



**Ilwe v Kaindu (Environment & Land Case 31 of 2021)
[2022] KEELC 13728 (KLR) (25 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13728 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE 31 OF 2021**

LG KIMANI, J

OCTOBER 25, 2022

MUSYOKA KAINDU..... APPELLANT

-VERSUS-

JAMES KITONGA ILWE..... RESPONDENT

**(FROM THE RULING AND ORDER OF THE LEARNED RESIDENT
MAGISTRATE SITTING IN MWINGI IN MWINGI PMCC NO. 35
OF 2014 JAMES KITONGA ILWE-VS MUSYOKA KAINDU, DATED
17/11/2014 G.W KIRUNGUMI ESQ, RESIDENT MAGISTRATE)**

BETWEEN

JAMES KITONGA ILWE APPELLANT

AND

MUSYOKA KAINDU RESPONDENT

JUDGMENT

1. This is an appeal by Musyoka Kaindu who was the defendant/ applicant in Mwingi in PMCC No 35 of 2014 James Kitonga Ilwe v Musyoka Kaindu. The appeal is from the ruling and order of the learned resident magistrate delivered on November 17, 2014 and the appellant sets for the following grounds:
 1. That the learned resident magistrate erred and misdirected herself in both law and facts by ruling that she had jurisdiction to entertain the suit in spite of the express provisions of section 18(2) of the *Land Registration Act* 2012 over the issue of common boundary between land parcel Nos Mwingi/Ngoo/1664 and 1665 before the same had been determined by the registrar of lands.



2. That the learned resident magistrate erred in law by ordering and requiring the land registrar to proceed and determine common boundary between land parcel Nos Mwingi/Ngoo/1664 and 1665 when the suit was pending and thence trying to salvage and breathe some life to the respondents case which was incompetent *ab initio* to the prejudice of the appellant.

The appellant prays that the ruling be set aside and an order be made striking out the respondent's case against the appellant with costs.

2. The plaintiff, who is the respondent in this appeal, filed a suit against the defendant claiming ownership of the suit property known as Mwingi/ngoo/1655 measuring 0.06 Ha which borders the defendant's land parcel Mwingi/ngoo/1654. The plaintiff claimed trespass by the defendant onto the suit property and prays for permanent injunction and quiet possession thereof.
3. The defendant then filed an application dated September 10, 2014 seeking that the plaintiff's suit be struck out for being an abuse of the process of the court as the court lacks jurisdiction to hear and determine the suit. The defendant based his application on grounds that the issue arising in the suit is the common boundary between land parcels numbers Mwingi/Ngoo/1664 and 1665 which are adjacent to each other. He further argued that under section 18 of the [Land Registration Act](#) 2012, the land registrar has the mandate to determine common boundaries and the same had never been determined before the filing of the suit. It was their contention that filing the case is an abuse of the process of the court to confer jurisdiction to the court to entertain this case when the same has already been taken away by statute.
4. In the ruling, G.W Kirugumi resident magistrate found that the court had applied its mind on the issue of jurisdiction under section 18 [Land Registration Act](#) and determined the issue its ruling delivered on July 28, 2014 which dealt with the plaintiffs application dated May 23, 2014. The trial court found that the plaintiff had canvassed the matter of jurisdiction conferred by sections 18 and 19 of the [Land Registration Act](#) 2012, the court declined to determine the same issue for a second time.
5. In the application dated May 23, 2014, the plaintiff had applied for an order of temporary injunction against the defendants restraining him from interfering with the suit property pending the hearing and the determination of the suit. The defendant filed grounds of opposition in response stating that by virtue of section 18(2) and 19 of the [Land Registration Act](#) 2012, the court had no jurisdiction to entertain proceedings on boundary disputes. The trial court found among other things, that the issue in contention was not purely a boundary dispute and that the substantive issue is a dispute over alleged unlawful development of land. The trial court stated that the issue does not fall purely under the ambit of section 18 (2) and 19 of the [Land Registration Act](#) 2012.

Appellant's Submissions

6. The appellants counsel filed written submissions and stated that the issue between the parties in the trial court was determination of the boundary between the two respective parties' land, Mwingi/Ngoo/1655 in the name of the appellant and Mwingi/Ngoo/1664 in the name of the respondent.
7. The appellant denied encroaching onto the respondent's property and invoked the provisions of section 18(2) of the [Land Registration Act](#) 2012, stating that the court had no jurisdiction to entertain the same as the boundary had not been determined by the land registrar.
8. The appellant relied on the case of the [Owners of Motor Vessel Lillian 'S' Caltex Kenya](#) 1989 eKLR, and submitted that the trial court erred in law for not finding that she had no jurisdiction and in failing to strike out the suit.



