



**Omwony v Omollo & 2 others (Environment and Land Appeal  
E02 of 2024) [2025] KEELC 4127 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4127 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND APPEAL E02 OF 2024**

**AE DENA, J**

**MAY 29, 2025**

**BETWEEN**

**CAROLINE ACHIENG OMWONY ..... APPELLANT**

**AND**

**JOYCE ADHIAMBO OMOLLO ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR BONDO ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The appellant appeals the ruling and order of the Chief Magistrate Court at Bondo delivered by Hon. John Paul Nandi (SPM) on 25/01/2024 in Bondo CMC ELC No. E041 of 2023, Joyce Adhiambo Omollo Vs Caroline Achieng Omwony & 2 Others. The Memorandum of Appeal dated 23/02/2024 raises the following grounds
  1. The learned Magistrate erred both in law and fact in holding that since section 18(2) of the [Land Registration Act](#) No. 3 of 2012 was already addressed by the Land Registrar upon visiting the site, the matter was properly before the court yet the proper procedure was for the 1<sup>st</sup> respondent to lodge an appeal against the finding of the said Land Registrar but not to file suit.
  2. The learned Magistrate erred both in law and fact by holding that the court had original jurisdiction to hear and determine the matter before it notwithstanding the evidence on record that the court would only exercise appellate jurisdiction under section 18(2) of the [Land Registration Act](#) 2012.
  3. The learned Magistrate erred both in law and fact by failing to appreciate the facts of the case and the applicable law and thus arrived at a wrong decision.
2. The appellant prays as follows; -



- a. That the appeal be allowed and the Appellants preliminary objection dated 1/12/2023 be upheld and the 1<sup>st</sup> respondent suit at the Lower Court be dismissed with costs.
  - b. In the alternative this Honourable court do make its own findings on the appeal
  - c. Costs of the Appeal.
3. The appeal is opposed and was canvassed by way of written submissions. The appellants submissions are dated 27/01/2025 and the respondents 28/02/2025. Parties were given an opportunity to highlight on the submissions orally on 10/3/2025. Mr. Awuonda did not highlight due to power challenges from his end.

### **Appellant's submissions**

4. Rehashing the provisions of section 18(2) counsel for the appellant contended that based on paragraphs 3-12 of the plaint the dispute was fundamentally a boundary dispute involving registered land. that a party was bound its pleadings as was held by the Supreme Court in *Raila Amolo Odinga & Ano. Vs IEBC & 2 Others* (2017)eKLR. That according to section 18(2) and 19 of the [Land Registration Act](#) (herein the Act) the proper forum to resolve the dispute was the Land Registrar which was buttressed by the court of Appeal in *Azzuri Limited Vs. Pink Properties Limited* (2018) eKLR.
5. It was submitted that the respondents failure to exhaust the statutory remedy before filing the suit rendered it premature and improperly before the court. The court was also referred to section 9(2) of the [Fair Administrative Action Act](#) and *Speaker of National Assembly Vs Karume* (2008) 1KLR 425, *Geoffrey Muthinja Kabiru & 2 Others Vs Samuel Munga Henry & 1756 others* (2015)eKLR and *Kibos Distillers Ltd & 4 Others Vs. Benson Ambuti Adegga & 3 Others* (2020)eKLR on the principle of exhaustion. It was urged that where the law has given a legal obligation to a department of government it is important for the court to let the department meet its legal obligations.
6. Mr. Ondabu for the appellant emphasized in his oral submissions that the matter is a boundary dispute and further referred the court to paragraph 18 of the respondents' submissions alleging there was an admission that there is a boundary dispute and ownership dispute. That when you buy land you are shown the beacons by the seller and the issue of titling and survey cannot arise since both parties are not the original allottees. That this is the reason why the land registrar attends site with the surveyor and their work is to place beacons and not to address ownership. That by dint of the recommendation that parties should approach court the land registrar cannot confer jurisdiction. As regards the issue of ownership the person who sold the land ought to have been sued and the survey office to explain the parcel sold and its extent. That the land registrar and the original owner are not parties to the original suit.
7. It is the appellants position that the boundary was not fixed and what was before the court was not an appeal but a fresh suit and thus the suit was improperly before court.

