



**Osuru v The Ward Administrator Nyalenda ‘B’ Ward & 2 others (Environment and Land Appeal 12 of 2020) [2022] KEELC 4932 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4932 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL 12 OF 2020  
A OMBWAYO, J  
SEPTEMBER 22, 2022**

**BETWEEN**

**FREDRICK JUMA OSURU ..... APPELLANT**

**AND**

**THE WARD ADMINISTRATOR NYALENDA ‘B’ WARD ..... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF KISUMU ..... 2<sup>ND</sup> RESPONDENT**

**ODUMBE GENERAL SUPPLIES LIMITED ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal arising from the Decision of Hon. W.K. Onkunya, SRM, Delivered on 13th February 2020 At Kisumu Chief Magistrate ELC Case No. 191 of 2018)*

**JUDGMENT**

1. Fredrick Juma Osuru, the appellant herein has brought this appeal against the decision of Hon W K Onkunya SRM delivered on February 13, 2020 at Kisumu Chief Magistrates Environment and Land Court Case No 191 of 2018. In that matter the appellant who was the plaintiff filed a plaint that was amended on January 28, 2019 seeking a declaration that the suit property number Kisumu/Pandpieri/1086 did not encroach on the Pharmacy Oboch Road to be constructed or rehabilitated by the respondents.
2. He sought a permanent injunction against the respondents by their servants and or agents from constructing and or rehabilitating a road on land parcel number Kisumu/Pandpieri/1086 or demolishing any structure thereon. The appellant prayed for compensation in the alternative.
3. The 1<sup>st</sup> and 2<sup>nd</sup> respondents herein denied the contents of the amended plaint but admitted the jurisdiction of the court. Likewise the 3<sup>rd</sup> respondent denied the contents of the plaint and admitted the jurisdiction of the court. The 3<sup>rd</sup> defendant filed a preliminary objection that the suit was a boundary dispute pursuant to section 18 (2) of the *land Registration Act*. The 3<sup>rd</sup> respondent argued that the



court should not entertain any action or other proceedings relating a dispute as to the boundaries of registered land unless the boundaries have been delivered in accordance with the Section.

4. The honourable magistrate found that from the pleadings, it was clear that the dispute is in regard to the correct boundary position of the suit land and the road reserve which mandate falls within the purview of the land registrar. According to the honourable court, the boundaries have to be established first before the other issues of compensation and permanent injunction can be considered.
5. The court observed that Justice S M Kibunja in his ruling dated April 27, 2016 on his own motion directed the County Land Registrar to confirm the Boundary between Kisumu/Pandpieri/1086 and the road reserved and that the road reserve was to be filed within 60 days indicating the extent of encroachment which according to the Magistrate had not been done.
6. Ultimately the court found that it lacked Jurisdiction and the plaint dated September 23, 2018 and amended on January 28, 2019 was dismissed.
7. The appellant appealed to this court on grounds that the learned magistrate erred in law and fact as the dispute revolving on the boundary had been determined by the Land Registrar and the boundary fixed as per section 21 (2) of the Registered Land Act cap 300 (now repealed) as replaced by section 18 of Land Registration Act No 3 of 2012. Moreover that the learned magistrate failed to analyse documents and submissions on record and that the dispute was encroachment and claim for compensation and not boundary dispute.
8. The appellant prays that the appeal be allowed and ruling of the trial court delivered on February 13, 2020 be set aside and substituted with the Judgment dismissing the preliminary objection dated September 12, 2019.
9. The gravamen of the appellant submissions is that the land registrar has already determined the boundary between parcel of land number Kisumu/Pandpieri/1086 and the road reserve has been determined hence the preliminary objection was misplaced. The respondent on the other hand submits that the preliminary objection was well founded and that the learned magistrate properly held that the court had no jurisdiction to entertain the matter as it was a boundary dispute.
10. I have considered the rival submission on the appeal and to begin with the basis of preliminary objection was section 18 of the Land Registration Act 2012, thus provides:-

“(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).”



