



REPUBLIC OF KENYA



**Githae v Ngugi & another (Environment and Land Appeal E001 of 2023)  
[2024] KEELC 6191 (KLR) (10 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6191 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT AND LAND APPEAL E001 OF 2023  
LN GACHERU, J  
SEPTEMBER 10, 2024**

**BETWEEN**

**JOYCE WANJIRU GITHAЕ ..... APPELLANT**

**AND**

**JOSEPH IRUNGU NGUGI ..... 1<sup>ST</sup> RESPONDENT**

**PETER MACHARIA MUNDIA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal against the Judgement of Hon. S. Mwangi S.R.M  
delivered on 12/7/2023, in Murang'a CMELC Case No.44 of 2020)*

**JUDGMENT**

1. The Appellant herein, Joyce Wanjiru Githae, filed this Appeal vide a Memorandum of Appeal dated 19<sup>th</sup> July, 2023, on the following grounds:
  - i. The learned magistrate erred in law and fact in her failure to find that a boundary dispute existed, which had not been resolved.
  - ii. The learned magistrate erred in law and fact in her failure to find that a boundary dispute was never resolved due to insecurity and hostility as explained by the Land Registrar.
  - iii. The learned magistrate erred in law and fact in her failure to acknowledge that the problem of security faced by the Land Registrar in her mandate of fixing boundaries and in her failure to grant the Land registrar security as requested.
  - iv. The learned magistrate erred in law and fact by finding that the Respondents had proved their case in the Counter-claim, yet there existed a boundary dispute that was unresolved.
  - v. The learned magistrate erred in law and fact by giving declaration that a sub-division, demarcation or other dealings, or transactions with respect to LOC10/Wajengi/198 and LOC



10/Wanjengi/205, was illegal without any evidence of such any attempt to subdivide and/or demarcate as the appellant claim was for fixing boundaries.

- vi. The learned magistrate erred in law and fact by finding that the appellant's claim was for expansion of her access path, yet the Appellant claim was for the Land Registrar to be ordered to carry out her mandate to fix a disputed and/or uncertain boundary as outlined in section 19 of the *Land Registration Act* 2012.
  - vii. The learned magistrate erred in law and fact and law by finding that the Respondents had satisfied the criteria of granting an injunction.
  - viii. The learned magistrate erred in law and fact by issuing an order requiring the Plaintiff to engage the Respondents on a willing buyer willing seller yet the appellant's evidence did not point to her intention of purchasing the Respondents Land Parcels of portions there from.
  - ix. The learned magistrate erred in law and fact by giving contradictory orders. Order no 3 for injunction against continued trespass was granted while order no 7 for damages was denied since there was no proof of trespass.
  - x. The learned magistrate erred in law by finding the appellant liable to pay full costs of the suit yet the counter claim succeeded partially.
2. The genesis of the dispute between the parties herein was a Plaint filed by the Appellant as the Plaintiff thereon, dated 29<sup>th</sup> November 2019, which was later amended on 11<sup>th</sup> August 2022, which sought the following orders:
1. An order for the District Surveyor and Land Registrar Murang'a to arbitrate the dispute between the owners of land parcel no Loc 10/Wanjengi /198, 205 and 211.
  2. Costs of the suit.
  3. Any other or further relief as this Honourable court may deem fit and just to grant.
3. On the other hand, the Defendants(Respondents), opposed the prayers sought in the Plaintiff's(Appellant's) claim and filed a Defense together with a Counter-claim, wherein they sought for the following prayers;
1. The Plaintiff's suit be dismissed with costs to the Defendants.
  2. A declaration that any subdivision, demarcation or other dealings or transactions with speed to the whole or any portion of the Defendants' properties known as parcel no LOC/ 10/ Wajengi/198 and LOC 10/ Wajengi/205, emanating from the claimed expansion of the access path to parcel no LOC/10/Wajengi/211 is illegal.
  3. An injunction to issue directed to the Plaintiff restraining her by herself, his servants and / or agents or any other parties claiming under or through her, from continued trespassing on parcel no. LOC 10/Wajengi/198 and LOC 10/Wajengi/205.
  4. An injunction to be directed to the Plaintiff restraining her by herself, her servants and /or agents or any other parties claiming under or through her from passing themselves off the owner of or having any proprietary or other rights in all or any portion of parcel no LOC/10/ Wajengi/198 and LOC 10/Wajengi/208.
  5. An order requiring the Plaintiff to engage the adjourning neighbour on willing seller willing buyer and to procure at the market price an access path to be severed from the interested



