel for the respondent. The court proposes to condense the grounds of appeal and deal with the prayers as sought in the Notice of Motion dated May 10, 2022.

### **Prayer 1: Joinder of the proposed 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties**

32. The appellant's application dated May 10, 2022 sought to join to the suit the district land registrar Mwingi sub-county and the Senior surveyor from the Director of Service (headquarters) as interested parties. Did the trial magistrate err in not granting the order sought? The rules governing the joinder of a party to a suit are found in order 1 of the [Civil Procedure Rules](#). Order 1 (10) provides that:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

33. As quoted by the appellant, the [Black's Law Dictionary](#) defines an “interested party” as “A party who has a recognizable stake (and therefore standing) in the matter.” It also defines a “Necessary Party” as “a party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings.”



34. An interested party is someone who is identified as being directly affected by the case and in particular the relief that may or may not be granted by the court depending on whether it finds for or against the claimant. This position was taken by Mativo J. (as he then was) in *Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others* [2017] eKLR).
35. The Court of Appeal in *Civicon Limited v Kivu Watt Limited & 2 others* [2015] eKLR confirmed the requirement for an interested party to show that he would be affected either legally or financially to qualify for joinder in a suit. The court stated that:
- “In the case of *Gurtner vs Circuit* (1968) 1 All ER 328 it was held that a party may be enjoined if he can demonstrate that any order in the action would directly affect him either legally or financially. (Denning, MR) stated thus:
- “...The bureau clearly had a commercial interest in resisting the declaration, but that is not enough. John Stephenson J accepted the analysis of the rule and the many previous decisions under it contained in the exhaustive judgment of Devlin, J, in *A Amon vs Raphael Tuck & Sons, Ltd* (1956) 1 All ER 273 and took the view that the court had no jurisdiction to add a party against the will of the plaintiff unless the person seeking to be added was:
- “...at least able to show that some legal right enforceable by him against one of the parties to the action or some legal duty enforceable against him by one of the parties to the action will be affected by the result of the action...”
- ...The only reason which makes it necessary to make a person a party to an action is so that he may be bound by the result of the action, and the question to be settled therefore, must be a question in the action which cannot be effectively and completely settled unless he is a party...”
- The rules of natural justice require that a person who is to be bound by a judgment in an action brought against another party and directly liable to the plaintiff on the judgment should be entitled to be heard in the proceedings in which the judgment is sought to be obtained.”
36. The Court in *John Harun Mwau v Simone Haysom & 2 others; Attorney General & 2 others (Interested Parties)* [2021] eKLR held that an interested party can be joined to the case at the very beginning of the suit. The court stated that:
- “The three interested parties were enjoined in the plaint. It is not unusual to have interested parties enjoined in court cases at the initial stage. However, the normal and established practice has been for such an interested party to apply to be enjoined in the matter and show what interest he/she has in the case. .... Generally, the plaintiff’s claim touches on the interested parties. I see no prejudice that will be suffered by the Defendants if the interested parties are left to participate in the case. There is no allegation that the interested parties are out to assist the plaintiff in prosecuting his case. The interested parties have also confirmed that their participation in the suit will assist the court in effectively and efficiently determining the issue of truth raised in the suit.”
37. From the foregoing, it is clear that the measure of whether an interested party should be joined to a civil suit is that their presence is necessary to effectually and completely adjudicate upon and settle all questions involved in the suit but their absence would not result in the dismissal of the suit. Further, they must have an identifiable interest, stake or legal rights or duties in the suit. The other criteria set



out is whether orders made by the court would be likely to bind the interested party and the questions to be settled in the suit cannot be settled unless the interested party is a party to the suit.

38. The appellant's case is that the district land registrar Mwingi sub-county and the Senior surveyor from the Director of Service (headquarters) fit the above criteria and are necessary parties to effectually settle all questions that arise from the suit.
39. From the pleadings before the trial court the question in dispute is the ascertainment of the boundary between the plaintiff's land parcel No Mwingi/Kazanzu/1875 and defendant's land parcel No Mwingi/Kazanzu/1874 and whether there is an encroachment on the appellant's land by the respondent.
40. The role of the land registrar and the Surveyor when it comes to the ascertainment of boundaries and settlement of boundary disputes is set out under sections 18 and 19 of the Land Registration Act No 3 of 2012. The said sections provide as follows:

- “(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, (cap 299).”

41. Section 19 provides that:

- “(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.”



