



Njenga (Suing as the legal representative of the Estate of Joseph Njenga Kaguma - Deceased) v Mungai (Environment and Land Appeal E013 of 2023) [2024] KEELC 6213 (KLR) (10 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6213 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E013 OF 2023
LN GACHERU, J
SEPTEMBER 10, 2024**

BETWEEN

JANE WANGARI NJENGA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOSEPH NJENGA KAGUMA - DECEASED) APPELLANT

AND

HARRISON KUNYONYA MUNGAI RESPONDENT

(Being an Appeal from the Judgment delivered by the Honourable S. MWANGI Senior Resident Magistrate on the 16th August 2023 in Murang'a Civil Suit No 399 of 2016)

JUDGMENT

1. By a Plaint dated 2nd November 2016, the Plaintiff (Respondent herein), sought for Judgement against the Defendants (Appellant herein) for the following orders:
 - i. A declaration that the Plaintiff is the legal owner of Land Parcel No. Kakuzi/Kimiri/Block 8/349.
 - ii. The Defendant be ordered to forthwith render vacant possession of the portion of land that he does occupy to the Plaintiff, otherwise he be forcefully evicted at his own cost.
 - iii. The costs and interest of the suit.
 - iv. Any other or better relief the Honourable court may deem fit to grant.
2. The Plaintiff's (Respondent's) claim was premised on dispute of the ownership and occupation of the land parcel No. Kakuzi/Kirimiri/Block 8/349. The Plaintiff (Respondent) had alleged that the Defendant/Appellant illegally encroached onto the suit property, and constructed on the said land parcel, which parcel of land belonged to the Plaintiff(Respondent).



3. The Plaintiff (Respondent) had relied on his Witness Statement dated 2/11/2016, his list of documents, further list of witnesses and documents dated 23rd January 2020, and 21st April 2022 respectively, and urged the trial court to allow his claim.
4. The initial Defendant (Joseph Njenga Kaguma), passed away on 23rd May 2020, before the conclusion of the case and vide a Notice of Motion Application dated 23rd February 2021, leave was sought to substitute the said Defendant Joseph Njenga Kaguma- deceased, with his legal representative Jane Wangari Njenga. Subsequently, an amended Defendant's Statement of Defence was filed on 24th May 2021.
5. The Defendant (Appellant) vehemently denied the Plaintiff's/ Respondent's claim, and averred that he was in quiet possession and occupation of her(their) parcel of land No. Kakuzi/ Kirimiri/ Block 8/351, and that the Plaintiff's claim were wild allegations. She also denied ever having encroached on the property owned by the Plaintiff(Respondent), and that the claim for vacant possession is made in bad faith.
6. Further, the Defendant(Appellant), alleged that the Plaintiff claim was stale, and the court had no reasons to hear stale claims, made by a party who came to court with dirty hands.
7. Further, the Defendant had alleged that the Plaintiff's claim was bad in law, incompetent, frivolous, vexatious and without a reasonable cause of action, as the claim lacked legal basis. He had urged the trial court to dismiss the Plaintiff's suit with costs.
8. After the Pre-trial, the matter proceed for viva voce evidence. In his evidence, the Plaintiff claimed that he was the owner of the suit land, and that the Defendant had illegally and wrongfully occupied the suit land, which occupation denied the Plaintiff the use of the suit land. On the other hand, the Defendant alleged that the suit land was his, and that the Plaintiff had no ownership of the land in question.
9. The Plaintiff called one witness, namely Charles Mwangi Ndungu, (PW2), who was identified as the secretary of Mutithi Farmers' Cooperative Society. He adopted his witness statement as his evidence in chief, and reiterated the Plaintiff's evidence.
10. In cross examination, PW2 gave the history of the land, and detailed how one became a member of the said Society, and that upon payment of the required money, one would be issued with a Share Certificate, which entitled one to ballot for land. He further averred that the Society members were to be apportioned 2 acres of land each on condition that they called a Surveyor to subdivided the entire land. Upon subdivision, each member was shown his/ her parcel of land on the grounds by the Surveyor.
11. The Appellant herein, Jane Wangari (DW2) testified that the original Defendant, her late husband (Joseph Njenga Kaguma), was the owner of land parcel No. Kakuzi/ Kirimiri/ Block 8/ 351, wherein as a family they have been in possession and occupation since 1977.
12. The Appellant(Defendant) adopted her Witness Statement as her evidence in chief. On cross examination, she stated that she occupied the suit land in 1977, as a squatter as the title deeds were yet to be issued. Further, that when the Surveyor subdivided the land, he asked those who had occupied other lands to move, and subsequently, they were issued with title deed in 1989, after balloting.
13. After hearing the parties and their witnesses, the trial court ordered for a site visit, to the disputed parcels of land, in the presence of the County Surveyor, who ascertained the status of the land parcels Kakuzi/Kirimiri/Block 8/349 and 351 on ground and on the map. The Surveyor later produced a Survey Report dated 24th April 2024, which the trial court relied on to make its determination.



