



**Chabari & another v Kairubi (Environment and Land Appeal
E010 of 2021) [2022] KEELC 2743 (KLR) (15 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2743 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND APPEAL E010 OF 2021**

CK YANO, J

JULY 15, 2022

BETWEEN

FRANCIS M.CHABARI 1ST APPELLANT

TERESIA KARIUKI KATHENYA 2ND APPELLANT

AND

MWARANIA GAICHURA KAIRUBI RESPONDENT

*(Being an appeal from the Ruling of Nyaga S.M, SRM dated 23rd September
2021 Marimanti in Miscellaneous E.L.C Application No. E001 OF 2021)*

JUDGMENT

A. Introduction

1. The appellants' Francis M Chabari & Teresia Kariuki Kathenya filed this appeal against the ruling of the Learned Magistrate (Nyaga SM SRM) delivered on September 23, 2021 in Misc ELC Application No E001 of 2021 on the following 3 grounds of appeal:
 - i. That the Learned Magistrate erred in Law and fact in finding that he had jurisdiction to hear and determine this matter.
 - ii. That the Learned Magistrate erred in Law and fact in finding that he had jurisdiction to hear and determine an application that was already time barred.
 - iii. That the Learned Magistrate erred in Law and fact in allowing a surveyor visit the subject matter on the ground and prepare a sketch map on how the same is occupied and whether the results were in tandem with the land Appeal No. 23 of 2004.
2. The appellant prayed for orders that:



- a) This appeal be allowed and the Ruling of the trial court dated 23rd/09/ 2021 be set aside and be substituted with an order entering judgement for the appellants as prayed for in the application plus costs of the said suit and interest.
- b) Cost of this appeal be granted to the appellants.

Background of the Appeal

3. The Respondent filed a notice of motion application dated May 27, 2021 seeking inter alia, a court order directing the Land Registrar and District Surveyor Marimanti to visit land parcel No 1478 Ciakariga “A” Adjudication Section and put beacons as per the minister’s order and the process to be overseen by the O.C.S Ciakariga Police Station for security reasons. The application was based on a minister of lands decision dated 10.3.2021 vide Land Appeal Case No 321 of 2004 regarding the subject land.
4. The application was opposed by the appellants through a replying affidavit by the 2nd appellant. It was the respondent’s contention that the land had already been surveyed in line with the minister’s decision and a sketch map on how the parties were to occupy the land on the ground was made. The appellants argued that the application was fatally defective and time barred and that the court had no jurisdiction and urged the lower court to dismiss the application.
5. The learned magistrate considered the application and allowed the same. Being dissatisfied with the said ruling made on September 30, 2021 (not 23rd as indicated in the record of appeal) the appellants preferred the present appeal which was canvassed by way of written submissions.

The Appellants’ Submissions

6. The Appellants submitted that they had filed an appeal to the Minister Vide Appeal No. 23 of 2004, against the decision of Land Committee of Chiakariga “A” Adjudication Section in respect of Land Parcel No. 1478 in Chiakariga whereby the Appeal was allowed.
7. The appellants submitted that since the appeal was allowed, they had not filed any appeal to challenge the decision of the minister and neither had they filed any judicial review proceedings to challenge the evidence that was used by the minister in making the decision.
8. The appellants submitted that once an adjudication register is stamped complete then it becomes wrong to reopen the same.
9. The appellants further submitted that in the proceedings before the Land Adjudication Office, parties were allowed the right to be heard and that the objector tendered evidence and then later on cross examined the other party.
10. The appellants submitted that it is then after full conclusion of the hearing that the Land Adjudication officer went to the parcel of land and the resultant map was given to ascertain the portions where each of the parties had developed. That the sketch map that was used in the case was drawn by the surveyors who visited the site and showed the correct position on the ground which made the decision of the Minister as follows:

“That parcel Number 1478 Chiakariga “A” to be sub-divided into three (3) portions and registered as follows: -

- (1) Mwarania Gaichura Kairubi(the Respondent herein) to retain one portion under P/ No. 1478)