42. From the above provisions of the law, it is clear that the mandate to determine a boundary dispute is a preserve of the land registrar. The applicant stated in the two Affidavits in support of the application that the land registrar had participated in trying to resolve the dispute through the Surveyor J. M. Elija but that the report given by the surveyor was untruthful thus he resorted to court for assistance. He contended that the land registrar had to participate fully in the dispute and that the said registrar had failed in his duty under article 47 of the [Constitution of Kenya](#) .
43. The respondent in his defence stated that they had called upon the sub-county surveyor Mwingi to determine the disputed boundary. It was contended that a report dated February 9, 2022 was prepared and the same formed part of the defence bundle of documents filed in court.
44. The trial magistrate in his ruling found that indeed such boundary disputes must be referred to the land registrar. He stated that the application before the court arose out of the applicant’s dissatisfaction with the decision of the land registrar.
45. This court notes that the appellant did not file a report by the land registrar or any documents to show that the Land Registrar had dealt with the boundary dispute. A report by a land registrar cannot be replaced by a report by a surveyor’s report. The court agrees with the finding of Kibunja J. in the case of [Willis Ocholla v Mary Ndege](#) [2016] eKLR:-

“That contrary to the submissions by the plaintiff’s counsel, the list of documents filed by the plaintiff does not include any document with the land registrar’s determination of the boundary dispute between the parties herein as proprietors of land parcels Kisumu/ Karateng/298 and 296. That the Kisumu County Surveyor’s report dated April 27, 2015 cannot be a substitute of a land registrar’s determination under section 18(2) of the [Land Registration Act](#) for reasons that the two offices are not synonymous or the same.”

46. The court agrees with the contention that the land registrar and the land surveyor are necessary offices when it comes to the determination of boundary disputes. However, the role that the said offices play are as provided under the law and in the particular circumstances of this case as provided under section 18 and 19 of the [Land Registration Act](#). In particular, and following the provisions of section 19 (1) and (2) the applicant, if interested in having the boundary between his land and that of the respondent ascertained and fixed ought to have made an application to the Land Registrar for such determination.
47. The procedure for ascertaining a missing boundary or a boundary dispute under sections 18 and 19 of the [Land Registration Act](#) is more specifically provided for under the [Land Registration \(General\) Regulations, 2017](#) regulations 40 and 41 which state as follows;

“(40)

- (1) An interested person may apply to the Registrar for the ascertaining of a missing boundary or a boundary in dispute under section 18(3) of the Act in Form LRA 23 set out in the sixth schedule.
- (2) The registrar shall issue a notice in Form LRA 24 set out in the Sixth Schedule to all persons appearing in the register that may be affected or such other persons as the Registrar may deem necessary for the resolution of the dispute if a person has complied with paragraph (1).



- (3) The Registrar shall notify the office responsible for the survey of land of the intended hearing of a boundary dispute and require their attendance if a person has complied with paragraph (1).
- (4) In determining a boundary dispute lodged in accordance with paragraph (1), the Registrar shall be guided by the recommendation of the office responsible for survey of land.
- (5) The Registrar shall, after giving all persons appearing for the hearing in accordance with the notifications sent under paragraphs (1) and (2) an opportunity to be heard, make a determination of the dispute and inform the parties accordingly.
- (6) Any party aggrieved by the decision of the Registrar made under paragraph (5) may, within thirty days of the date of notification, appeal the decision to the Court.
- (7) Upon expiry of thirty days, the Registrar shall-
  - a. cause to be defined by survey the precise position of the boundaries in question;
  - b. file a plan approved by the authority responsible for survey of land containing the necessary particulars; and
  - c. make a note in the register that the boundaries have been fixed, and thereupon the plan shall be deemed to define accurately the boundaries of the parcel.
- (8) A dispute for determination of a boundary and or parcel shall unless in the case of special circumstances, be completed within a period not exceeding six months from the date of filing the application. 41. (1) An interested person may apply to the Registrar for the ascertaining and fixing of boundaries of 19 (1) Act, in Form LRA 23 set in the Sixth Schedule.
- (2) The notice issued by the Registrar under section 19(1) of the Act shall be in Form LRA 24 set out in the Sixth Schedule.
- (3) When making a decision under section 19(1) of the Act, the Registrar shall follow the procedure outlined in Regulation 40.”

48. From the foregoing procedure, the process can be triggered by the land registrar or by the person seeking to have a boundary dispute resolved by the registrar. Without following the procedure set out in ascertaining and fixing the boundaries, the court is barred under section 18 (2) of the [Land Registration Act](#) from entertaining any action or other proceedings relating to a dispute as to the boundaries of the suit parcels of land. Indeed, under regulation 40 (6) of the [Land Registration \(General\) Regulations, 2017](#), the court’s jurisdiction with regard to boundary disputes is appellate and the court is of the view that the said jurisdiction cannot be invoked in the 1<sup>st</sup> instance as the appellant did in the case before the trial court.