14. Upon hearing both parties, the trial court delivered its Judgment on 16th August 2023, in favour of the Plaintiff (Respondent) as follows:
 - a. A declaration be and is hereby made that the Plaintiff is the legal owner of land parcel number Kakuzi/Kirimiri/Block 8/349.
 - b. The Defendant, and or his legal representative, be and is hereby ordered to forthwith render vacant possession of the portion he does not occupy to the Plaintiff, otherwise he and/or his legal representatives be forcibly evicted at his and/or their own cost.
 - c. A permanent injunction be and is hereby issued against the defendant and/or his legal representatives and their servants or agents from entering, remaining, trespassing, dealing or otherwise interfering with the plaintiff's possession and use his suit land No. Kakuzi/Kirimiri/Block 8/349.
 - d. The plaintiff is also awarded costs of this suit and interest therein until payment in full.
15. Dissatisfied with the trial court's decision, the Appellant, filed the instant Appeal vide a Memorandum of Appeal dated 14th September 2023, on the following grounds:
 1. The Learned Magistrate erred in law and in fact by making a finding that the Appellant had encroached on the Respondents land parcel number Kakuzi/Kirimiri/Block 8/349 despite there being evidence to the contrary.
 2. The Learned magistrate erred in law and in fact by making a finding that the Appellant and his family encroached the entire land parcel number Kakuzi/Kirimiri/Block 8/349 and a portion of land parcel number Kakuzi/Kirimiri/Block 8/350 and further that the registered owner of land parcel number Kakuzi/Kirimiri/Block 8/350 is the one who had encroached on land parcel number Kakuzi/Kirimiri/Block 8/351 and the other part of Kakuzi/Kirimiri/Block 8/350.
 3. The Learned Magistrate erred in law and fact by making a finding that the Appellant and her family be evicted from the Respondents land which they had allegedly encroached upon in light of the protection afforded by Sections 24,25 and 26 of the *Land Registration Act*.
 4. The Learned Magistrate erred in both law and facts by issuing a permanent injunction against the Appellant despite the fact that the Respondent had not met the threshold for granting of a permanent injunction.
 5. The Learned Magistrate erred in both facts and law by failing to appreciate the evidence tendered by the Appellant and Land Surveyor and analyse and the correct law thereby arriving at an erroneous conclusion that is not premised on evidence and law in respect of the orders sought by the Respondent.
 6. The Learned Magistrate erred in law and in fact in failing to consider all the issues presented before her to enable her make an informed decision.
 7. The Learned Magistrate erred in law and in fact in putting more weight on the Respondent's submissions than the Appellants' to the detriment of the appellant and which is clearly demonstrated in the lopsided Judgment.
 8. The Learned Magistrate erred in both law and facts by granting the prayers/remedies sought by the Respondent thereby occasioning a miscarriage of justice.



