



Macharia v Mpesha (Sued as the administrator to the Estate of Stephen Lemoya Ole Mpesha) & another (Environment and Land Appeal 7 of 2023) [2024] KEELC 5404 (KLR) (11 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5404 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL 7 OF 2023
LC KOMINGOI, J
JULY 11, 2024**

BETWEEN

OBADIAH KARIUKI MACHARIA APPELLANT

AND

STEPHEN LEMOYA OLE MPESHA (SUED AS THE ADMINISTRATOR TO THE ESTATE OF STEPHEN LEMOYA OLE MPESHA) 1ST RESPONDENT

PETER KINUTHIA KIBUNYI 2ND RESPONDENT

(Being an Appeal against the Judgement of Hon. P. Achieng (SRM) at Ngong’ Magistrates Court Case No. 343 of 2014 delivered on 3rd February 2022)

JUDGMENT

1. In her Judgement dated 3rd February 2022, the Honourable P. Achieng (PM) observed thus;

“The Plaintiff did not ensure compliance with the above provisions of the law before bringing the present suit. He put the cart before the horse. The Land Registrar ought to have determined the matter in the first instance before any aggrieved party challenges the same in court. Section 18 (2) of the *Land Registration Act* is couched in mandatory terms and this court cannot assume jurisdiction which it does not have. I therefore find that the Plaintiff brought the present suit prematurely, and proceed to strike out the suit. Each party shall bear their own costs of the suit.”
2. Aggrieved by the said Judgement, the appellant has appealed
3. against Judgment seeking that the Respondents be evicted from the property known as LR No. Ngong Township/Block/1/193 formerly LR No. 14187 together with costs of the appeal on grounds that:



1. The learned Magistrate erred in law and in fact in failing to appreciate that the Plaintiff's case was for eviction against the Defendants from the Plaintiff's property.
 2. The learned Magistrate erred in law and in fact in failing to appreciate that the Plaintiff and the Defendants had distinct titled properties duly registered with clear boundaries already determined and registered.
 3. The learned Magistrate erred in law and in fact in failing to appreciate and scrutinise the documents filed and relied on by the Plaintiff in their entirety.
 4. The learned Magistrate erred in law and in fact in failing to appreciate that in the course of the matter the court (previous Magistrate handling the matter) directed that the District Surveyor Kajiado County to carry out a survey of the suit properties and make a report to the court.
 5. The learned Magistrate misdirected herself in disregarding and failing to appreciate and consider (at all) the District Surveyor Kajiado County's report made and filed in court.
 6. The learned Magistrate misdirected herself by reading the provisions of the law selectively and applying the same partially.
 7. The learned Magistrate misdirected herself in holding that the Plaintiff presented the suit to court prematurely.
4. This Appeal was canvassed by way of written submissions.

The Appellant's submissions

5. Counsel submitted that the Appellant filed the suit at the lower court in 2014 seeking to evict the 1st and 2nd Respondents from his property in order to re-establish the beacons. He also sought damages for trespass together with costs.
6. Counsel further submitted that Appellant engaged the Land Registrar Kajiado on the issue of boundaries in the year 1999. The letter dated 18th March 2010 from the Director of Survey to the Commissioner of Lands directed that the owners of the properties engage the services of a Surveyor to show/ re-establish the beacons as per the area survey plan. It was then that the Appellant engaged services of Juliko Geospatial Consultants who established that two of the beacons could not be placed due to encroachment by the neighbouring properties being Ngong Township/Block/192 belonging to the 1st Respondent and Ngong Township/Block/191 belonging to the 2nd Respondent. It was on this basis that the Appellant asked the Respondents to vacate and stop the trespass, but they declined and the Appellant filed the suit at the lower court for eviction. During trial, the lower court together with the District Surveyor Kajiado visited the suit property. The surveyor surveyed the plots and filed the report in court. The report confirmed that the respondents had indeed trespassed. Despite this evidence, the Magistrate failed to appreciate that the issue for determination was on eviction and arrived at an erroneous determination.
7. Counsel also submitted that it was on record that the Appellant had adhered to the set down requirements in determining the boundary dispute which began in 1999 and moved to court for enforcement of the boundary decision. Therefore, the Magistrate erred in finding that the suit was presented in court prematurely because the issue of beacons had already been determined and the issue that the court ought to have addressed was trespass and eviction.
8. Counsel thus sought for setting aside of the lower court's judgement together with award for damages and costs of the suit.



The 1st Respondent's submissions

9. At the time of writing this Judgement, the 1st Respondent had not filed their submissions.

The 2nd Respondent's submissions

10. Counsel while acknowledging that the surveyors had filed their reports submitted that the Land Registrar was never called upon to determine and ascertain the boundary issue as stipulated under Section 18(2) of the [Land Registration Act](#). This is what the Lower Court held. Therefore the jurisdiction to determine boundary disputes lay with the Land Registrar and the Magistrate did not err in holding as such.