neighbours or otherwise trade in a portion of the desired access road from the interested neighbours with an equivalent on her own parcel of land known as LOC 10/Wajengi/211.

6. In the event of the Plaintiff by herself, her servants and/or agents or any other parties claiming under or through her, failing to obey the express orders of this court in relation to the subject properties known as LOC 10/Wajengi/205 and LOC 10/WAJENGI /198, the OCS kirogo police station do supervise the enforcement of the same.
  7. Damage for trespass against the Defendants.
  8. Costs of the defence and counterclaim be awarded to the Defendants.
  9. Such other or further orders as the court may deem fit and just to grant.
4. That the Appellant, as a Plaintiff vide her written statement dated 29<sup>th</sup> July 2020, and another dated 6<sup>th</sup> September 2022, had averred that she was the registered owner of land parcel no LOC 10/Wajengi/211, which land bordered land parcels no 205 and 198, registered in the names of the Respondents. It was her allegation that there was a boundary dispute over the said parcels of land.
  5. It was her further averments that in the August 2011, she filed for the resolution of a boundary dispute at the Land Registrar Office at Murang'a. That the Land Registrar gave a date on 19/02/2011, for resurvey of the boundaries, when a Registrar by the name KIMANI and a Government Surveyor by the name KAMAU were present. That the Respondents were also present, but they objected to the resurvey being undertaken, by occasioning violence at the Land Registrar, and the Surveyor.
  6. She alleged that Beatrice Wamweru Mundia (2nd Respondent, deceased), even removed her clothes in objection to the resurvey. That the District Land Registrar informed the Appellant that due to the objection and security risk, the process could not be undertaken, and advised her to seek legal redress at the Kahuro Land Disputes tribunal.
  7. Further, that around November 2011, upon visiting the Land Disputes Tribunal offices, the Appellant was informed that the said Land Disputes Tribunal had been dissolved, and the Appellant thereafter wrote to the Land Registrar, informing him of her findings at the Kahuro Land Disputes Tribunal, vide a letter dated 15/12/2011 (at page 70). That since then, she had been making inquiries to the Land Registrar, Murang'a to provide a way forward to no avail hence the suit.
  8. The Respondents as Defendants before the trial court filed their statement of Defence and Counter-claim dated 10<sup>th</sup> September 2020, and denied that the Appellant(Plaintiff), had any legal right to claim for a private access path through the Defendants(Respondents) private land.
  9. They further averred that the Appellant has been trespassing upon their land illegally by forcefully excavating and cutting down trees along the borderlines, thus causing serious soil erosion as a result of which the Respondents (Defendants) have suffered loss.
  10. In their Counter-claim, the Respondents(Defendants) urged the court to dismiss the Appellant's case with costs. Further, they urged the court to issue a declaration that any subdivision, demarcation or other dealing or transaction with respect to the whole of, or any portion of the Defendants properties known as Loc 10/ Wanjengi/ 198, and 205, emanating from the expansion of the access road to land parcel no. Loc 10/ Wanjengi/ 211, is illegal, among other prayers.
  11. The matter proceeded via viva voce evidence, wherein the Appellant as the Plaintiff gave evidence for herself, and called three other witnesses including the Land Registrar, E.M Mputhia, who testified as to when the dispute was lodged in their office, and a Land Registrar and surveyor went to the ground to establish the road of access, and the acreage, that the exercise could not be carried due to the animosity



