



**Ochieng v Were (Environment and Land Appeal E001 of 2023)  
[2025] KEELC 4391 (KLR) (11 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4391 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT AND LAND APPEAL E001 OF 2023**

**FO NYAGAKA, J  
JUNE 11, 2025**

**BETWEEN**

**PETER OCHIENG ..... APPELLANT**

**AND**

**MERCY WERE ..... RESPONDENT**

**JUDGMENT**

1. The Appellant commenced suit vide a Complaint dated 07/09/2022 seeking the following reliefs
  1. Permanent injunction restraining the defendant by herself, her agents and/or servants from erecting septic pit along the access road.
  2. An order directing the defendant to re-construct her roof and re-direct rain water from the parcel of the plaintiff thereof for a period of more than 12 years.
  3. General damages.
  4. Costs of the suit with interest.
  5. Any other relief that the Honourable Court may deem fit and just to grant.
2. The Respondent who was the Defendant at the time entered appearance on 28/09/2022. She filed a Statement of Defence dated 15/08/2023. She denied the allegations of the Complaint and urged the trial court to dismiss the Plaintiff's suit with costs. Before the matter could proceed for hearing, the Respondent filed a Notice of Motion Application dated 17/07/2023 seeking a temporary injunction restraining the Defendant/Respondent from continuing to construct a septic pit, erecting a bio digester along the access road and/or any other dealings to parcels of land no. Suna East/Wasweta 1/19717 and 14076 pending the determination of the suit.



3. The matter proceeded to hearing on the merits. After considering the pleadings and submissions of the parties, the trial magistrate, on 12/09/2023, found both the Application and the suit an abuse of the court process. He thus dismissed the Application and suit with costs to the Respondent.

### **Memorandum of Appeal**

4. The Appellant, being aggrieved by the findings, filed his Memorandum of Appeal dated 20/09/2023 that raised four grounds by which he impugned the findings of the trial court. This Court has taken the liberty to summarize the grounds as follows;
  - a. that the learned magistrate erred by considering the claim of the plaintiff as a boundary dispute,
  - b. that the learned magistrate erred by failing to consider that the respondent is constructing a septic put along an access road and,
  - c. that the trial magistrate erred in law and fact by failing to consider that the respondent constructed a roof that is draining rain/storm water to the land parcel of the Appellant.
5. The Appellant also prayed that the ruling be set aside and the case be heard afresh.
6. The appeal was heard on the basis of the parties' respective written submissions. The Appellant filed his written submissions dated 13/03/2025. By them he argued that he and the respondent were neighbors, by virtue of owning parcels Suna East/Wasweta 1/14076 and 19716 and 19717 respectively. Further, that his complaint was about a septic tank built on his access road and the roof of the Respondent draining rain water to his compound.
7. He stated that the same was a finding made on 6/2/2016 by the Ministry of Lands, Housing and Physical Planning, which report was part of the Record of Appeal.
8. The Respondent, on her part, relied on her written submissions dated 14/03/2025. She argued that the trial court did not err in its ruling as the dispute emanated from a boundary dispute. She added that it is trite law that courts were not clothed with the jurisdiction to entertain a boundary dispute. She urged the court dismiss the appeal as the suit contravened the statutory provisions of Sections 18 and 19 of the *Land Registration Act*. She relied on the case of Hon. Henry Kosgey v Brian Cuthbert & Another (2019) eKLR wherein the court stated that the jurisdiction of the Court in determining boundary disputes should be considered in view of section 18 of the *Land Registration Act*.
9. The Respondent submitted that a surveyor's report dated 11/08/2023 disputed the allegations of encroachment. She added in reiteration that the court did not have jurisdiction to determine boundary disputes of registered land. She urged that the Appellant never substantiated his claim hence prayed that the Appeal be dismissed with costs.

### **Analysis and Determination**

10. The role of this Court, being a first appellate one is well settled and spelt out in many a decision. The findings in the longstanding case of Okemo -vs- Republic (1977) EALR 32 as well as in Mark Oiruri Mose -vs- R (2013) eKLR are to the effect that such a court is duty bound to re-visit the evidence tendered before the trial court, re-evaluate and re-analyse it and come to its own independent conclusions.
11. The sole issue for determination is whether the trial court erred in dismissing the suit. The attendant one is which of the parties is to bear the costs of the Appeal.



12. The basis upon which the trial court dismissed the suit was that the dispute was a boundary dispute which falls under the mandate of the Land registrar under section 19 of the [Land Registration Act](#).
13. Using the Issue, Rule, Application and Conclusion (IRAC) process of determination of legal matters, this Court now analyses the appeal, starting with the parties' pleadings and then the evidence adduced.
14. It is clear that Issue between the parties was a claim by the plaintiff based on an allegation of construction of a septic tank by the Defendant on an access road thereby blocking the entrance of the two parcels of land while the other is that the Respondent has constructed a house whose roof drains rain water onto the Appellant's land. The alleged construction was carried out on the access road, which is a public road.
15. The Respondent countered the issue. She stated that theirs was a boundary dispute that fell outside the mandate of the trial court. Both parties presented diagrams of which the appellant alleged that the development was partly on the access road while the appellant' showed that it was on his parcel of land.
16. Section 18(2) of the [Land Registration Act](#) which provides as follows:

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.
17. Additionally, in the case of *George Kamau Macharia vs Dexka Limited (2019) eKLR*, the Court held that;

“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.”
18. Both parties have title deeds to their parcels of land. Both claim to share a common boundary and an access road. The Appellant contends that the Respondent's house's roof is constructed in such a manner as to drain onto his parcel of land, while part of the septic pit is on a public road. With regard to the latter claim by the appellant, the appellant has not stated that he brings this claim on behalf of the public. It is clear to me that if the construction was on a public road, the activity did not interfere with the appellant's land by way of encroachment onto it. It means that his purport to enforce public interests while relying on private ones is clearly a misconception. The question that would remain unanswered is, does the appellant have the mandate or locus to institute the claim on behalf of a public entity, the such as Kenya Urban Roads Authority? No. Thus, his argument must be rejected.
19. Regarding the first limb of argument that the Respondent's constructed house drains onto the Appellant's land, the proper interpretation of the alleged facts is that the dispute between the two parties is where the boundary between them lies. The question then that follows is whether, if the claim were true, the Court had jurisdiction in terms of Section 18(2) of the [Land Registration Act](#) to entertain the suit. The Appellant did not demonstrate that the boundaries between the parcels of land in issue had been established in terms of the provision. Thus, the trial court was correct in finding that the claim was a boundary dispute which lay before another forum for determination and the court lacked jurisdiction to handle it. The Appeal is dismissed with costs to the Respondent.
20. Orders accordingly.



**JUDGMENT DATED SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 11<sup>TH</sup> DAY OF JUNE 2025.**

**HON. DR. iur NYAGAKA**

**JUDGE**

At 08:15 AM in the presence of,

Mr. Awino Advocate for Appellant

Mr. Owino Advocate for the Respondent