9. The Learned Magistrate erred in both law and facts by issuing orders that were ambiguous, nebulous, imprecise and/or incapable of compliance.
 10. The Learned Magistrate misapprehended the law and facts by considering extraneous matters which were not in issue.
 11. The Learned Magistrate erred in both law and fact by ruling the way she did.
16. The Appellant sought for orders that :
- a. This appeal be allowed.
 - b. The lower Court Judgment delivered on 16th August 2023, and orders thereof be vacated and/or set aside and the orders sought by the Appellant in lower court for dismissal of the Respondents suit with costs be granted.
 - c. The costs of this appeal and of the proceedings in the lower court awarded to the appellant.
17. The Record of Appeal was filed on 29th November 2023, and this Court admitted the Appeal, and directed that the same be canvassed by way of written submissions. The Appellant filed his written submissions on 11th March, 2024, through the Law Firm of Mbue Ndegwa & Co Advocates, and set out the following facts;
- a) That the Appellant is the registered owner of land parcel number Kakuzi/Kirimiri/Block 8/351, measuring approximately 0.8040 Hectares or thereabouts.
 - b) That the Appellant has been in actual, physical occupation and possession of the said land since 1977.
 - c) That the Appellant has extensively developed the said land over the years.
 - d) The Appellant was allocated the said parcel of land by Mutithi Farmers Co-operative Society, which he had occupied since the year 1977.
 - e) That upon his demise, his mortal remains were interred on the said parcel of land.
 - f) The Respondent is the registered owner of land parcel number Kakuzi/Kirimiri/Block 8/349.

Appellant's Case:

18. In his submissions, the Appellant submitted that from the Surveyor's Report dated 24th April 2023, it was evident that the Appellant has never encroached on the Respondent's parcel of Land, as alleged in his Plaint. Further, the Appellant submitted that it was clear that the Respondent's land was affected by the road running along land parcels numbers, 342,349,350,367 and many others along that strip. That the Respondent's recourse if any lies elsewhere, but not against the Appellant.
19. The Appellant disputed the findings of the Surveyor as contained in his Report on pages 8-9, and submitted that the said finding failed to take into account the fact that the Appellant was in occupation and use of the said parcel of land, since the year 1977. Further, the appellant pointed out that the subdivision of the properties came much later, including the road that affected Respondent's parcel of land that is land parcel No. Kakuzi/Kirimiri/Block 8/349. Therefore, the Appellant cannot be said to have wrongly entered and developed land parcel No.349.
20. It was his further submissions that the Surveyor's Report on one hand at pg. 6 stated that the Respondent's land was affected by the road, and then at pages 8-9 stated that the Appellant wrongfully



- entered and developed the Respondent's land, and therefore the two positions are diametrically opposed.
21. The Appellant was in agreement with the proposition of the Surveyor on page 9 of the Report which stated;
- “In the interest of settling this matter, one Harrison Kunyona Mungai, who has been rendered landless in the mixed up occupations agrees to take up land parcel Kakuzi Kirimiri B1.8/352 which in the title register belonged to one Benard Kariuki Nduati (who is settled in parcel Kakuzi Kirimiri B1.8/351). Either the option of Transfer of Title deeds or the Map amendment by re-numbering the parcels of land to match ground occupations shall be considered where best possible following set practice regulations.”
22. Further, the Appellant invited the court to have a look at Section 15-17 of the *Land Registration Act, 2012*, and submitted that in the said sections, the Director of Survey is empowered to alter and rectify boundary lines or position of a boundary, based on a cadastral as per the subdivision plan, combination plan or any other approved plan necessitating the alteration of the boundary.
23. It was submitted that from the Surveyor's Report referred to above, the other Surveyor's Report dated October 2016, and 5th September 2016 (pgs. 41 and 42) of the Record, it is abundantly clear that the issue at hand is one of a boundary dispute, and establishment of beacons for the two (2) parcels of land and not an encroachment/trespass issue.
24. To buttress the submission above, the Appellant relied entirely on the decision in the case of *Reuben Kioko Mutyane v Hellen Kiunga Miriti & 4 others; Ntalala Eric Mutura & another (Interested Parties)*[2021] eKLR;
25. In the Court of Appeal Case of *Azzuri Limited v Pink Properties Limited* [2018] eKLR, the court stated as follows in relation to the application of Section 18 of the *Land Registration Act*;
- “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”
26. Reliance was also placed in the case of *George Kamau Macharia & Dexka Limited* (2019)eKLR, where the court stated as follows:
- “From the above provisions of the law, it is manifestly clear that the above section gives the mandate to the Land Registrar to resolve boundary disputes of land with general boundaries. Registry index map (RIM) only indicates approximate boundaries and the approximate situation on the ground. Even if this court was to hear and determine this matter it will still require the input of the Land Registrar. The framers of section 18 (2) of the *Land Registration Act* placed this matter before the land registrar who has the technical advice and resources of the district surveyor to determine and ascertain the boundaries. 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”.