Analysis and Determination

11. I have considered the grounds of appeal, record of appeal, rival submissions and the authorities cited. I find that the issues for determination are:

- i. Whether the Lower Court erred in its Judgement dated 3rd February 2022.
- ii. Whether the Appellant is entitled to the orders sought.
- iii. Who should bear costs of the appeal?

12. This being the first appellate court, it is called upon to reconsider and re-evaluate the evidence and decision of the trial court and draw its own conclusion. This was the holding of the Court of Appeal in [Frann Investment Limited v Kenya Anti-Corruption Commission & 6 others](#) [2024] KECA 714 (KLR) where it was stated;

“In determination of the appeal, we are mindful of the duty of this Court as a first appellate Court as set out in the decision of *Selle & Another v Associated Motor Boats Co. Ltd & Others* [1968] EA 123, which is to reconsider the evidence, evaluate it and draw conclusions of the fact and law. The Court would only depart from the findings by the trial Court if they were not based on evidence on record; where the said Court is shown to have acted on wrong principles of law as held in *Jabane v Olenja* [1968] KLR 661; or where its discretion was exercised injudiciously as was held in *Mbogo & another v Shah* [1968] EA 93.

13. Similarly in [South Nyanza Sugar Company Ltd. v Leonard. O. Arera](#) [2020] eKLR Mrima J observed thus;

“As the first appellant court it is now well settled that the role of this court is to revisit the evidence on record, evaluate it, and reach its own conclusion in the matter (See the case of *Selle & Another v Associated Motor Boat Co. Ltd.*)”

14. The Appellant claims that the trial Magistrate failed to appreciate the substance of the dispute and therefore arrived at an erroneous decision. The Appellant claims that the issue for determination was whether the Respondents had trespassed on his land and ought to be evicted. The Appellant submitted that the issue of boundary had already been addressed and reports filed in court and what was before the lower court was enforcement of the reports.

15. In the Plaint filed on 15th October 2014, the Appellant claims that he is the registered proprietor of Title No. Ngong Township/Block 1/193 Kajiado, formerly LR No. 14187. The 1st Respondent is the registered owner of Title No. Ngong Township/Block 1/192 Kajiado, formerly LR No. 14186 and the



2nd Respondent is the registered owner of Title No. Ngong Township/Block 1/191 Kajiado, formerly LR No. 14185. Both properties border the Appellant's property and there had been a long standing boundary dispute between them. In a survey report by Juliko Geospatial Consultants, they indicated that they could not re-establish the beacons because of encroachment of the respondents plots on the Appellants plot. As such, the Respondents had wrongfully entered and trespassed on the Appellant's plot and sought:

- “ a. An order of eviction as against the 1st and 2nd Defendants ... in order to facilitate the re-establishment of beacons by the surveyor;
 - a. Damages against the respondents for trespass;
 - b. Costs of the suit;
 - c. Any other reliefs deemed fit by court.”

16. The Learned Trial Magistrate in the impugned judgement dated 3rd February 2022 held:

Page 3: ...” This is clearly a boundary dispute. According to Section 18(2) of the [Land Registration Act](#), the same ought to have been submitted to the Land Registrar in the first instance...

In the Court of Appeal case of [Azzuri Limited vs Pink Properties Limited](#) [2018] eKLR ... 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...

The Plaintiff did not ensure compliance with the above provisions of the law before bringing the present suit... I therefore find that the Plaintiff brought the present suit prematurely, and proceed to strike out the suit. Each party to bear their own costs of the suit.”

17. The issue that this court is to determine therefore is: whether the trial Magistrate erred in arriving at the decision that this suit was a boundary dispute which ought to have been determined by the Land Registrar; or whether the boundary issue had already been determined and what was before court was enforcement of the decision.

18. From the Record of Appeal, I agree that this dispute indeed emanates from a boundary dispute. As aptly held by the Learned trial Magistrate, the Land Registrar has the jurisdiction to determine boundary disputes as stipulated under Section 18(2) of the [Land Registration Act](#) Which provides;

“ 18 (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.”

19. The Appellant claims that the boundary dispute had already been determined as stipulated and what was required of the court was to enforce the findings.

20. From that in the Record of Appeal, there is a letter dated 12th October 1999 from the Land Registrar Kajiado addressed to the Appellant and the 1st Respondent's father which reads: “Boundary dispute Ngong Block/1/193 vs 192: Please note that we have arranged to visit and determine your common boundary dispute on 4th November 1999... You are therefore requested to be present at the site of the exercise as scheduled...”

