



**Southern Shipping Services Limited v Dursoma Investments Limited & 4 others (Environment & Land Case 116 of 2018) [2023] KEELC 22379 (KLR) (14 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22379 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 116 OF 2018  
FM NJOROGE, J  
DECEMBER 14, 2023**

**BETWEEN**

**SOUTHERN SHIPPING SERVICES LIMITED ..... APPLICANT**

**AND**

**DURSOMA INVESTMENTS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**MOHAMED YERROW DUBA ..... 2<sup>ND</sup> RESPONDENT**

**HUSSEIN HASSAN DUBA ..... 3<sup>RD</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. The Notice of Motion application dated 31<sup>st</sup> May 2022 has been brought under Order 40 and 51 rule 1 of the [Civil Procedure Rules](#), 2010 and sections 18 and 19 of the [Land Registration Act](#). The Applicant seeks the following orders:
  1. Spent.
  2. That this honourable court be pleased to order that the Land Registrar Kilifi and the County Surveyor Kilifi do visit the property known as LR No. 29029 situate Northwest of Mariakani, Kilifi District and LR No. 29992 situate Northwest of Mariakani, Kilifi District and carry out an inspection of the physical boundaries of the two parcels.
  3. That the parties herein be at liberty to be present at the date of inspection or to be represented by a private surveyor of their choice.



4. That this honourable court be pleased to order that the Land Registrar Kilifi and the County Surveyor Kilifi do prepare a sketch plan to illustrate any encroachment and further prepare and file a report in court within 90 days from the date of this order.
5. That costs of this application be provided for.
2. The application is premised on the grounds outlined on its face and supported by the sworn affidavit of Clinton Gitonga. The gist of the applicant's case herein relates to the boundaries between the applicant's parcel of land identified as LR 29029 situated Northwest of Mariakani within Kilifi District containing by measurement approximately 17.44 ha and whose dimensions are delineated on Deed Plan No. 330765 dated 29<sup>th</sup> May 2013 and annexed to the grant registered as CR 53908/1 on Land Survey Plan No. 330765 and the 1<sup>st</sup> Defendant's land known as LR No. 29992. To the Applicant, a mix-up is created by the existence of different survey reports in the possession of both parties hence the need to have the Land Registrar and government surveyor to conduct a survey of the two parcels.
3. The application is opposed by the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents. On their part, the 1<sup>st</sup> respondent filed a replying affidavit sworn by Abdulrazack Mohamed Jamma, its director, on May 9, 2023. He deposed that the dispute herein is not related to boundaries but an overlap that cannot be adjudicated by the Kilifi Land Registrar. To him, such disputes can only be resolved by the Director of Surveys since both deed plans were issued by the ministry. Mr. Jamma added that the 1<sup>st</sup> defendant through its advocate has written two letters dated 4/10/2022 and 4/4/2023 respectively inviting the Plaintiff to the conduct of a joint survey in the presence of a government surveyor appointed by the director of surveys; however, the said invitations have been ignored. He expressed the 1<sup>st</sup> Defendant's willingness to attend a joint survey conducted by a government surveyor appointed by the director of survey; and that the parties be allowed to engage their private surveyors at the joint exercise.
4. The 4<sup>th</sup> and 5<sup>th</sup> respondents, through the Office of the Attorney General, raised the following grounds in their grounds of opposition dated April 17, 2023: -
  1. That by dint of section 19(1) of the [Land Registration Act](#) the application is premature as the applicant has failed to exhibit proof of prior application to the land registrar seeking determination of the boundary dispute and refusal by the registrar to accede to the same.
  2. The application is devoid of merit as the applicant is seeking orders against the Land Registrar Kilifi who is not the custodian of the register under which the title was registered.
  3. The application is premised upon speculation, unfounded fears and concealment of material facts thus falls short of the basic criteria for grant of reliefs sought.
  4. The application is devoid of merit as the orders sought are not enforceable hence the same is an abuse of the court process.
  5. That the Land Registrar Kilifi is incapable of adjudicating over the boundary dispute for want of jurisdiction as the suit property's register is under the jurisdiction and custody of the Land Registrar Mombasa.
5. By consent of the parties the application was disposed of by way of written submissions.

### **Applicant's Submissions**

6. Counsel for the Applicant submitted that by dint of Sections 18 and 19 of the [Land Registration Act](#), the Land Registrar and Surveyor are bestowed the mandate of defining boundaries in such cases as the



present one. Counsel relied on the case of [Judith Achieng Omondo v June Nyaiingo Hossei & another; Francis Macharia \(third party\)](#) [2021] eKLR and urged the court to allow the application as prayed.

