



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC APPEAL NO. 20 OF 2019

ESQUIRE INVESTMENTS LIMITED.....APPELLANT

-VERSUS-

KAJIADO DISTRICT LAND REGISTRAR.....1ST RESPONDENT

PRIME STEELS MILLS LIMITED.....2ND RESPONDENT

JUDGMENT

(1) This Appeal was filed by Esquire Investment Limited, the Appellant, after being dissatisfied with the decision of the Land Registrar Kajiado, the first Respondent, who made a decision on 9th August, 2019, that the current boundary between L.R. Kajiado/Kaputiei North/110 belonging to Prime Steel Mills Limited, the second Respondent and L.R. Kajiado/Kaputiei North/111 belonging to the Appellant should be maintained.

(2) In the Memorandum of Appeal dated 5th September, 2019, the Appellant raises eight (8) grounds of Appeal namely;

1. That the first Respondent erred in fact and in law in failing to appreciate that the boundary between the two parcels had been interfered with and that the acreage of each of them on the ground differed with the acreage in the survey maps.
2. The First Respondent erred in fact and in law by failing to ascertain the actual area of the two parcels when the District Surveyor conducted the site visit and confirmed that there was a decrease in the size of the Appellant's land owing to the encroachment.
3. The First Respondent erred in fact and in law by failing to appreciate that the picked boundary between where the parcels where the perimeter wall stands clearly shows an encroachment onto parcel 111 by about 11.3 metres.
4. The First Respondent erred in law in disregarding and ignoring the Government Surveyor's Report who found the Appellant's land to be less in size than it should be owing to the encroachment by the second Respondents land.
5. The First Respondent erred in law in failing to accord due regard and importance to the compelling evidence of approximate boundaries as reflected on the cadastral map as required by **Section 18(1)** of the **Land Registration Act**.
6. The First Respondent erred in law in failing to consider the evidence adduced by the Appellant thereby violating the rules of natural justice as well as the principles of fair administrative action.
7. The First Respondent erred in fact when he ignored the fact that the Appellant had applied for the boundary dispute resolution, which had not been replied to.
8. The First Respondent erred in fact and in law in misapplying the doctrine of acquiescence to overrule the statutory provision under **Section 18** of the **Land Registration Act**.

(3) For the above noted errors and failures, the Appellant seeks for orders as

follows;

- (a) That the First Respondent's determination of 9th August 2019 be set aside and the Surveyor's Report be adopted as the correct decision.

(b) The area maps which reflect the correct area and dimension of the two parcels be maintained and the physical boundary therein be enforced.

(c) The part of the Second Respondent's wall encroaching on the Appellant's parcel be demolished.

(d) The Respondents to bear the costs of this appeal.

The First Respondent did not file any submissions.

(4) The second Respondent filed written submissions on 8th November, 2021

and raised two issues for determination as follows;

(a) Whether the Registrar was reasonably and procedurally fair in determining the boundary dispute

(b) Whether there was encroachment as alluded to by the Appellant.

Regarding the first issue, it is submitted that there is a difference between general and fixed boundaries and the ones in this case are general not fixed. For this reason, one has to go beyond the Registry Index Map when determining boundaries.

The second Respondent's Counsel relied on several authorities such as *Ali Mohamed Salim –vs- Faisal Hassan Ali (2014) eKLR and Samuel Wanjau –vs Attorney General and 2 others (2009) eKLR* as well as *Sections 18, 19 and 20 of the Land Registration Act* and the *Survey Act (Cap 299)*.

On the second issue, it is submitted that there is no encroachment because the Appellant did not raise the issue of the encroachment with the neighbors or the Land Registrar. Counsel relied on the case of *Azzuri Limited –vs- Pink Properties Limited (2018) eKLR*.

The second Respondent disputes that the Appellant ever reported the dispute to the Land Registrar urging that the letter dated 23/9/2003 was not stamped as having been delivered.

(5) On the other hand the Appellant's Counsel identified three issues for determination as follows;

(a) Whether an encroachment exists in respect of the neighboring plots.

(b) Whether the Land Registrar erred in law in failing to fix the boundary

(c) Whether the Registrar erred in law and in fact in finding that the perimeter wall was the actual boundary.

In support of the Appeal, counsel for the Appellant started by defining what encroachment means, the authority of the Land Registrar to fix boundaries under *Section 18* of the *Land Registration Act* only and not to delve into the issue of ownership and the duty of the Registrar to fix the boundary once a request has been made.

(6) I have carefully considered the entire appeal including the proceedings before the Land Registrar, the grounds of Appeal, the submissions by both sides and the jurisprudence in the authorities cited.

This being a first Appeal, I am conscious of my role of considering all the above, evaluate it afresh, then draw my own independent conclusions but bearing in mind that I did not see the evidence being gathered at the visit to the locus in quo.

Again it is expected that an Appellate Court will not normally interfere with a finding of fact by the Trial Court unless it is based on no evidence or on a misapprehension of the evidence, or the judge is shown demonstrably, to have acted on wrong principles in reaching the findings he did. (*see Ephantus Mwangi and another –vs Duncan Mwangi Wambugu (1982 – 88) IKAR 278*).

I find that the following issues come up for determination;

(a) Can the facts of this case be distinguished from those in the case of *Azzuri Limited –v-s Pink Properties Ltd (supra)* ?

(b) Did the Appellant acquiesce and fail to raise the boundary dispute at the earlier possible opportunity?

(c) Did the Second Respondent's land parcel encroach onto the Appellant's parcel?

(d) Did the First Respondent make a fair determination of the dispute?

(7) On the first issue, I find that the facts of this case are not similar to those of the Azzuri (supra) case. The two cases can be distinguished on various facets.

Firstly, the dispute in the Azzuri case was not determined by the Registrar but by the surveyor. *Section 18(2)* of the *Land Registration Act*

requires that boundary disputes be determined by the Registrar not the surveyor. In this case, it is the Land Registrar who determined the dispute.

Secondly, in the *Azzuri* case, the encroachment was of 1.3 metres by 1.6 metres which was considered negligible. In this case, the encroachment is by over 12 metres.

(8) On the second issue, I find that the Appellant did not acquiesce in any way regarding the boundary dispute. The record does not disclose the date the Appellant purchased the suit plot but there is credible evidence that as early as 23rd September, 2003, it raised the complaint with the First Respondent.

Again, it is the Appellant's action that caused the First Respondent to demarcate the boundary which resulted in this Appeal. This is not acquiescence. It is the opposite of acquiescence.

(9) On the third issue, I find that encroachment was proved not just by the Government Surveyor but also by the Appellant's Surveyor.

The Government Surveyor found the frontage of the Appellant's parcel shorter than the records show while the Second Respondents was longer than the records show.

The disparity was not within a small margin but a big margin of over 12 metres.

(10) On the fourth and final issue, 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 allowed by the law.

In the *case of Azzuri (Supra)* it was said that a discrepancy of 1.3 m is negligible. A margin ten times bigger than the negligible cannot be ignored the way the First Respondent did.

It was not fair at all to let the status quo remain while the Appellant lost a huge chunk of his land without just cause or compensation.

The First Respondent had discretion and was duty bound to rectify this glaring injustice.

For the above stated reasons, I allow the Appellants Appeal in terms of the prayers in paragraph (3) above.

Order accordingly.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 17TH DAY OF JANUARY, 2022.

M.N. GICHERU

JUDGE