



REPUBLIC OF KENYA



**Nyori v Kigen & 2 others (Environment and Land Appeal E013 of 2022)
[2023] KEELC 22467 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22467 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL E013 OF 2022
JM ONYANGO, J
DECEMBER 19, 2023**

BETWEEN

JOSPHAT KANIU NYORI APPELLANT

AND

PIUS KIPKORIR KIGEN 1ST RESPONDENT

HARUN NJOROGE KARANJA 2ND RESPONDENT

LAND REGISTRAR UASIN GISHU COUNTY 3RD RESPONDENT

*(Being an appeal from the ruling of Honourable B.K Kiptoo S.R.M
delivered on 25th March 2021 in Eldoret ELC Case No. 186 of 2021)*

JUDGMENT

1. This appeal traces its antecedents to a suit filed by the Appellant in the Chief and Magistrates Court vide Eldoret CMELC Case No. 186 of 2021 in which the main prayer sought is an order of mandatory injunction compelling the Land Registrar to review and re-establish the boundaries between parcels of land Uasin Gishu/kimumu/6134 and Uasin Gishu/kimumu/1195.
2. Contemporaneously with the Plaint, the Appellant filed a Notice of Motion dated 29th September, 2021 seeking similar orders as those sought in the Plaint.
3. Upon being served with the Plaint and Summons to enter appearance, the 2nd Respondents filed his statement of Defence denying the Appellant's claim. He also filed a Replying Affidavit and a Notice of Preliminary Objection on the grounds that pursuant to the provisions of section 18(2) and 19(1) of the *Land Registration Act*, the Court lacked jurisdiction to entertain the proceedings as they relate to a boundary dispute between the parties. He also stated that the suit was premature, misconceived, vexatious and an abuse of the court process.



4. The court directed that the Preliminary Objection be heard first and that the same be disposed of by way of written submissions. After considering the parties' submissions, the trial Magistrate delivered his ruling on 25th March 2022 striking out the suit on the ground that the court had no jurisdiction as the provisions of section 18(2) of the [Land Registration Act](#) had not been complied with.
5. Being aggrieved by the said ruling, the Appellant filed the instant appeal citing the following grounds of appeal;
 - i. That the learned magistrate erred in law and in fact in holding that the matter is a boundary dispute under section 18 of the [Land Registration Act](#) No. 3 of 2012 when in fact the dispute is in relation to the ownership of a portion of land on either side of the contested boundaries.
 - ii. That the learned trial magistrate misdirected himself in finding that it had no jurisdiction under section 18 of the [Land Registration Act](#) Act No. 3 of 2012 to entertain this matter on account of the fact that it relates to a boundary dispute while in essence it relates to a portion of land that lies on either side of the first and 2nd Respondent's land.
 - iii. That the learned trial magistrate erred in law and in fact in finding that the dispute is a boundary dispute when in fact the dispute is in relation to the fact that the Appellant and the 2nd Respondent each agreed that to sell an 1/8th of an acre to the 1st Respondent from their respective parcels of land known as L.R NO. KIM/1194 and L.R NO. KIM/1195 to make ¼ acre for the 1st Respondent and thus considering this fact, the honourable court has jurisdiction to determine the dispute.
 - iv. That the learned trial magistrate erred in law and in fact in failing to consider the fact that the Appellant had on diverse dates notified the 3rd Respondent of the dispute and had requested the 3rd Respondent to visit the site and make a report in line with the provisions of section 19 of the [Land Registration Act](#) Act No. 3 of 2012 to no avail and this honourable court was the only forum left capable of protecting the Appellant's proprietary/ beneficial interest.
 - v. That the learned trial magistrate erred in law and in fact in failing to recognize that the office of the 3rd Respondent has failed or neglected to take steps with a view to establishing the boundaries between the two parcels so that the 1st Respondent can realize that he is occupying the entire of the plaintiff's land contrary to their sale agreement.
 - vi. That the learned trial magistrate erred in law and in fact in failing to consider the fact that the dispute also relates to the 2nd Respondent's non-performance of his obligation under the agreement of sale dated 21st October 2003 as a result of which the 1st Respondent now resides on all that parcel of land known as Uasin Gishu/kimumu/6134 to the detriment of the Appellant.
 - vii. That the learned trial magistrate erred in law and in fact in holding that the suit is purely a boundary dispute when in fact there are more underlying issues such as ownership of the land known as Uasin Gishu/kimumu/6134 as well as non-performance of contractual obligations that require the court's determination.
6. The court directed that the appeal be canvassed through written submissions and the parties duly filed their respective submissions which I have carefully considered.

