



REPUBLIC OF KENYA



KENYA LAW
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**Munyali v Musyoka (Environment and Land Appeal 19 of 2021)
[2022] KEELC 3247 (KLR) (26 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3247 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL 19 OF 2021
LG KIMANI, J
JULY 26, 2022
FORMERLY MACHAKOS ELC APPEAL NO. 5 OF 2020**

BETWEEN

MULWA MUNYALI APPELLANT

AND

SYANDA MUSYOKA RESPONDENT

*(Being an appeal from the judgment of the learned Chief Magistrate
Sitting in Kitui in CMCC No. 100 of 2018 dated 20/12/2019)*

JUDGMENT

1. The Appellant was the Defendant in Chief Magistrate's Court at Kitui CMCC 100 of 2018. He appeals to this court from the judgment delivered on 20/12/2019 and sets forth the following Grounds of Appeal:
 1. That the Learned Chief Magistrate erred and misdirected himself in law by proceeding with a case whereof he had no jurisdiction under the mandatory provisions of The [Land Registration Act](#) 2012, Section 18.
 2. That the findings of the Learned Chief Magistrate were against the weight of the evidence as adduced.
 3. That supplementary grounds to be filed upon receipt of the typed copy of the judgment and proceedings.

Summary of case before the Trial Court

2. By a Plaint dated 16th March 2018 the Plaintiff claimed to be the registered proprietor of Land Parcel Miambani/Miambani/2491 and that the Defendant has trespassed onto his property and caused



- damage to the trees and vegetation while conducting cultivation and farming thereon. The Plaintiff therefore prayed for recovery of Ksh.60, 000 being the value of the damaged property and general damages and loss as well as costs of the suit.
3. The Defendant filed a defence and denied the Plaintiffs claim. He stated that he and the Plaintiff share a common border and denied trespassing on the suit land. He denied being present when the Forester did the assessment of the trees that he allegedly damaged but confirmed that his wife was present during the assessment. He also stated that he was summoned together with the Plaintiff by the chief and they talked but did not agree.
 4. During the hearing, the Plaintiff adopted his written witness statement as his evidence-in-chief and further stated that he knew the Defendant who is his neighbor. He stated that the Defendant cut his trees and made charcoal and has planted his crops in his land. He stated that he had called the chief and the land surveyor, who planted beacons on the land but the defendant removed them. He produced in evidence documents one of which is a report from the Sub county Forest Officer dated 2nd November 2017. He also produced a copy of his title deed of Land Parcel Miambani/Miambani/2491 which shows that the land measures 20.49 Hectares. The Plaintiff prayed for general damages for the trespass and illegal use of his land since 2016 as well as costs of the suit.
 5. During cross-examination, the Plaintiff reiterated his statement and stated that the stream is not the boundary mark but that the surveyor had put beacons according to the area map in the presence of the Defendant's wife. He also stated that the Forester assessed the damaged trees on his land.
 6. The Defendant adopted his written witness statement as his evidence-in-chief and further stated that he owns land parcel No. Miambani/Miambani/2495 which he inherited from his father, it borders the Plaintiffs land and that he carries on cultivation and other activities. He denied having trespassed onto the Plaintiffs land as claimed.
 7. Upon cross-examination, the Defendant stated that his wife told him that the Forester came to the Plaintiffs land. That the Plaintiff put sisal plants marking the boundary in his absence and the survey office has surveyed their area and that there is a survey area map.
 8. In his judgment, the Chief Magistrate Hon. S. Mbungi found that the Plaintiff had proved his case and entered judgment against the Defendant for a sum of Ksh.145, 000 with Ksh.100, 000 being general damages and Ksh.45, 000 being special damages for the damage of trees as assessed by the forestry expert. The trial court further found that the surveyor went to the ground and fixed the boundary between the Plaintiff and the Defendant and it emerged that the Defendant had trespassed on the Plaintiffs land. He thus found that the Plaintiff was entitled to damages for the said trespass.