- between the owners of the concerned parcels of land. It was her evidence that she was ready and willing to carry out the exercise, but with provision of enough security.
12. On their part, the Respondents(Defendants), gave evidence for themselves and called no witnesses. Thereafter, parties filed their respective written submissions, which the trial court considered together with evidence on record.
  13. On 12<sup>th</sup> July 2023, the trial court delivered its judgment, wherein it dismissed the Appellant's (Plaintiff's) case, and upheld the Respondents' Counter- claim. The trial court held that the Plaintiff(Appellant) wants expansion of the access road, but does not want to follow the laid down laws and procedures, of having the Defendants(Respondents) who are her neighbours and owners of adjacent land and who would be affected give their consents for the said expansion and compensation.
  14. It was the trial court's findings that the Appellant had failed to prove her case on the required standard of balance of probabilities, and for that reasons, her case was dismissed, and the Defendants(Respondents) Counter- claim was upheld.
  15. The Appellant herein as the Plaintiff thereon was aggrieved by the decision of the trial court and thus filed this Appeal. The Record of Appeal was filed on 23<sup>rd</sup> November 2023, and Appeal was admitted on 6<sup>th</sup> December 2023.
  16. The Appeal was canvassed by way of written submissions. The Appellant filed her written submissions dated 4<sup>th</sup> April 2024, through the Law Firm of Charles Mbugua& Co Advocates, while the Respondents filed their written submissions dated 29<sup>th</sup> April 2024, through the Law Firm of Triple N.W & CO Advocates, which this court has carefully considered.
  17. In her written submissions, the Appellant identified five issues for determination being;
    - i. whether there existed a boundary dispute between the parties and whether it had been resolved;
    - ii. whether the court had power to facilitate the land Registrar to fix the boundaries;
    - iii. whether the court had powers to entertain any action or other proceedings relating to a dispute as the boundaries of the registered land, unless the boundaries have been determined in accordance with section 19 of the [Land Registration Act, 2010](#);
    - iv. whether the trial magistrate issued a contradictory judgement;
    - v. who should bear costs of the Appeal.
  18. The Appellant relied on the provisions of section 19 of the [Land Registration Act, 2012](#) which provides;
    - “ 19. If the Registrar considers it desirable to indicate on a filed plan approved by
      - (1) 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.”

19. It was her further submissions that there is no dispute that there exists a boundary dispute between the parties herein, which relates to land parcels no Loc 10/ Wanjengi/ 198, 205 & 211, and the parties herein and the Land Registrar confirmed this position. With the above confirmation, then section 19 of the *Land Registration Act*, ought to come into play.
20. Further, the Appellant relied on section 18(2) of the *Land Registration Act*, which states;
- “(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.”
21. It was the Appellant’s submissions that the trial court made determination while the boundary dispute was still not yet determined, and thus the orders issued were illegal, and should be set aside.
22. The Appellant urged the court to allow the Appeal and set aside and/ or vacate the Judgement of the trial court. Further, that this court should direct the Land Registrar Murang’a to visit the disputed parcels of land and fix the boundaries, and that the OCS Kirogo Police Station, should provide security during the exercise. The Appellant prayed for costs of the Appeal.
23. In their submissions, the Respondents set out two issues for determination being;
- i. whether the learned Magistrate’s Judgement evaluated the apparent evidence before her and applicable laws and case laws in her Judgment of 12<sup>th</sup> July 2023;
  - ii. who should bear the costs of the Appeal?
24. On the question of whether the impugned judgment adequately evaluated the apparent evidence, applicable laws and case laws it was submitted that the Plaintiff/Appellant in her testimony in court confirmed that the dispute before the court was not a boundary dispute, but a claim to justify existence of an access path between the Appellant and the Respondents parcel of land.
25. It was further submitted that though the Plaintiff/Appellant had pleaded the access path was not to her liking and convenience, all parties were in agreement that the boundaries and set beacons were intact, and the acreage as on the ground was the same as per the lands records and thus, any change on the boundary would affect the true acreage of the suit land.
26. Therefore, it was their evidence that from the pleadings and the testimony of the Appellant, it was apparent that the cause of action arose from a gross misconception by the Appellant that she was entitled to expand the access path, without appreciating the financial implication and the legal process involved as a result of which she dragged the Respondents into vexatious and frivolous suit.
27. Further, it was submitted that the trial court appreciated the facts and evidence sufficiently as the cause of action mutated from access path dispute, to boundary dispute without material evidence. Further, that the Land Registrar declined to change the boundary because parties had not agreed to change as required by the law.