9. Counsel also cited the case of *George Kamau Macharia v Dexka Ltd* 2019 eKLR where Justice J. G Kemei held that it is clear that the mandate is with the land registrar to resolve boundary disputes of land with general boundaries. Learned counsel also relied on the cases of *Samuel Njoroge Gitukui & 6 others v Kenya Rural Roads Authority and 5 others* 2017eKLR and *Maricus Otieno Okwanyo v George Owenge Aluoch* 2017 eKLR.

The Respondent's Submissions.

10. The respondent filed written submissions and contended that the court had in the ruling of July 28, 2014 pronounced itself on the issue of jurisdiction, therefore the appellant's application dated September 10, 2014 could not lie due to the principle of *res judicata*. He further submitted that *res judicata* applies to applications as it does to suits. He cited the case of *Uhuru Highway Development Limited v Central Bank of Kenya & 2 others* (1996)eKLR.
11. The respondent contends that what the appellant is really appealing is the trial magistrate's ruling of July 28, 2014 which was never appealed from and states that there is no such order or ruling requiring the land registrar to determine the boundary in the ruling dated November 17, 2014 as the appellant claims. According to the respondent, the appellant failed to appeal the trial court's ruling of July 28, 2022 and lost the opportunity to challenge the trial court's determination on the question of jurisdiction.
12. The respondent also points out that this appeal on an interlocutory application has had the effect of stalling the proceedings in the trial court since 2014 and they urge the court that the matter be heard on a propriety basis.

Analysis and Determination

13. I have considered the grounds of appeal as enumerated in the memorandum of appeal, the record of appeal, submissions by counsels for both parties and proceed to consider the two grounds raised as hereunder;
14. This appeal is from the trial court's ruling dated November 17, 2014. The said ruling arose from the application dated September 10, 2014 where the appellant sought orders that "the plaintiffs suit be struck for being an abuse of the process of the court" the application was based on the grounds that the dispute involves the common boundary between land parcel numbers Mwingi/Ngoo/1664 and 1665 which are adjacent to each other and that under section 18 of the *Land Registration Act* 2012, the land registrar has the mandate to determine common boundaries while section 18 (2) takes away the court's jurisdiction on proceedings involving common boundaries. The trial court delivered a short ruling and stated as follows in the relevant part:

"The court applied its mind and came to a determination on the issue of jurisdiction in its ruling of July 28, 2014 when considering the plaintiffs application dated May 23, 2014 to proceed and determine this said application would be to review its earlier ruling or seat on appeal on the same. The defendant and the plaintiff canvassed at length the issue of jurisdiction particularly as regards section 18 and 19 of the *Land Registration Act*, 2012. Owing to this reason, the court declines to determine the same issue for the second time and dismisses the application by the defendant dated September 10, 2014 with costs to the plaintiff."

15. It is noted that the trial court did not in the above ruling make a finding as claimed in the above ground 1 that "the learned resident magistrate had jurisdiction to entertain the suit in spite of the express



provisions of section 18(2) of the [Land Registration Act](#) 2012 over the issue of common boundary between land parcel Nos Mwingi/Ngoo/1664 and 1665 before the same had been determined by the registrar of lands.”

16. Indeed the court found that it had already applied its mind and come to a determination on the issue of jurisdiction in its ruling of July 28, 2014 when considering the plaintiffs application dated May 23, 2014. The trial court further found that to proceed and determine the application before it would be to review its earlier ruling or seat on appeal on the same.
17. I further find that the trial court did not make an order as claimed in ground 2 of the memorandum of appeal that: “the learned resident magistrate erred in law by ordering and requiring the land registrar to proceed and determine common boundary between land parcel Nos Mwingi/Ngoo/1664 and 1665 when the suit was pending and thence trying to salvage and breath some life to the respondents case which was incompetent *ab initio* to the prejudice of the appellant.”
18. The respondent filed a supplementary record of appeal dated December 8, 2021 which included proceedings of the trial court between May 23, 2014 and November 17, 2014 and the ruling dated July 28, 2014. In the said ruling dated July 28, 2014, the court found as follows in the relevant part:

“The substantive issue is development of land. It is not a mere statement that the boundary has been moved or encroached. It is a matter of development of land. I do find that this matter does not fall purely under the ambit of section 18(2) and 19 of the [Land Registration Act](#) 2012. It is partly a boundary dispute and partly a matter dealing with encroachment of registered land which the court has jurisdiction to determine.”