Analysis And Determination

7. The main issues for determination as can be discerned from the Grounds of Appeal are:



- i. Whether the dispute herein relates to a boundary dispute
 - ii. Whether the court's jurisdiction was properly invoked.
8. It is trite law that parties are bound by their pleadings. In the case of Independent Electoral and boundaries Commission and Another v Stephen Mutinda & 3 Others (2014) eKLR the court cited the decision of the Malawi Supreme Court of Appeal in Malawi Railways Limited v Nyasulu (1998) MWSC 3 in which the learned judges quoted with approval an excerpt from Sir Jack Jacob' article entitled "The Present Importance of Pleadings" published in (1960) Current Legal Problems at page 174 where the author stated as follows:

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

9. In his plaint filed in the lower court, the Appellant states at paragraph 11 of the Plaint as follows:
11. The Plaintiff avers that on account of a boundary dispute between him and the 2nd defendant over the parcels of land known as Uasin Gishu/kimumu/6134 and L.R KIM/1195 the 1st Defendant now occupies all that parcel of land known as Uasin Gishu/kimumu/6134
 12. In view of the circumstances, the plaintiff did on 26.7.2018 and on 20.1.2021 write to the 3rd Respondent, expressing a dispute over the boundary of the two parcels of land, and inviting the said office to cause a re-establishment of the boundary between the parcel of land for settlement of the dispute.
 13. Despite the plaintiff writing to the 3rd Defendant as aforesaid, that said office has failed or neglected to take necessary steps with a view to establishing the boundaries between the two parcels of land so that the 1st defendant can realize that he is occupying the entire of the plaintiff's land contrarily (sic) to their sale agreement."
10. It is noteworthy that the only relief sought by the plaintiff is:
- "a). An order of mandatory injunction compelling the Land Registrar, the 3rd Defendant herein to review and re-establish the boundaries between parcels of land Uasin Gishu/ kimumu/6134 AND L.R KM/1195".



11. From the plaint it is clear that the Appellant acknowledges that he has a boundary dispute between himself and the 2nd defendant which needs to be determined by the Land Registrar and he can therefore not depart from his own pleadings. Although learned counsel for the 2nd Respondent has submitted that the suit relates to a breach of contract, the same is not borne out by the plaint as there is no prayer relating to breach of contract.
12. I will now move to the next issue which is whether the court jurisdiction was properly invoked. Since the instant suit relates to a boundary dispute, Section 18 (2) of the [Land Registration Act](#) No. 3 of 2012 provides that:

S.18 (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.
13. The courts have in a number of decisions pronounced themselves on the above provision of the law. In the case of *George Kamau Macharia & Dexka Limited (2019) eKLR Kemei J* held as follows:

“From the above provisions of the law, it is manifestly clear that the above section gives the mandate to the Land Registrar to resolve boundary disputes of land with general boundaries. Registry Index Map (RIM) only indicates approximate boundaries and the approximate situation on the ground. Even if this Court was to hear and determine this matter it will still require the input of the Land Registrar. The framers of section 18(2) of the [Land Registration Act](#) placed this matter before the Land Registrar who has the technical advice and resources of the District Surveyor to determine and ascertain the boundaries. It is trite law that where the law has given a legal obligation to a department of Government, it is important for the Court to let that department proceed to meet its legal obligations. In this case the office of the Land Registrar is mandated to deal with the general boundary dispute first before the same is escalated to the Court. It is the view of this Court that the dispute is prematurely before the Court.”
14. Section 18(2) of the [Land Registration Act](#) makes it clear that the court lacks the jurisdiction to entertain boundary disputes until the boundaries have been determined by the Land Registrar. Since the Appellant in his pleadings acknowledged that the Land Registrar had not determined the boundaries, the court lacks the jurisdiction to deal with the matter and there is justification for interfering with the trial magistrate’s decision in that regard.
15. The upshot is that the appeal lacks merit and it is hereby dismissed with costs to the 1st and 2nd Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 19TH DAY OF DECEMBER 2023.

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J.M ONYANGO

JUDGE

In the presence of:

Miss Kurungu for the Appellant

Ms. Tallam for the 2nd Respondent



Court Assistant: A. Oniala