- 28. It was their contention that the appeal herein infers a boundary dispute, while the substratum of the suit was about access path and thus the Appellant court do not have jurisdiction and neither was the trial court as boundary dispute was within the Land Registrar purview.
- 29. The Respondents submitted that the matter herein is not a trespass dispute and it should suffer the same fate as the suit. They relied on sections 18 and 19 of the Land Registration Act No. 3 of 2012.
- 30. Reliance was also placed on the case of Michael Maluti & 5 others vs Julius Mbau Nzyuko & 2 others(2019) eklr, the Court held that ;

“Whereas the Plaintiffs/Applicants have pleaded in their plaint and their application that there has never been any boundary dispute between themselves and the Defendants/ Respondents, it is clear to me that they ought to have given the Land Registrar the chance to address the boundary complaint raised by the 1<sup>st</sup> Defendant/Respondent herein in line with Section 18 and 19 of the aforementioned Land Registration Act.”

- 31. Emphasis was also placed in the Court of Appeal Case of the Estate Sonrisa Ltd & Another vs Samuel Kamau Macharia & 2 others (2020) eklr, where the court held;

“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).

- 32. On the issue of who should bear the costs of the Appeal, it was submitted that though costs are awarded at the discretion of the court, as provided by Section 27 of the Civil Procedure Act, it should be awarded to the successful litigant who are the Respondents, since there are no good reasons for the court to direct otherwise.

- 33. Reliance was placed in the case of Republic vs Rosemary Wairimu Munene, Exparte Applicant vs Ihururu Dairy Farmers Cooperative Society Ltd where the court held;

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it



is for compensating the successful party for the trouble taken in prosecuting or defending the case”.

34. The above are the Pleadings by the parties herein, their evidence before the trial court as contained in the Record of Appeal, the parties rival submissions and cited authorities, which this court has carefully read and considered. The court too has considered the relevant provisions of law and finds as follows;

35. This is a first Appeal, and as provided by section 65(1) of the *Civil Procedure Act*, this court as an appellate one is mandated to consider both the facts and the law. Further, as provided by section 78 of the said Act, this court is bound to re-consider, re-evaluate, re-assess and re-analyse the evidence adduced before the trial court, and then come up with its own independent conclusion.

36. In the case of *Nashon Onyango Otieno vs George Onyango Otieno*(2021) eKLR, the court held;

“This being a 1<sup>st</sup> appeal, it is the duty of this court to review the evidence adduced before the lower court, and satisfy itself that the decision was well-founded. The jurisdiction of 1<sup>st</sup> appellate Court was well settled in the case of *Selle & Another vs. Associated Motor B Co.Ltd & Others* [1968] EA 123, which was quoted in the case of *Barnabas Biwott v Thor Kipkorir Bundotich* [2018] eKLR as thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ...is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

37. As the court re-evaluates and re-considers the available evidence adduced before the trial court as is contained in the Record of Appeal, it will bear in mind that it never saw nor heard the witnesses, as did the trial court, and thus did not observe the demeanour of the witnesses. It will therefore give due deference to the trial court’s findings, while considering that the trial court too has discretion and mandate to make its determination as provided for in *the Constitution* and statutes.