### **Respondents Submissions**

8. It was submitted that the dispute is about land ownership of the land portion claimed by each party on the basis of purchase from the 2<sup>nd</sup> respondent and which is an issue that requires full hearing before the court and cannot therefore be dismissed through a preliminary objection. That item No. 3 of the appeal is factual and calls for evidence. The court was referred to the case of *Oraro Vs. Mbaja* (2005)eKLR and *Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd* (1969) EA 696. It is further urged that the matter also involves other substantial issue like trespass and illegality which fall under



the ELC jurisdiction. That the respondent has presented prima facie evidence and coupled with the Land registrars findings that requires full adjudication.

9. Counsel went on to add that while ADR is encouraged it is not a mandatory prerequisite given that the matter involves substantial legal issues requiring the courts intervention.
10. That section 18(2) of the Act has two limbs, firstly where the court shall not have jurisdiction on a matter of boundary dispute between parties where land is registered no boundary has been determined by the relevant office; secondly where the court shall have jurisdiction over a boundary dispute between parties where one has been determined as per the section. It is contended that both Bondo Nyangoma/5767 and 5726 have title deeds in terms of boundaries shown on the RIM meaning the boundaries were already fixed before filing of the present suit. That dismissing the case will violate the plaintiffs right to be heard and access to justice.

### **Analysis And Determination**

11. Upon considering the appeal, the pleadings, the evidence on record, the ruling of the trial court below, the grounds of appeal, and the rival submissions of the parties, the issue that arise for consideration is whether the trial court rightly found that the trial Magistrates' court had jurisdiction to determine the plaintiffs claim in view of the provisions of section 18(2) of the *Land Registration Act*.
12. My understanding of the 1<sup>st</sup> ground of appeal is that the appellant faults the trial court finding that the matter was properly before the court yet the proper procedure was for the 1<sup>st</sup> respondent to lodge an appeal against the finding of the said Land Registrar but not to file a fresh suit. Infact it is the appellants position that a question emerges whether the trial court properly analyzed the determination to establish if it met the requirements of section 18(2) which mandates that a boundary must be fixed before a court can assume jurisdiction. That the boundary was not fixed rendering the proceedings in the trial court premature.
13. It is important to note that there are two limbs to the preliminary objection which I also note was raised by all the defendants, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants being represented by state counsel. First is the aspect concerning the provisions of section 18(2) of the Act conferring jurisdiction over boundary disputes upon the Land Registrar. The second limb is the manner in which the suit was filed before court as a fresh suit and not appeal.
14. I find it necessary to reproduce the said provisions
  18. Boundaries
    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).
15. Section 19 is on fixed boundaries and stipulates as 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.
16. On the first limb the contention is that where there is another forum available then the court must give a chance for this mechanism to be exhausted. The trial court proceeded to refer to a report filed by the 1<sup>st</sup> defendant dated 17/3/2022 stated to have been prepared by the Land Registrar who determined the boundary dispute and made recommendations that since both parties were claiming the same portion the dispute was a land claim and parties should seek redress in court. Based on this the trial court found that it had jurisdiction because the land registrar had already determined the issue of boundaries.
17. I think what the appellant is stating is that the mechanism was not exhausted because the registrar ended up not fixing the boundaries and therefore the court could not assume jurisdiction. The record of the trial proceedings shows that the suit herein was filed in July 2023. A report dated 17/03/2022 on Boundary Dispute between Parcel Siaya/Nyangoma/5726 and Siaya/Nyangoma/5767 is also on record as part of the defendants bundle. The exercise was conducted on 3/11/21.
18. I would not be quick to impugn the reasoning of the trial court since parties did appear before the land registrar and a site visit conducted in the presence of the surveyor and parties heard. I have read the report herein. It states that on the ground part of parcel 5726 has been encroached by the owner of parcel 5767 belonging to the defendant who stated she bought the same from Stevin Milla Okwaro. The plaintiff also claims to have bought the disputed portion from the same person. However the land registrar recommended that the dispute is escalated to the court for the reasons given. I agree with Mr. Ondabu that the Land Registrar cannot confer jurisdiction. Indeed it is trite that jurisdiction is conferred by the constitution or statute. But I respectfully posit the land registrar merely made a recommendation.
19. My understanding of the outcome is that I hear the Land Registrar stating that he has looked at the boundaries and with the benefit of the expert surveyor, noted there is indeed an encroachment and also heard the parties. That however he had come to the realization that the character of the dispute cannot qualify to be treated as a boundary dispute that can be resolved within the framework provided under the sections 18 and 19. This is because it is not a pure boundary dispute. It is true and I agree with Mr. Ondabu that the boundaries were not fixed and for the reasons the land registrar has given. I respectfully differ with the respondent submission that by dint of the titles the boundaries were fixed.
20. However it cannot be expected that every boundary dispute would result into the fixing of the boundaries under the entire process laid out in section 19. Logically there are instances where the outcome could be different depending with the circumstances of the case and this is one of them. The registrar has already done his bit the other bit would be for the court to hear the parties. As to whether



the alleged vendor and the land registrar are parties or not to the original suit I respectfully think this is not a matter for this forum.