- (2) Teresia Karaukito be given a new Number on the portion she has already developed.
- (30 Francis K. Chabarito be given a new Number on the portion he had developed as shown on the tracing paper (map) and the right of appeal was granted.”
11. The Appellants further submitted that the respondents in the matter had a right to appeal against the decision of the minister as provided under section 29 of the *Land Adjudication Act* but instead sought a resurvey of the property and the surveyor introduced a new sketch map. It was the appellants contention that the surveyors that conducted the survey were not independent because they were biased and did not take into consideration the developments done thereof by the Appellants where each and every party normally occupies.
 12. It was the Appellants submissions that section 18 of the *Land Registration Act* outlines that the Chief Magistrate court did not have jurisdiction to entertain the Land dispute already concluded by the Minister and that the actions of the trial magistrate in making the ruling was an error in law and fact in holding that he was vested with jurisdiction to hear and determine the matter and further making subsequent orders that the map that was used by the minister in making the decision was not justified and ordering the resurvey of the land causing a new map to be used.
 13. The Appellants further contended that the decision to have the Land Registrar and the District Surveyor visit the suit premises and illegally undertake a survey resulted in the moving of the boundary marks that were in place which exercise was in total violation of the right to property rights of the appellants.
 14. The Appellants submitted that the issue cannot be survey of the land as outlined in the ruling and that undertaking of a second survey interfered with the boundaries that was in place which makes the dispute between the parties a boundary one falling within the meaning of section 19 of the *Land Registration Act*. The Appellants further submitted that the learned trial magistrate erred as he did not have the requisite jurisdiction to determine a boundary dispute and hence misdirected himself by holding that the issue in dispute was a survey while in essence it meant allowing an alternative survey that resulted in disrupting the boundaries that were fixed and therefore affecting the decision of the Minister for Lands.
 15. The appellants further submitted that the learned magistrate did not have the requisite jurisdiction to make such a decision irrespective of the nature and strength of evidence that was in possession of either of the parties and that the application was camouflaged in such a manner as to hide the true nature of the dispute.
 16. The appellants relied on the case of *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others* [2017] eKLR; *Azzuri Properties v Pink Properties Limited* [2018] eKLR and *Whitehorse Investments Ltd v Nairobi City Council* [2019] eKLR where, they submit, it was held that the disputing parties are legally obligated to follow the laid down procedure when it comes to statutory mechanism for resolution of the boundary disputes and that the courts do not therefore have any jurisdiction to entertain such disputes in the first instant.
 17. The appellants submitted that the proceedings that were undertaken by the learned magistrate in making the decision was null ab initio by virtue of the lack of jurisdiction of the court to entertain boundary disputes between parties and that the order of resurvey issued by the trial court was illegal because it resulted in another creation of a sketch map that was different from the one that was adopted by the minister in the process of making the decision on appeal.



18. The appellants urged the court to set aside the ruling dated September 23, 2021 and substitute it with an order entering judgment in favour of the appellants as prayed with costs to the appellants.

The Respondent's Submissions

19. The Respondent submitted that the appeal herein lacks merit and ought to be dismissed on the grounds that the appeal was filed out of time; that the court had jurisdiction to make the orders made, and that the orders granted by the learned magistrate are good for the appellants and the respondent in equal measures.
20. The Respondent submitted that according to the record in his possession, the ruling complained about by the appellants was delivered on September 30, 2021 and the appeal was only filed on November 25, 2021, a period of 65 days late. The respondent's contention is that the appeal ought to have been filed by October 24, 2021 hence was filed out of time and without leave of court.
21. The Respondent further submitted that he approached the land's officers to implement the award of minister as per a letter dated March 10, 2021. That the Land Registrar and surveyor were unable to implement the said award due to the hostility on the ground posed by the appellants, and as a result the said officers asked the respondent to obtain an order for security to be provided during the implementation of the minister's award. The respondent stated that it was that order that the trial court granted.
22. The respondent submitted that the miscellaneous application (before the trial court) was not about surveying or interfering with the minister's award, but was only meant to facilitate the execution of the award, therefore section 29 of the *Land Adjudication Act* does not come in. It is the Respondent's submissions that the trial court had jurisdiction to give the orders it gave to secure the protection of the state officers in question to carry out their mandate.
23. The respondent further submitted that the trial court gave the said orders to meet the ends of justice, that is, the implementation of an award that both the appellants and the respondent agree with. That it was the appellants who refused the officers to go to the ground to implement the award, and that the trial court on being approached, and upon listening to both parties concluded that it was prudent to grant the orders. The respondent's submission is that the appeal is a mere academic exercise meant to delay the justice, and urged the court to dismiss it to pave way to the implementation of the minister's award made on March 10, 2021.

Analysis and Determination

24. I have considered the record of appeal, the grounds of appeal and the submissions. The issues for determination in this appeal as I can deduce from the grounds of appeal and submissions are:
- i. Whether the appeal was filed out of time and without leave of court.
 - ii. Whether the trial court had jurisdiction to hear and determine the matter.
 - iii. Whether or not the decision of the trial magistrate was in tandem with the minister's Land Appeal No. 23 of 2004.
25. It is the respondent's submissions that the appeal herein was filed out of time and without leave of court. The respondent submitted that the ruling appealed against is alleged to have been delivered on September 30, 2021 and the appeal was filed on November 25, 2021 which is outside the period allowed for filing of appeals from the subordinate court.