38. This court will only interfere with the trial court’s conclusion and discretion if it is satisfied that the said discretion was exercised erroneously and was misdirected. See the case of *Mbogo & Another vs Shah*, [1968] EA, p.15, the Court held that;

“An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”

39. This court having considered the Record of Appeal and the rival written submissions herein, the court finds the issues for determination are;

- i. Whether the appeal herein is merited;
- ii. Who should bear the costs of this Appeal?



### **i) Whether the Appeal herein is merited?**

40. In her claim before the trial court, the Appellant had sought for an order to the District Surveyor and the Land Registrar Murang'a to arbitrate the dispute between the owners of land parcels no. Loc 10/ Wanjengi/ 198, 205 and 211; any other relief as the court may deem fit and just to grant.
41. In her claim, the Appellant had alleged that she is the registered owner of land parcel no. Loc 10/ Wanjengi/ 211, while the Respondents are registered owners of land parcels no Loc 10/ Wanjengi/ 198 and 205. She claimed that there is a boundary dispute among the owners of these parcels of land, and the Respondents had claimed that there was no access road that existed between land parcels no 198 and 205, that give the Appellant access to her land parcel No 211, while it was clear that the cadastral map showed the access road.
42. The Respondents in their Defence averred that the Appellant had no right to claim a private access path through their land, and that the existing access path was surrendered by the government measuring 3.3 mts and any expansion of the same would affect the Respondents acreage. Therefore, the Appellant has been trespassing upon the Respondents land, which action is illegal and she had not come to court with clean hands.
43. In their Counter-claim, the Respondents sought for dismissal of the Appellant's claim and a declaration that any subdivision demarcation or transactions in respect to the three parcels of land was illegal; injunctions; damages among other prayers.
44. In its determination, the trial court held that the Appellant had not proved her case on the required standard, and dismissed her case. However, the said court found that the Respondents had proved their claim as per the Counter-claim and allowed the prayers sought therein.
45. What is not in doubt is that the Appellant is the registered owner of Loc 10/ Wanjengi/ 211, while the Respondents are the registered owners of Loc 10/ Wanjengi/ 198 & 205, respectively.
46. What is also not in doubt is that the parties herein have had a dispute for a long time. The Appellant claimed that she reported her dispute to the Land Registrar in 2011, who referred her to Kahuro Land Disputes Tribunal, but by the time she visited the said tribunal, she found that the tribunals had been dissolved.
47. Pw2, Peter Mwangi Kamau, had testified that that this dispute had been a longstanding one even before the land changed hands, and the main issue was the access path and the boundary issue.
48. Pw4, E.M Mputhia, the land Registrar had testified that the dispute herein was about the boundary which dispute had been lodged in their office. Further, she testified that the Land Registrar and the Surveyor went to the ground to establish the access road in question, and the acreage but there was animosity between the land owners, and therefore could not carry the exercise and determine the dispute. She had further testified that her office was ready to go back to the ground and determine the boundary and access path, together with the County surveyor, but with security.
49. In its determination, the trial court had found and held that; the dispute is all about the access road that passes by the boundary to the Respondents land, that leads to the Plaintiff's land, and that the said dispute started in 2011, and has been ongoing.
50. Further the trial court held that; there is in existence a road of access between the parties parcels of land which measures 3.3 meters, and it leads to the Plaintiff land. That although the Plaintiff denied to have it expanded, it came out in cross examination that indeed this was her intention and it is common



knowledge that expansion of private road of access has to be done in agreement with all the land owners, whose lands were going to be affected by the expansion.