21. There is another letter dated 4th March 2003 from the District Land Registrar to the above mentioned parties on the boundary dispute which reads: “... all parties are required to meet With all the



- necessary documents to support your claim. The party present will be heard and the boundary determined.”
22. From the correspondences in the Record of Appeal it is noted that this dispute remained unresolved until this suit was filed. The Appellant in his letter to the District Land Registrar dated 5th November 2004 followed up on resolution of this dispute. The Chief Land Registrar then wrote a letter dated 10th December 2004 to the District Land Registrar Kajado seeking information on action taken regarding this dispute. The Appellant once again wrote to the Chief Land Registrar on 22nd December 2005 following up on the issue. There is no evidence of what transpired between 2005 and 2010 when in a letter dated 21st April 2010 the District Officer summoned the Appellant and the 1st Respondent to his office to determine the boundary dispute. There is similarly no evidence of the happenings after the parties were summoned in 2010 until the filing of this suit 2014 as Senior Principal Magistrate’s Court at Ngong Civil Suit No. 343 of 2014.
23. Indeed as at the filing of this suit, the Land Registrar had not determined the boundary dispute but, there is no evidence in court to show that his decision had been implemented. However, the issue for determination was trespass of the Respondents on the Appellant’s plot. During the pendency of the suit at the lower court, the District Surveyor Kajado County was summoned to define the boundaries and establish beacons between plot numbers 191, 192 and 193 for the court to arrive at a just determination. This step taken by the Learned Trial Magistrate was commendable as it was to aid in the determination of the claim of trespass.
24. On the issue of trespass and boundary dispute, the court in *Kiptarus & 3 others v Rono; Director of Surveys & 2 others (Interested Parties)* [2023] KEELC 18031 (KLR) held:
- Whilst it is true that the land registrar does not have power and/or jurisdiction to determine a case of trespass to land, it is the view of this court that there is a thin line between a case of trespass to land and a boundary dispute as in determining a boundary issue, the land registrar may end up with evidence capable of showing that one party to the dispute has encroached and/or trespassed into land belonging to another. In my view, such finding/determination, unless controverted by other evidence or it is demonstrated to be unreliable, is good evidence for purposes of determining a case of trespass or ownership of the area of land said to have been encroached onto.
25. In a Survey report by the District Surveyor dated 28th August 2017 and addressed to the Chief Magistrate’s, Ngong Law Court regarding the plots read: “... This is to inform you that a team of surveyors visited the above mentioned site on Wednesday 28th June 2017 and further on Wednesday 23rd August 2017 to re-establish the boundary beacons... Boundary beacon ... was however not placed because it falls inside a building and was not accessible. Part of 9 meter road between plot 193 and plot 191 is blocked by a container structure.”
26. I find that this report is an indication that the boundary between these plots was determined and ascertained. The report showed that the beacons could not be placed because of a building and a container that were in place of the beacons.
27. On 6th July 2018, the ruling by Hon. S.N. Mbungi reads: “The applicant wants the Respondents to remove the containers from a portion of land where the surveyor find the beacons should be placed... I do allow in that the Respondent be ordered to remove the container from the portion of the Plaintiff land where the surveyor found the beacon should be placed to facilitate the fixing of the boundary between the Plaintiff and the Defendants’ plots.”



28. The respondents indicated that they would appeal this decision but it is not clear whether they appealed or not. The matter proceeded for hearing and the impugned judgement by Hon. P. Achieng was made.
29. Before this judgement, the Hon. S.N. Mbungi had ruled that the surveyor's findings on the beacons and boundaries should be adhered to. I support that ruling because, the surveyor's report is exactly what the Land Registrar is tasked to do by Section 18 and 19 of the [Land Registration Act](#). The Registrar should determine boundary disputes by giving persons an opportunity to be heard; receiving evidence as to the boundaries and its situation; causing to be defined by a surveyor the precise position of the boundaries in question; and determining the position of any uncertain boundaries.
- “Section 18 (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).
- Section 19 (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.”
30. Once it was determined that the beacon was not accessible because it fell inside a house and another one was blocked by a container, the Land Registrar's duty ended. Any person aggrieved by the Registrar's determination had the right to appeal. The suit having sought eviction orders on ground of trespass should have proceeded as such. I find that the Learned Trial Magistrate erred in finding that the suit was premature. I also find that the Land Registrar had already pronounced himself on the issue of boundary as per the report filed in court.
31. The survey report having found that boundary beacon b32 fell inside a building and was not accessible and part of 9 metre road between plot 193 and plot 191 is blocked by the container, this, meant that the Respondents had indeed trespassed on the Appellants' plot as claimed in his Complaint and was entitled to the orders sought.
32. On the issue of damages for trespass I find that the court was not guided on the quantum. I do not award any damages for trespass.
33. The upshot of the matter is that I find merit in this appeal and the same is allowed in the following terms;



- i. That the judgement dated 3rd February 2022 by Hon. P. Achieng' is hereby set aside;
- ii. The 1st and 2nd Respondents are hereby ordered to remove any structure, obstacle or offending material on the Appellant's plot, in line of site where the Survey report dated 28th August 2017 indicates was inaccessible due to blockage by a building and a container structure within 60 days from the date of this judgement;
- iii. That the Officer Commanding Station Ngong police Station does ensure compliance of this court orders;
- iv. That the Land Registrar is directed to re-establish beacons on the said plots within 30 days of the removal of the offending material.
- v. That the Appellant do have costs of this Appeal and of the suit in the lower court

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 11TH DAY OF JULY 2024.

L.KOMINGOI

JUDGE.

In The Presence Of:

Mr. Nguru for the Appellant

N.A for 1st Respondent.

Mr. Ombati for the 2nd Respondent.

Court Assistant – Mutisya.