49. The evidence placed before the trial court relating to the boundaries was the report by the Sub-County Surveyor Mwingi and the same was addressed to the OCS Mwingi Police Station. It is the court's view that the appellant did not show that the boundary dispute herein had been referred to the Land Registrar in terms of the provisions of section 18 and 19 of the [Land Registration Act](#) or the regulations thereunder and that the said office had failed and or refused to determine the dispute and/or had determined the same in violation of the law. As was determined in the case cited above [Willis Ocbolla v Mary Ndege](#) (*supra*) a Surveyor's report cannot be a substitute of a land Registrar's determination under section 18(2) of the [Land Registration Act](#) for reasons that the two offices are not synonymous or the same.
50. It is thus the court's conclusion that the powers given to the office of the land registrar and the survey office in relation to ascertainment and determination of boundaries ought to be invoked using the procedure set out under sections 18 and 19 of the [Land Registration Act](#) and the regulations set out thereunder. The said power can be invoked without joining the said offices as interested parties in the suit. It is further the court's conclusion that the land registrar was not a party whose presence before the court was necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit.
51. The court has also not seen any evidence from the claim filed by the Appellant that the proposed interested party will be bound by the result of the suit filed and that the question to be determined by the court cannot be effectively and completely settled unless he is a party.
52. The second limb of prayer 1 is whether the trial magistrate erred in not joining the Senior Surveyor Director of Service (Headquarters) as an interested party to the suit. The appellant's reason for seeking joinder was that the sub-county surveyor, Mwingi was one of the defence witnesses and would therefore not give an independent report and that a surveyor has expertise in spatial information. The trial court in its ruling held that the said party was not specific, was vague and it was not possible to join an amorphous character to the suit.
53. The court notes that the Appellant has not shown that an office of Senior Surveyor from the Director of Service (Headquarters) exists. The question that arises is whether if the said interested party had been joined to the suit, who would have been served with summons and against whom would any orders issued be directed and executed? In the circumstances of this case, the court would have been acting in vain if the orders made would not be capable of execution.
54. It is trite law that the court will not normally act on issues that are moot or academic. As was held by Mativo J (as he then was) in [Evans Kidero v Speaker of Nairobi City County Assembly & another](#) (2018) eKLR, where the learned Judge stated inter alia that:
- “ A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic
- ..... A suit is academic where it is merely theoretical, makes empty sound and of no practical utilitarian value to the plaintiff even if judgment is given in his favour. A suit is academic if it is not related to practical situations of human nature and humanity...”
55. The Appellant submitted that the court should have known that he was not an advocate as he is representing himself in person and should have enjoined a government surveyor nonetheless. He relied on sections 1A and 3A of the [Civil Procedure Act](#) and his constitutional rights of fair hearing.



56. *Stephen Boro Gitiba v Family Finance Building Society & 3 others* [2009] eKLR Nyamu, JA expounded on the Overriding Objective and stated that:

“.....The overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with and whatever is in conflict with it must give way. A new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time.”

57. From the record the appellant had rejected the findings of the Sub-County Surveyor Mwingi who is the surveyor with jurisdiction over the suit parcels of land. In the circumstances even if the court were to accept the appellant’s argument, the dilemma would have been the criteria the court would have used to identify specific surveyor the trial court would have appointed to be joined as an interested party to the suit.

58. From reading the relevant law, the court concludes that when it comes to ascertainment and determination of boundary disputes, the office of the Surveyor works with the office of the Land Registrar as provided under section 19 (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.....”

59. The court thus finds that the appellant ought to have moved the land registrar under sections 18 and 19 of the *Land Registration Act* and regulations 40 & 41 of the *Land Registration (General) Regulations* before filing any proceedings before the court.

60. The survey work is thus carried out under the direction of the Land Registrar. Under regulations 40 and 41 of the *Land Registration (General) Regulations, 2017* the Registrar is guided by the recommendation of the office responsible for the survey of land.

61. The court thus finds that the trial court was not wrong in dismissing prayer 1.

## **Prayer 2: Restraining Orders**

62. The appellant does not seem to have pursued the grant of the orders sought in this prayer through the Memorandum of appeal or during submissions. It is the court’s view that it need not address the said prayer. This is as provided under order 42 rule 4 of the *Civil Procedure Rules* which deals with Grounds which may be taken in appeal and states;

“The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal, but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule:

Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.”

## **Prayers 3 and 5: The appellant sought orders of production of documentary evidence, filing of a report and attendance in court for cross-examination by the intended interested parties**

63. The appellant argues that it was necessary to order the District land Registrar to produce in court all documentary evidence (records) and the measurements on the ground about the land namely Mwingi/



Kanzanzu/1875,Mwingi/Kanzanzu/1874 and the neighborhood Mwingi/Kanzanzu/1871,Mwingi/Kanzanzu/1873 Mwingi/Kanzanzu/1876,Mwingi/Kanzanzu/2961and Mwingi/Kanzanzu/2962.