Appellant's submissions

9. The Appellant submitted that from the evidence on record, the issue between the parties is the location of the boundary between the parties' parcels of land and that trespass cannot be proven unless the common boundary is located.
10. It is the Appellant's submission that the authority vested with the power to determine boundaries is the office of the Land Registrar as provided for in Section 18(2) of the *Land Registration Act* 2012. The Appellant relied on the authority in *Michael Maluti & 5 others-vs- Julius Mbau Nzyuko and 2 others* 2019 eKLR where the Court held that the parties should have given the Land Registrar a chance to address the boundary complaint in line with Sections 18 and 19 of the *Land Registration Act*. He also relied on the case of *Geoffrey Muthinja Kaburu & 2 others vs Samuel Muga Henry & 1756 others* cited in *Fredrick Wainaina & 2 others vs Stephen Kariuki Ndung'u and 2 others* 2021 eKLR where the



court espoused the doctrine that where a dispute resolution mechanism exists outside the courts, the same should be exhausted before the jurisdiction of the courts is invoked. It is therefore the Appellant's submission that the Judgment in the lower court should be set aside for want of jurisdiction.

The Respondent's submissions.

11. The Respondent submitted that it was proven in the lower court that the Defendant had trespassed upon the Plaintiff's land and that as per the plaintiff's exhibits no.7 and 8, it was evident that the area chief and the land adjudication officer/surveyor had visited the area and sorted out the boundary issue but it was the defendant who was violating the boundary.
12. The Respondent also submitted that the trial magistrate drew the proper issues or questions for determination and properly addressed his mind to the same. It was the Respondent's submission that he was satisfied that a surveyor had visited the land and found evidence of the Defendant's trespass and that the determination was sound and founded on facts and conviction of the trial magistrate.
13. The Respondent urged the court to recall that it did not have the advantage of listening or seeing the witnesses or their conduct or inclination. The Respondent concluded by submitting that as per law, trespass is actionable and that there is no issue in the appeal.

Analysis and Determination

14. The role of an appellate court was stated in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, where the Court of Appeal stated that;

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”

15. Similarly, in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the same stated with regard to the duty of the first appellate court;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

16. The Appellant has set out his grounds of appeal in his Memorandum of Appeal dated 12th February 2020 and I will proceed to list them as the issues for determination hereunder:
 1. Did the Learned Chief Magistrate err and misdirect himself in law by proceeding with a case whereof he had no jurisdiction under the provisions of The *Land Registration Act* 2012, Section 18?
 2. Were the findings of the Learned Chief Magistrate against the weight of the evidence as adduced?



1. Did the Learned Chief Magistrate err and misdirect himself in law by proceeding with a case whereof he had no jurisdiction under the provisions of The Land Registration Act 2012, Section 18?

17. The Appellant has contended that the Trial Court should not have made the determination it did for the reason that the office with the mandate to determine boundaries is the office of the Land Registrar as contained in Section 18(2) of the Land Registration Act 2012. Section 18 of the Land Registration Act No.3 of 2012 provides 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).”

18. The Appellant relied on the authority in Michael Maluti & 5 others-vs- Julius Mbau Nzyuko and 2 others 2019 eKLR where the Court held that: “....it is clear to me that the Plaintiffs/Applicants appear to have been prompted to come to court by what they have termed as summons with unclear date for hearing. That being the case, I am in agreement with the counsel for the 1st Defendant/Respondent that the Plaintiffs/Applicants had an obligation to seek clarification with the relevant offices as to the genuineness or otherwise of the said summons and more so, the date of visitation by the Land Registrar. Whereas the Plaintiffs/Applicants have pleaded in their plaint and their application that there has never been any boundary dispute between themselves and the Defendants/Respondents..... it is clear to me that they ought to have given the Land Registrar the chance to address the boundary complaint raised by the 1st Defendant/Respondent herein in line with Section 18 and 19 of the aforementioned Land Registration Act.”

19. On the face of it the Court by virtue of Section 18(2) is precluded from entertaining 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. It is true that the Court lacks the technical capacity to determine such disputes and that is why that mandate, has been given to technical experts. Under Section 18 and 19 of the Land Registration Act No.3 of 2012, the Land Registrar and the Surveyor who is the custodian of the land records have been given the power and mandate to handle issues relating to boundary disputes. Section 19 of the Land Registration Act provides follows:-

19. Fixed boundaries

- (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.”