26. The court has perused the record of appeal. Whereas the appellants have indicated that the ruling appealed against is dated September 23, 2021, the copy of the ruling that has been exhibited on the record was delivered on September 30, 2021. There appears to be an error on the date cited by the Appellants and the date the impugned ruling was delivered. It is clear that the ruling was delivered on November 30, 2021. Therefore, this court will treat the mix-up in the dates as an excusable error or mistake which does not go to the substance of the case. The court will invoke article 159 (2)(d) of *the constitution* and consider substantive justice as opposed to procedural technicalities being the mix-up of the dates in this case. In addition, section 19 of the *Environment and Land Court Act* gives the court powers to act without undue regard to technicalities. Having done so, I now turn to the issue whether the appeal was filed out of time and without leave.
27. Appeals from the subordinate court to the High Court have to be filed within 30 days from the date of the decision of the lower court and such appeal is filed when a memorandum of appeal has been filed. Section 79 G of the *Civil Procedure Act* provides as follows:
- “Every appeal from a subordinate court to the High Court shall be filed within thirty days from the date of the decree or order appealed against, excluding from such period any time which the court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.”
28. In this case, the decision of the lower court was made on September 30, 2021 while the memorandum of appeal was filed on October 18, 2021. The period between the date on which the impugned ruling was delivered and the date the memorandum of appeal was filed is about 18 days, which is a period of less than thirty days. It is therefore clear that the appeal herein was filed within the period stipulated in law, which is thirty days. In that regard, the respondent’s submission that the appeal was filed out of time has no merit and is not factually correct. For that reason, I find no basis upon which I can accept the respondent’s invitation to dismiss the appeal on that ground.
29. Regarding the issue whether the trial magistrate had jurisdiction to hear and determine the matter, I have perused the record of appeal. The subject matter that was before the subordinate court was a miscellaneous application filed by the respondent vide a notice of motion dated May 27, 2021 seeking inter alia a court order directing the Land Registrar and District Surveyor Marimanti to visit Land Parcel No. 1478 Ciakariga “A” Adjudication Section and put beacons as per the minister’s order and the process to be overseen by the O.C.S, Ciakariga Police Station for security reasons. The application was based on a decision of the minister of lands dated March 10, 2021 arising from Land Appeal Case No. 321 of 2004 regarding the subject land. In the affidavit in support of the application, the respondent annexed a letter dated March 10, 2021 (annexture “MG1”) from the Director of Land Adjudication and Settlement, Ministry of Lands and Physical Planning to the County Surveyor to implement the order, both on the ground and on the Registry Index Map. The Respondent’s submissions is that the Land Registrar and District Surveyor were unable to implement the said order due to security concerns on the ground posed by the appellants and that the said officers asked the respondent to apply and obtain an order for security, hence the application dated May 27, 2021. The application was however, opposed by the appellants who inter alia argued that the trial court did not have jurisdiction. Upon hearing the parties, the learned magistrate found in favour of the respondent and granted the orders. The trial court found that the minister’s decision was not in contention and that what the parties were haggling over was a simple court order directing survey in line with the minister’s decision.
30. It is common ground that vide the minister’s decision in Appeal Case No. 321 of 2004 vide the letter dated March 10, 2021 “marked MG1” the Director of Land and Settlement directed the County Surveyor to implement the order both on the ground and on the Registry Index Map (R.I.M). The



Respondent averred that when he approached the surveyor to implement the said order from the minister, the surveyor requested for a court order to do so and for security reasons. The appellants did not challenge this averment. Instead, the respondents contended that the surveyor had visited the land and prepared a sketch map which was annexed and marked as “TKK1”. I have however perused the said sketch map and I agree with the trial magistrate that it was not clear who the author of that sketch map was and there was no report on how the process was done since there was no evidence to show that the process involved all the interested Parties.

31. The above being the case, it is clear that the minister’s decision in Land Case No. 321 of 2004 was yet to be implemented and the learned trial magistrate was right in granting the orders sought in the application dated May 27, 2021. In my view, the learned magistrate had the requisite jurisdiction to determine the matter because the trial court was merely issuing orders to assist in the implementation of the minister’s decision which decision had conclusively determined the rights of the parties with regard to the dispute. In my view, the trial court did not make any orders that go to the merits of the issues in dispute, because had he done so, no doubt he would have no jurisdiction. Since the minister’s decision was yet to be implemented, and the issue of security concerns having been raised, the appellants cannot be heard to say that the same was implemented notwithstanding their hostility to the exercise. It is therefore my considered view that there was no other means that the minister’s decision could be implemented other than in the manner sought by the Respondent and the trial court was right and had the requisite jurisdiction to handle the matter and to grant the orders he made to prevent the ends of justice from being defeated. Further, it is the finding of this court that the decision of the learned trial magistrate was in tandem with the decision of the minister in Appeal Case No. 321 of 2004 since it was merely intended to assist in the implementation of the orders already granted by the minister.
32. In the result, I find no merit in the appellants’ appeal and the same is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 15TH DAY OF JULY, 2022

IN THE PRESENCE OF:

CA: Martha

Ms. Musyimi h/b for Ms. Wahome for Appellants

Appellants also present in person

N/A for Respondent

**C. K. YANO,
JUDGE.**