The trial court further found that:

“It is in the interest of justice to grant a temporary injunction for a period of three weeks and order the district registrar within the time to determine the right boundary on each of the plaintiff and defendant’s land.”
19. From the foregoing it is clear that the orders complained of in this appeal arise from the ruling dated July 28, 2018 which ruling was not appealed against. The complaints do not arise from the ruling dated November 17, 2014. In my view the appellant has not presented any grounds of appeal challenging the ruling dated November 17, 2014. Order 42, rule 1 of the [Civil Procedure Rules](#) provides that:
 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
 2. The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.
20. In my considered view the appellants grounds of appeal presented are irrelevant and not applicable for purposes of an appeal against the ruling and order of the court dated November 17, 2014 and the same do not lie since the trial court did not make any of the findings it is alleged by the appellant to have made. Order 42, rule 4 of the [Civil Procedure Rules](#) provides for the grounds which may be taken in appeal and states that:
 1. The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule:



2. Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.
21. Counsel for the appellant did not attempt to advance any grounds challenging what was actually a finding of the court in the ruling dated November 17, 2014. However, I do find that by virtue of the provisions of order 42, rule 4 (1) of the Civil Procedure Rules, the court in deciding the appeal is not confined to the grounds of objection set forth in the memorandum of appeal. I have thus considered the submissions by the respondent in resisting the appeal and in support of the findings of the trial court where he states that the trial court had in the ruling of July 28, 2014 pronounced itself on the issue of jurisdiction, therefore the appellant's application dated September 10, 2014 could not lie due to the principle of *res judicata*. He further submitted that *res judicata* applies to applications as it does to suits.
22. The test for determining the application of the doctrine of res-judicata in any given case is spelt out under section 7 of the Civil Procedure Act which provides that:
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
23. In Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:
- “(a) The suit or issue was directly and substantially in issue in the former suit.
- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
24. In the case of E.T v Attorney General & another [2012] eKLR where it was held that;
- “The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v NBK & others* (2001) EA 177 the court held that “parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.”
- In that case the court quoted Kuloba J, (as he then was) in the case of *Njanju v Wambugu and another* Nairobi HCC No 2340 of 1991 (unreported) where he stated: If parties were allowed to go on litigating forever over the same issue with the same opponent before courts



of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of *res judicata*....”

25. In my opinion, the issue of jurisdiction by dint of sections 18(2) and 19 of the [Land Registration Act](#) was addressed by the court in its ruling of July 28, 2014. The respondent could not raise the same issue in the later application and doing so would offend the principle of *res judicata*. In the case of [Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others](#)(2014)eKLR relied upon by the 1st defendant, the court held that:

“It is trite law that a valid judgment of a court unless overturned by an appellate court remains a judgment of court and is enforceable, the issue of jurisdiction notwithstanding. The plaintiff had all avenues to impugn the award as well as the judgment. He did nothing. As sarcastically put by counsel for the defendants in his submissions, the plaintiff chose to sleep on his rights like the Alaskan fox which went into hibernation and forgot that winter was over. In the meantime, the 1st defendant’s rights to the suit premises crystallized. Equity assists the vigilant and not the indolent.”

26. In my view, the respondent had a right to appeal the trial court’s ruling of July 28, 2014 but chose not to do so. He therefore slept on this right and this court cannot exercise appellate jurisdiction against a ruling that was not appealed from. In the case of [Uhuru Highway Development Ltd v Central Bank of Kenya, Exchange Bank Ltd \(in voluntary liquidation\) and Kamlesh Mansukhlal Pattni](#) the court found that the principle of *res judicata* applies to similar applications as well as suits.

27. The Court of Appeal in that case held that:

“That is to say, there must be an end to applications of similar nature that is to further, under principles of *res judicata* apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be mandated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that section 89 of or [Civil Procedure Act](#) caters for.”

28. For the reasons given above the court finds that this appeal lacks merit and the same is hereby dismissed with costs to the respondent. The trial courts file to be returned for purposes of hearing and final determination of the suit on merit.

DELIVERED, DATED AND SIGNED AT KITUI THIS 25TH DAY OF OCTOBER, 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

Muigai Advocate for the Respondent