51. As this court stated earlier, the Appellants claim is that there is a boundary dispute in existence, and that the Respondents have denied her an access road, which she claims exists on the ground as per the cadastral map.
52. Though the trial court held that the Appellant wanted to have the access road expanded, and that the said intention was deduced from her cross examination, this court has re-considered the evidence adduced by the Appellant and while cross examined on the issue of access road on page 24 of the Record of Appeal, she responded;

“Our father never told us the road of access was how big, for all we knew was that there was a road and so he told us to buy the map and the government is to say the measurements of the road for I do not know the same. I have not said I want my land to be added for I only need the right of way from my land to the main road, and I do not care of the road measurement. I do not know that the cadastral map states that the road provided for me is 3.5 m. I have not said I want the road added, but I want the road provided for me from the main road to my house”
53. From the above excerpts of the cross examination of the Appellant, there is no evidence that the Appellant stated that she wanted the access road expanded. All that is recorded is that the Appellant stated that she did not care the road measurements, but she wanted an access road.
54. This court finds and holds that it is not clear that all that the Appellant wanted was expansion of the access road. The trial court held that the dispute is over an access road, that was allegedly between the parcels of land for the parties herein. The Appellant alleged that there is in existence an access road as per the cadastral map, between the parcels of land and the Respondents denied that existence.
55. The Respondents on their part denied existence of this access path and claimed that the access path that is available is 3.3Meters, and which is a private road, and when the Appellant insists on using the same, then she trespasses on the Respondents parcels of land, and she should be ordered to pay damages for trespass.
56. There was a claim by the Appellant that the Respondents have interfered with the existing boundaries and access road, and there was a denial and Counter-claim by the Respondents. The Appellant called the Land Registrar as her witness who testified that the dispute was reported to their office, but could not be resolved as there was animosity between the parties when the Land Registrar and Surveyor visited the ground.
57. Even if the Respondents alleged that the access road was a private one, there was no confirmation of the same from the government office. The Land Registrar is the custodian of documents that would confirm whether an access road exist or not.
58. If the Land Registrar and County Surveyor had been allowed to visit the ground and ascertained whether the alleged access road existed or not, whether it was private or had been provided in the cadastral map, this dispute could not have escalated to this stage. It seems the trial court concurred with the Respondents allegations that the Appellant had trespassed on their parcels of land, and that she wanted the access road expanded, but without evidence from the government officials on that allegation. This court finds that the Land Registrar and the County Government Surveyor were the best suited officials or witnesses who could unravel the dispute herein.



59. It is evident that the trial court arrived at a finding that the Appellant was a trespasser on the Respondents parcels of land based only on their evidence without any confirmation from the Surveyor that indeed the Appellant had trespassed on the Respondents parcels of land. Indeed, there was a boundary dispute which needed to be resolved by the Land Registrar, and Surveyor and after that the issue of access road would have been resolved.
60. In her Memo of Appeal, the Appellant raised various grounds. On Ground No1, the Appellant lamented that the trial court erred in law and fact in failing to find that a boundary dispute existed, which has not been resolved.
61. From the judgment of the trial court, it is clear on page 8, the trial court held that the dispute was all about the road of access, that passes by the boundary to their land. However, Pw2 testified that there has been a longstanding boundary dispute, even before the Appellant became the registered owner of the suit land. Indeed, if the boundary dispute had been resolved, the issue of the access road would have been resolved too.
62. This court finds and holds that the issue in dispute was a boundary dispute, which dispute translated to a dispute over an access path. This being a boundary dispute, the Land Registrar was the one mandated to resolve the same. Therefore, this court finds and holds that the trial court erred in law and fact in its failure to find that a boundary dispute existed and which had not been resolved as attested by the Land Registrar, Pw4.
63. There being a boundary dispute, the Land Registrar had the mandate to resolve the same. See the decision of the Court of Appeal in the case of *Azzuri Ltd vs Pink Properties Ltd (2018) eklr*, where the court stated as follows;
- “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”
64. On Grounds Nos 2 and 3, on the failure of the trial court to acknowledge that the dispute was not resolved due to insecurity and hostility among the parties and thus the said insecurity hindered the Land Registrar from carrying her mandate, it was evident that the boundary dispute could not be resolved without availability of security, and the trial court could have referred the matter to the Land Registrar, with an order for provision of security.
65. On ground No 4, it is indeed clear that there was in existence a boundary dispute between the Appellant and the Respondents, which culminated into an access road dispute. The Respondents had alleged that the Appellant was seeking to expand the access road. There was no evidence adduced to support that allegation. In prayer no 2, of the Respondents Counter-claim, they had sought for a declaration that any demarcation or subdivision of their respective parcels of land with the aim of expanding the access road was illegal. There was no evidence that such demarcation or subdivision was intended to be carried out.