21. In my view the matter was indeed subjected to alternative dispute mechanism as required under the provisions of section 18(2) except that the Land registrar in the course of his undertaking to discern the boundaries found that the dispute was not purely a boundary one. It was beyond what was envisaged under the dispute resolution framework provided. It could not be resolved thereof.
22. But I think the pertinent question that arises is what does the Act provide in terms of the next steps to be taken and considering the above outcome. Ordinarily the next step would be to challenge the decision of the land registrar. However the appellant did not lead this court to a specific provision of the law but stated the challenge should be by way of appeal.
23. The provisions of section 86 would then come to my mind and which reads;-  
Section 86(1)  
“If any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on the Registrar by this Act, the Registrar or any aggrieved person shall state a case for the opinion of the Court, and thereupon the Court shall give its opinion, which shall be binding upon the parties.”  
86(2) The Rules committee shall make rules on the procedure to be followed by the Registrar or an aggrieved person under subsection (1)
24. My search did not lead me to any rules made under subsection 86(2). However I found The Land Registration (General) Regulations 2017 made under section 100 which in any case provide for appeal to the Chief Land Registrar and not the court. Any party aggrieved can thereafter move the court. But I must add that even section 86 above does not oust a plaintiff as one of the ways contemplated to approach court and the suit herein would be an appropriate matter for the court to intervene.
25. But for me I think the proposition that the appellant should have moved the court by way of appeal is misplaced. I say so for the reason that the dispute has been found not to be a pure boundary issue, which I agree for in my view the dispute has clearly mutated into a dual one encompassing boundaries as well as ownership. If it is not a purely boundary issue then an appeal will not suffice. The genesis for the encroachment must be unravelled as well as the ownership.
26. Assuming this court is wrong on the above and which I believe I'm not, section 19 of the *Civil Procedure Act* provides for institution of suits and is operationalized by the provisions of Order 3 Rule 1 of the Civil Procedure Rules which is on means of approaching a court of law or commencing a suit which is by way of a plaintiff unless there is another prescribed manner. The appellant cannot therefore seek to drive a party from the seat of justice on the basis raised.
27. Furthermore the jurisdiction of the court, flows from Article 162(2)(b) of *the Constitution* and section 13(2) of the ELC Act which provides;“(2)In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes?(a)relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;(b)relating to compulsory acquisition of land;(c)relating to land administration and management;(d)relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and(e)any other dispute relating to environment and land.”



Clearly therefore Article 162 (2)(b) vests the ELC with original jurisdiction and under Section 13(2) of *Environment and Land Court Act* as seen the scope is expansive.

28. Having made the above observations and findings I also pondered over what would bring substantive justice to the parties. Striking out the suit in the lower court will not achieve justice to the parties. The Court of Appeal in *Chief Justice and President of the Supreme Court of Kenya & another v Bryan Mandila Khaemba* [2021] eKLR stated that the doctrine of exhaustion notwithstanding, courts still retain residual jurisdiction to intervene in exceptional circumstances. I think the circumstances herein suffice. Suffice it to say that , even the provisions of section 9 (2) of the *Fair Administrative Action Act* cited has provided for exceptions.
29. Moreover courts exist to serve substantive justice for all parties to a dispute before it. Both parties deserve justice and their legitimate expectation is that they will each be allowed a proper opportunity to advance their respective cases upon the merits of the matter. This is the fundamental principle of natural justice as enunciated in *Wachira Karani vs. Bildad Wachira Civil Suit No. 101 of 2011* [2016] eKLR.
30. For the foregoing reasons I find no reason to disturb the finding of the trial court. This appeal is dismissed and each party shall bear its own costs.

**DELIVERED AND DATED AT SIAYA THIS 29<sup>TH</sup> DAY OF MAY 2025**

**HON. LADY JUSTICE A.E. DENA**

**JUDGE**

**29/052025**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Ondabu for the Appellant

Mr. Mwamu for the 1<sup>st</sup> Respondent

Court Assistant: Ishmael Orwa