27. The Appellant further cited the decisions of the Court in case of Willis Ocholla v Mary Ndege (2016) Eklr, and Court of Appeal Case of Estate Sonrisa Ltd & another v Samuel Kamau Macharia & 2 others [2020] eKLR , that reiterated what was held in the case cited above, that disputes relating to boundaries ought to be resolved by the Land Registrar in the first instance. Further, that such decision can thereof be challenged in court, pursuant to provisions of Sections 79 (3A), 80,86 and 91(9) Of the [Land Registration Act](#).
28. Ultimately, the Appellant submitted that the trial court ought not to have made a determination of the matter the way it did, but instead ought to have referred the matter back to the Land Registrar for determination of the boundary dispute as per the provisions of Sections 18 and 19 of the [Land Registration Act](#), 2012. It was also submitted that the Land Registrar, has the requisite technical skills and expertise to determine the same.
29. The Appellant invited this court to look at the Respondent’s Complaint appearing on pg.3 of the Record of Appeal where the Respondent at prayer (d), urged the court to make: “Any other or better relief the Honourable Court may deem fit to grant.”
30. The Appellant cited the case law in Reuben Kioko Mutyaene v Hellen Kiunga Miriti & 4 others; Ntalala Eric Mutura & another (Interested Parties) [2021] eKLR; where it was 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 the 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.”
31. Reliance was also placed in the case of Speaker of National Assembly -Versus- Karume (1992) KLR 21, where the court held:-

“Where there is a clear procedure for redress of any particular grievance prescribed by [the Constitution](#) or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”
32. Further, the Appellant invited this court to look at the record and find that both the Appellant and the Respondent produced their respective title deeds, and that the Respondent did not challenge the Appellant’s title. That in light of Sections 25 and 26 of the [Land Registration Act](#),2012, he remains the rightful, absolute and indefeasible owner of his parcel of land, with all the rights and privileges accruing therefrom; including the right to possession, to a quiet and peaceful occupation and right to use of his property.
33. In conclusion, the Appellant submitted that he had demonstrated that the Respondent did not prove that he was deserving of the orders that were eventually granted by the trial court, vide the Decree issued on 26th October 2023.

Respondent’s Case:

34. The Respondent filed his written submissions dated 26th April 2024, through the Law Firm of R.M Njiraini & Co Advocates, and submitted that this being a first Appeal, then the duty of this court as



the first appeal are well settled and he cited the case of *Nashon Onyango Otieno v George Onyango Otieno* [2021] eKLR, where the court stated;

“This being a 1st 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 1st 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...”

35. The Respondent further submitted that the jurisdiction of this court is set out under sections 162(2) of *the Constitution* of Kenya, Section, Section 13 of the *Environment and Land Court Act* and Section 9 of the Magistrates Courts Act. it was also submitted that an Appeal on jurisdiction is thereof misconceived.
36. Further, the Respondent submitted that the trial court heard the parties and their witnesses, visited the site, called for an expert opinion in form of a Surveyor, and the evidence was very clear that the Appellant had illegally occupied the Respondent’s parcel of land. That the Surveyor Report was emphatic, and therefore, the trial Court pronounced itself properly on facts, evidence and the law.
37. In conclusion, the Respondent submitted that the Appeal herein is misconceived, since the trial court pronounced itself in accordance with the law and evidence. Further, the Respondent submitted that Section 13. (7) of the Environment and Land court gives the Court powers to make orders namely;
 - (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including-
 - (a) interim or permanent preservation orders including injunctions;
 - (b) prerogative orders;
 - (c) award of damages;
 - (d) compensation; The *Environment and Land Court Act*, 2011 10
 - (e) specific performance;
 - (f) restitution;
 - (g) declaration; or
 - (h) costs.
38. It was also submitted that since this is a first Appeal, then it is the duty of the Court to analyse and re-assess the evidence on record, and reach its own independent decision in the matter as provided by



Section 78 of the Civil Procedure Act. Reliance was placed in the case of *Selle ...Vs... Associated Motor Boat Co.* [1968] EA 123, where the Court held that;

“An appeal to this Court from a trial by the High 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. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan*(1955), 22 E. A. C. A. 270).