66. It is evident that it is not enough for one to allege, as he who alleges must prove. See Sections 107 and 108 of the *Evidence Act*. Which states as follows;

“ 107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

67. The Respondents had also sought for injunctions against the Appellant, by alleging that she had trespassed on their parcel of land. There was no proof of trespass availed by the Respondents. Although they had alleged that the Appellant had cut down their trees, such evidence was not availed, and there was no evidence that the Appellant had remained onto the Respondents parcels of land, and thus trespassed thereon.

68. Without prove of trespass, this court finds that indeed the trial court erred in law and facts in finding that the Respondents had proved their counter-claim on the required standard of balance of probabilities. See the case of *Miller Vs Minister of Pensions* [1942] 2 ALL ER 372, defined the standard of proof on a balance of probabilities as follows:

“It must carry a reasonable degree of probability... If the evidence is such that the tribunal can say ‘we think it is more probable than not’ the burden is discharged., but if the probabilities are equal, it is not”.

69. On grounds No 5, 6 and 7, this court finds and holds that there was no evidence to support the claim of demarcation, and subdivision of the suit lands by the Appellant herein. Further, there was no evidence of expansion of the alleged access road and also the criteria for grant of injunctions were not met. These grounds succeed on Appeal.

70. On ground No 8, there was no evidence that the Appellant intended to purchase the Respondents parcels of land. This prayer and the subsequent order issued by the trial court was misplaced, and misdirected, and thus the court finds that the trial court erred in law and fact in allowing the same.

71. Having now carefully considered the available evidence, and having re-analysed the evidence on record as above, this court finds and hold that the appeal herein as filed by the Appellant is merited, and the Judgement of the trial court delivered on 12<sup>th</sup> July 2023, be and is hereby set aside/and or vacated, and Judgement is entered for the Appellant as prayed in her Amended Plaintiff dated 11<sup>th</sup> August 2022.

## **ii) Who should bear costs of this Appeal.**

72. As provided by section 27 of the *Civil Procedure Act*, costs are granted at the discretion of the court, but ordinarily, costs follow the event, and is awarded to the successful litigant, unless there are exceptional circumstances that would warrant the court to depart from that position. The court finds that the Appellant herein is the successful litigant and is thus awarded costs of this Appeal and the costs at the lower court.



73. In a nutshell, this court as an Appellate court finds and holds that the Appeal herein is merited and the same is allowed entirely. This being a boundary dispute that culminated in an access road dispute, the court allows the Appellant's prayer No (a) of the amended Plaintiff dated 11<sup>th</sup> August 2022, with costs to the Appellant.
74. Further, the Land Registrar Murang'a, and the County Surveyor to visit the disputed parcels of land within a period of 60 days from the date hereof to assess the boundary dispute, between the Appellant and the Respondents herein, the alleged access road, take measurements of the acreage, and thereafter prepare a report. Any party is at liberty to apply.
75. Costs of the exercise that will be undertaken by Land Registrar and County Surveyor to be met jointly by the parties herein, being the Appellant and Respondents.
76. Further, the OCS Kirogo Police Station to provide security during the exercise that will be undertaken by the Land Registrar and the County Surveyor.
77. The orders granted in respect of the Respondents' amended Counter-claim dated August 24, 2022, are hereby set aside and/ or vacated, and the said Counter-claim is dismissed entirely with costs.
78. Appeal is allowed accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 10<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**L. GACHERU**

**Judge**

**10/9/2024**

Delivered online in the presence of;

Joel Njonjo - Court Assistant

Mr Mbugua for the Appellant

N/A for the Respondents (though served with Judgement Notice via email)

**L. GACHERU**

**JUDGE**

**10/9/2024**