### Defendant's Submissions

7. Counsel for the 1<sup>st</sup> defendant argued that the dispute between the parties herein could not be considered a boundary dispute since the area in dispute is too big (12.44ha). Further, counsel submitted that section 18(2) relied upon by the applicant mandates the land registrar to determine a boundary dispute only where the boundaries are yet to be established or land is unsurveyed, which is not the case herein. To buttress this point, counsel cited the case of [Fredrick Nganga Thuo v Peter Mungai Njuho](#) [2017] eKLR.
8. Counsel added that the proper authority and procedure in this case should be done through the director of survey as envisaged under section 18 (3) of the [Land Registration Act](#).

### 4<sup>th</sup> & 5<sup>th</sup> Defendants' Submissions

9. Mr. Munga, State Counsel, appearing for the 4<sup>th</sup> and 5<sup>th</sup> defendants agreed that the dispute herein is a boundary dispute and by dint of sections 18 (2) and 19 of the [Land Registration Act](#), this court has no jurisdiction to determine the dispute in the first instance. To counsel, the dispute falls within the mandate of the Land Registrar. Counsel relied on the cases of [Azzuri Limited v Pink Properties Limited](#) [2018] eKLR; [Willis Ocholla v Mary Ndege](#) [2016] eKLR and [Estate Sonrisa Ltd & another v Samuel Kamau Macharia & 2 others](#) [2020] eKLR.
10. Counsel added that since the subject parcels of land were registered under the [Registration of Titles Act](#), the custody of their records were at the Mombasa Lands Registry, and therefore the orders sought could not be issued as framed. He argued that the nature of boundaries in this case were fixed boundaries capable of being inspected by any surveyor and the Land Registrar Mombasa. Counsel cited the case of [Abdalla Mohamed Salim & another v Omar Mahmud Shallo & another](#) [2014] eKLR.

### Analysis and Determination

11. Section 13 of the [Environment and Land Court Act](#) provides for the jurisdiction of this Court. Sub-section (2) provides that:
  13. Jurisdiction of the Court
    - (1) ...
    - (2) In exercise of its jurisdiction under article 162(2)(b) of the [Constitution](#), the court shall have power to hear and determine disputes—
      - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
      - (b) relating to compulsory acquisition of land;
      - (c) relating to land administration and management;
      - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
      - (e) any other dispute relating to environment and land.



12. The court in hon. *Henry Kosgey v Brian Cuthbert & another* (2019) eKLR stated that the jurisdiction of this Court in determining boundary disputes should be considered in the light of Section 18 of the *Land Registration Act* and 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. The said Section 18 provides: -

18. Boundaries

- (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).

13. I have perused the case of *Fredrick Nganga Thuo v Prof. Peter Mungai Njubo* (supra) cited to me by the 1<sup>st</sup> defendant. In that case the Court was clear that the Land Registrar would have jurisdiction where the boundaries have not been fixed and that where the boundaries have been fixed, the Court will have jurisdiction to hear and determine the matter.

14. It is undisputed in this case that the two parcels of land herein have been surveyed and cadastral maps registered as deed plans. This would mean that the boundaries have been fixed hence this court has jurisdiction to determine the issues herein. The 4<sup>th</sup> and 5<sup>th</sup> Respondent's argument on jurisdiction therefore fails.

15. In addition, the applicant averred that the 1<sup>st</sup> defendant has deprived it 12.44 ha out of its parcel measuring approximately 17.44 ha. I agree with the 1<sup>st</sup> respondent's argument that this is more of an issue of overlap as opposed to boundaries. In the given circumstances, the most appropriate authority to inspect the parcels of land would be the office of the director of surveys or the *Survey Act*, in accordance with section 18 (3) of the *Land Registration Act* above.

16. It is also evident that the subject parcels of land are registered under the *Registration of Titles Act* (repealed) and have both numbers under the Coastal Registry. It follows therefore that the custodian of their records is the Mombasa Lands Registry. The applicant sought orders that the Kilifi Lands Registry be directed to conduct a site inspection. I also note that the respondents do not entirely oppose the inspection. Their only issue is that the same be done by a government surveyor in the presence of the land registrar Mombasa.

17. In view of the foregoing and in the interest of justice, I issue the following orders: -

1. The Land Registrar Mombasa and a Surveyor from the office of the Director of Survey shall visit the property known as LR No. 29029 situate Northwest of Mariakani, Kilifi District and LR No. 29992 situate Northwest of Mariakani, Kilifi District and carry out an inspection of the physical boundaries of the two parcels and prepare a sketch plan and a report of their findings in court within 60 days from the date of this order.



2. The said sketch map and report shall clearly indicate the proper location of each plot and the extent of overlap, if any, or, in regard to their boundaries, the extent of encroachment if any.
3. The parties herein shall be at liberty to be present at the date of inspection or to be represented by a private surveyor of their choice.
4. The costs of the motion shall abide the outcome of the suit.
5. The matter shall be mentioned on 21/2/2024.

**DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 14<sup>TH</sup> DAY OF DECEMBER 2023.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