64. The court notes that apart from the two parcels of land Mwingi/Kanzanzu/1875 and Mwingi/Kanzanzu/1874, the other parcels of land are not mentioned in the pleadings before the court and the proprietors of the said parcels are not disclosed and were not party to the suit. The relationship between the said parcels of land to the dispute at hand was also not disclosed.
65. The procedure to compel any person to attend court and produce documents is set out under order 16 rule 1 of the *Civil Procedure Rules* which makes provision for the issuance of summons to attend court to give evidence or produce documents and states that;
- “At any time before the trial conference under order 11 the parties may obtain, on application to the court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents.”
66. The appellant did not show that he had applied for witness summons to issue to the land registrar and that he/she had failed to honour the summons. The court notes that the above procedure is applicable in obtaining the attendance of witnesses in court to produce documents where the court has the legal mandate to proceed to hear and determine the suit at hand.
67. In the present case, the court refers to its findings when dealing with prayer 1 of the application at hand where the court found that the land registrar is mandated to ascertain and determine boundaries and it was not necessary to join him in the suit as an interested party or to call him/her to attend court and produce documents before the process of ascertainment of the boundaries had been carried out in accordance with the law.

**Prayer 4: compliance with sections 18 and 19 of the *Land Registration Act***

68. The appellant sought an order that pending the hearing and determination the registrar comply with his duty given to him by parliament under sections 18 and 19 of the *Land Registration Act* for the interest of justice. The court has earlier found that the procedure to be followed when any person applies to the land registrar for ascertainment and determination of the precise position of the boundaries of a parcel of land is already provided for under the said sections 18 and 19 of the *Land Registration Act* and the rules made thereunder. The Land Registrar did not need to be compelled by an order of the court to carry out his/her mandate. The appellant did not show in the application before the trial court that he had followed the laid down procedure under Regulations 40 and 41 of the *Land Registration (General) Regulations, 2017*.
69. It is the position of this court that the appellant did not show on the face of the documents filed that he had exhausted the procedure provided under the *Land Registration Act* and the rules thereunder in obtaining relief for his dispute and therefore the application before the trial court offends the doctrine of exhaustion.
70. The doctrine of exhaustion is defined in *Blacks Law Dictionary* 10th edition as follows –
- “exhaustion of remedies. The doctrine that, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available. The Doctrine’s purpose is to maintain comity between the courts and administrative agencies and to ensure that courts will not be burdened by cases in which juridical relief is unnecessary.



71. Legal authorities abound that hold that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process. This was well set out in the case of *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR, where the Court of Appeal held that: -

“... In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. We observed without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions....”

**Did the Trial Magistrate err in finding that the appellant was seeking an order of mandamus and that the Magistrate’s Court does not have the jurisdiction to grant?**

72. The trial magistrate stated in the impugned ruling that the applicant cited a violation of his rights and fundamental freedoms under article 47 and that the applicant was essentially seeking an order of mandamus as stated in his Further Affidavit. The trial court found that making such an order is a preserve of the superior court and held that the court could not arrogate itself jurisdiction where none exists.

73. The circumstances under which an order of *mandamus* is issued were set out by the Court of Appeal in *Republic vs Kenya National Examinations Council ex parte Gathenji & 8 others* Civil Appeal No 234 of 1996, the Court of Appeal cited, with approval, *Halsbury’s Law of England*, 4th edn vol 7 p 111 para 89 thus:

“The order of mandamus is of most extensive remedial nature and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly, it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”...These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”

74. In the present case, prayer 4 of the application dated May 10, 2022 sought an order compelling the land registrar to comply with his duty under sections 18 and 19 of the *Land Registration Act*. The court is of the view that even though the appellant did not specifically state that he was seeking orders of mandamus, the tenor of the specific order sought was in the nature of an order of mandamus to compel the land registrar to carry out his/her duty as required by the law. The court finds that the trial court did not have the requisite jurisdiction to hear and determine the said prayer 4 of the application dated 10<sup>th</sup> May 2022.

75. From the foregoing, the court finds as follows;

1. The trial court did not err in dismissing the appellant's application dated May 10, 2022.
2. The appeal herein lacks merit and the same is hereby dismissed.



3. Costs of the appeal are awarded to the respondent.
4. The trial court file is to be returned for determination in accordance with the findings made in this judgment.

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

**HON. L. G. KIMANI**

**ENVIRONMENT AND LAND COURT JUDGE - KITUI**

**The ruling was read in open court and virtually in the presence of:**

Musyoki Court Assistant.

Justus Kairu – Appellant in person

Kioko holding brief for Musyoki for Respondents