11. It is clear that the above provision ousts the jurisdiction of the court when it comes to boundary disputes. Several decisions have been made by the courts in Kenya in respect of section 18 of the [Land Registration act](#).
12. In the Court of Appeal Case of [Azzuri Limited v Pink Properties Limited](#) [2018] eKLR, the court stated as follows in relation to the application of section 18 of the [Land Registration Act](#);

“This means that under the aforesaid provisions, boundary disputes pertaining to lands falling within general boundary areas must be referred to the land registrar for resolution.....From this analysis of the law, it should be clear from the above that, we are in agreement with the learned Judge’s conclusion that the dispute ought to have been heard by the Land Registrar as stated in the statute. Jurisdiction is everything. It has been said many times before, that, without it a court has no powers to make one more step, irrespective of the strength and nature of evidence in the parties’ possession”.
13. In the case of [George Kamau Macharia & Dexka Limited](#) (2019) eKLR, Kemei J stated 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. While in the case of [Willis Ocholla v Mary Ndege](#) (2016) eKLR Kibunja J rendered himself thus,

“That in terms of section 18 (2) of the [Land Registration Act](#), proprietors of registered land with a boundary dispute are obligated to first seek redress or solution from the Land Registrar before moving or escalating the dispute to this court. That where such a party fails to do so, and comes to court without first seeking redress from the land registrar, the court being a court of law, has to remind such a party that he/she has moved the court prematurely. That the provisions of section 18 (2) of the [land registration act](#) shows clearly that the court is without jurisdiction on boundary disputes of registered land until after the land registrar’s determination on the same has been rendered”.
15. In the Court of Appeal Case of [Estate Sonrisa Ltd & another v Samuel Kamau Macharia & 2 others](#) [2020] eKLR , the court stated thus;

“It is the [Land Registration Act](#) that makes provisions relating to the determination of boundaries. Those provisions are found in sections 16 to 19. Specifically, for this dispute, the registrar is empowered, after giving notice to all the affected parties, in this case, the 1st appellant and 1st respondent, indeed as well as any owner whose land adjoins the boundaries in question, and with the assistance of the surveyor, to ascertain and fix the disputed boundaries.



.....

Under that Act, the registrar carries out his functions without any restrictions and may rely on any other relevant document and existing records in order to resolve any dispute between landowners. Because a title deed is only prima facie evidence of the matters shown therein, the registrar's investigations, of necessity must encompass all entries in the register, rely on any other relevant document and existing records, conduct proceedings in accordance with section 14(1) and cause a survey to be carried out and determine the dispute.....

It is only after determining the dispute can parties move to court to challenge it (emphasize added).

16. The aforementioned case law clearly indicate that the dispute relating to boundaries ought to be resolved by the land registrar in the first instance. The decision thereof can then be challenged in court pursuant to the provisions of sections 79 (3A), 80, 86 and 91 (9) of the Land Registration Act.
17. 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 the 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.
18. In Speaker of National Assembly v Karume(1992)KLR 21 the court held:-

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures”.
19. However, this case appears to be an exceptional as there is evidence on record that the land registrar has dealt with the issue of boundary. I have perused the investigation report by the District Land Registrar – Kisumu by Mr J A Mudimba and the Surveyor Mr Stephen Mbela into a dispute over access road serving parcel No Kisumu/Pandpieri/537, 1086, 441 among many others on January 21, 1999at 10.00 a.m. and the proceedings therein and the findings by the Land Registrar where the Land Registrar states

“I have determined the disputed road of access serving parcel numbers Kisumu/ Pandpieri/537, 1086, 441 amongst others parcels under Section 21 (2) and have ordered all the affected persons to maintain the same under section 23 (1) of the Registered Land Act cap 300 of the Laws of Kenya”. He ordered the road to be re-opened forthwith and remain freely passable.
20. I do find that in view of this determination the preliminary objection was not merited and therefore the honourable court erred in striking out the suit. The appeal is hereby allowed and the ruling allowing the preliminary objection dated the February 13, 2020 is set aside and the preliminary objection dated September 12, 2019 is dismissed with costs. The cost of the appeal to the appellant. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 22<sup>nd</sup> DAY OF SEPTEMBER, 2022**

**ANTONY OMBWAYO**

**JUDGE**



This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> *March 2020*