20. From the pleadings and the evidence adduced before the court it was evident that though the Plaintiffs claim was for compensation for destruction of property and for continued trespass the main issue was whether the portion of land where the activities complained of took place belonged to the Plaintiff or the Defendant. If the same was determined to belong to the Plaintiff the conclusion would be that there was trespass while if the same was determined to belong to the Defendant there would be no trespass and/or destruction of property.
21. The trial court determined that “when the surveyor went on the ground and fixed the boundary between the Plaintiff and the Defendant parcels of land it emerged that the Defendant had trespassed onto the Plaintiffs land. Despite this the Defendant continued using the Plaintiffs’ land against the will of the Plaintiff. Everyone has a right to the use of the legally owned land exclusive of everyone else.”
22. However this court is of the view that the trial court misapprehended the law in concluding that when the surveyor visited the land he “fixed” the boundary. Section 18 clearly provides that unless 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. In my view it was for the Plaintiff to show that there is noted in the land register that the boundaries of the parcels of land have been fixed. Since this was not shown, it is my view that the cadastral map and any filed plan that the surveyor who is said to have been instructed by the Plaintiff to show the boundary between the Plaintiffs land and that of the Defendant and place the beacons can only be deemed to have indicated the approximate boundaries and the approximate situation of the parcels.
23. Section 19 provides the procedure and process through which the precise boundaries of parcels of land are fixed. It is to be noted that the process is carried out by the Land Registrar and it is for the said Land Registrar to 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. It is therefore erroneous to find that the boundary between the parcels of land belonging to the Plaintiff and the Defendant



were fixed by the attendance of the surveyor. As was noted by Kibunja J. in the case of *Wills 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 27th April 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. “

24. From the evidence on record the Defendant seems in any event not to have been satisfied with the boundary as shown by the surveyor by planting of the sisal plants and he seems to have insisted that the boundary to the land was the river. Consequently and for that reason the dispute between the two parties ought to have been escalated to the office of the Land Registrar to hear and determine the boundary dispute in accordance with section 18 of the *Land Registration Act*. Instead of referring the matter to the Land Registrar the Plaintiff chose to bring the dispute to court.
25. I have considered as part of the fundamental question that arises for determination in this appeal as whether the provisions of section 18(2) of the *Land Registration Act* precludes the ELC from determining a matter involving a boundary dispute. In my view the provisions of Section 18 (2) of the *Land Registration Act* have to be considered alongside the provisions of Section 13 (2) (a) of the Environmental and Land Court Act. It is necessary to restate the said provisions;

“In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes—

- i. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

26. Further consideration must be given to the provisions of by Section 9 of the *Magistrates’ Courts Act* No.26 of 2015 which stipulates that:

“In the exercise of the jurisdiction conferred upon it by section 26 of the *Environment and Land Court Act* (No. 19 of 2011) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to —

- (i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

27. The court in the case of *Menkar Limited v Ratalal Ghela Samat Shah & 2 others* [2019] eKLR considered the issues under consideration in this appeal and stated as follows;

“Having considered the motion Komingoi, J., was persuaded the ELC had jurisdiction to hear the suit, her decision was also informed by the holding of Kibunja, J., in *Willis Ocholla v. Mary Ndege* Kisumu ELC Land Case No. 137 of 2015 (2016) eKLR when making the following observations in a pertinent portion of the impugned ruling;

“Section 18(2) of the *Land Registration Act* is set in mandatory terms. It means any issue relating to a dispute as to boundaries are within the Land Registries’



mandate. I agree that the Plaintiffs' ought to have taken the dispute to the Land Registrar in accordance with Section 18 of the [Land Registration Act, 2012](#)."

The Judge however found no merit in the appellant's application and declined to strike out the respondents' plaint citing also the case of *D.T Dobie Company (K) Limited v. Muchina* (1982) KLR where the court relied on *Wenlock v. Moloney* (1965) where it was stated that;

"This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts for the case in order to see whether the Plaintiff really has a cause of action. To do this is to usurp the position of the trial judge and to produce a trial of the case in chambers on affidavits only without discovery and without oral evidence tested by cross examination in the ordinary way. This seems to be an abuse of the court and not a proper exercise of that power."

Madan J.A further added;

"No suit ought to be summarily dismissed unless it appears so hopeless that it is plainly and obviously so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action provided it can be injected with real life by amendment it ought to be allowed to go forward for a court of justice ought not to act in darkness without full facts of the case before it."

Although the trial court appeared to agree that Section 18 (2) of the RLA vested the jurisdiction of determining boundary disputes on the Land Registrar, the court went further and directed that the Land Registrar, Mombasa do conduct the required process of determining the boundaries of the subject parcels of land as envisaged under Section 18, 19 and 20 of the [Land Registration Act](#) and moreover a report to be filed in court within sixty (60) days from the date of the ruling. That is the order that provoked the instant appeal"

28. The Court went on to make a final finding that;-

"Having looked at the two enactments within the context of the case before us, we do not think that the jurisdiction of the ELC is divested especially where the issues in dispute are intertwined with others. As the Judge unravels the intricate web of disputes, we find nothing wrong in the order requesting the Land Registrar who is the custodian of the official records of land ownership to avail them to assist the court make a determination on the germane issue of whether the wall constructed on the disputed plot is within its boundary and whether there was trespass. As correctly pointed out by the Judge, the court is enjoined under Article 159 (2) (d) of the Constitution to ensure the ends of justice are met by overlooking technicalities and addressing substantive issues. Striking the entire suit would not serve the ends of justice"

29. Following the findings in the above Court of Appeal decision I do find that the jurisdiction of the ELC is not completely divested by the provisions of Section 18 of the [Land Registration Act](#) especially where the issues in dispute are not confined to ascertainment of boundaries alone but as in this case involves compensation for trespass and special damages for damage and destruction to trees and vegetation and continued cultivation, farming and planting on the disputed portion of land. Following the above decision I do find that the trial court ought to have referred the dispute to the Land Registrar for



determination of the boundary dispute in accordance with the provisions of the [Land Registration Act](#) before determining the claim of trespass and destruction of property.

2. Were the findings of the Learned Chief Magistrate against the weight of the evidence as adduced?

30. As discussed above, the evidence adduced by the parties; that is their title deeds, the forestry expert report and the letters therein did indicate that there was a disagreement on the location of the boundary between the two parcels of land owned by the two parties. It is thus not clear whether the portion of land where damage of property was assessed by the sub county forest officer was located on the land owned by the Plaintiff or the Defendant. Taking into account the finding of this court that the Plaintiff did not show that the boundary in question was a fixed boundary, I do find that the courts findings in the circumstances were against the weight of the evidence adduced by the parties.
31. For the foregoing reasons, I find that this appeal has merit only to the extent that the court failed to refer the boundary dispute to the Land Registrar for hearing and determination before dealing with the rest of the claim. The Appeal is therefore allowed in the following terms;
1. The appeal be and is hereby allowed.
 2. The judgment and decree in the Chief Magistrates Court sitting at Kitui in CMCC No. 100 of 2018 be and is hereby set aside.
 3. The suit before the Chief Magistrates Court be remitted back for hearing afresh with directions that the determination of the boundary between the Plaintiffs land parcel No. Miambani/Miambani/2491 and the Defendants land parcel No. Miambani/Miambani/2495 be referred to the Land Registrar for hearing and determination and a report be filed with the court.
 4. Subsequent to filing of the Land Registrars report, the court to proceed with determination of the suit.
 5. Costs of this appeal be awarded to the Appellant.

DELIVERED, DATED AND SIGNED AT KITUI THIS 26TH DAY OF JULY 2022

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Judgment read in open court in the presence of-

C. Nzioka/Musyoki Court Assistant

Kalili Advocate for the Appellant

Kilonzi Advocate for the Respondent