1. The above is the summary of the facts and evidence before the trial court, as contained in the Record of Appeal, the Memo of Appeal and the rival written submissions. As this Court determines the instant Appeal, it will take into account that it can only interfere with the discretion of the trial Court, where it is shown that the said discretion was exercised contrary to the law, or that the trial Magistrate misapprehended the applicable law, and failed to take into account a relevant factor or took into account an irrelevant factor, or that on the facts and law as known, the decision is plainly wrong. See the case of *Mbogo & Another V Shar*(1968) EA 93;

“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.” “The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”

39. Having carefully read and considered the Record of Appeal, the Grounds of Appeal, the respective written submissions by the parties herein, this court finds the issues for determination are;
 1. Whether the trial Court had Jurisdiction to hear and determine the dispute.
 2. Whether the Appeal is merited
 3. Who should bear costs of this Appeal?

I). Whether the trial Court had Jurisdiction to hear and determine the dispute.

40. It is trite that Jurisdiction is everything, and without it, the court has no option but to down its tools. The Appellant herein has averred and submitted that the trial court erred in law and fact when it proceeded to determine the dispute before it, which was purely a boundary dispute and ought to have



been referred to the Land Registrar as provided by sections 18 and 19 of the *Land Registration Act, 2012*, and thus the trial court had no Jurisdiction.

41. On his part, the Respondent submitted that the trial court had jurisdiction to hear the dispute before it, as the dispute is over encroachment of the Respondent's land and thus it was one falling under section 13 of ELC Act, which sets out the jurisdiction of the ELC. He proceeded to submit that trial court made a sound determination based on the available evidence and applicable law.
42. For this court to determine whether the trial court had jurisdiction to hear the matter before, this court will consider the claim as filed, the evidence tendered, and the exhibits produced by the parties.
43. What is not in dispute is that the Respondent(Plaintiff) Harrison Kunyonya Mungai, is the registered owner of land parcel No. Kakuzi/ Kirimiri/ Block 8/ 349. Further, there is no doubt that the late Joseph Njenga Kaguma, is the registered owner of land parcel No. Kakuzi/ Kirimiri/ Block 8/ 351.
44. Though the Respondent(Plaintiff) had sought for a declaration that he was the legal owner of the land parcel no Kakuzi/ Kirimiri/ Block 8/ 349, there was no evidence that anyone else leave alone the Appellant had claimed ownership of this title. The Respondent had produced his certificate of title, and the Appellant did not dispute it. The appellant too had his own certificate of title.
45. Further, the Late Joseph Njenga Kaguma, had his title deed for land parcel no Kakuzi/ Kirimiri/ Block 8/ 351, registered in his name of 5th May 1989, and no one is disputing this registration in his name. therefore, as the registered owners, the Appellant and the Respondent, were deemed to be the absolute and indefeasible owners of their respective parcels of land.
46. As the absolute and indefeasible owners, the Appellant and Respondent are entitled to enjoy all the rights and privileges appurtenant thereto. Right to possession, occupation and use of their parcels of land is one of such right.
47. The above rights can only be enjoyed if one is in actual possession and occupation of their respective parcel of land. A proprietor of land can take possession and be in occupation of the land, if he is shown the physical land, enters unto it and start to use it. This is done after the land is identified by the Surveyor and Land Registrar, and then delivered to the registered owner.
48. The dispute herein is that though both the Appellant and Respondent have their respective certificates of title, the Respondent is landless as he has no land to occupy , possess and make use of it. On the other hand, it was alleged that the Appellant entered unto the Respondent's parcel of land being Kakuzi/ Kirimiri/ Block 8/ 349, and thus should give the Respondent vacant possession.
49. It was the Appellant's claim that she has been in occupation of the suit land since 1977, and certainly, her family and herself could not have entered into the wrong parcel of land, that is Kakuzi/ Kirimiri/ Block 8/ 349, instead of block 8/ 351.
50. From the Surveyor's report that was produced in court as exhibit, the issue in dispute is a boundary dispute . The law is very clear that boundary disputes ought to be referred to the Land Registrar. See section 18 of the *Land Registration Act*.
51. In the case of *Azzuri limited vs Pink Properties limited (2018) eKLR*, the court of Appeal stated as follows:

“... boundary disputes pertaining to lands falling within general boundary areas must be referred to the Land Registrar for resolution; while disputes pertaining to lands with fixed boundaries may be investigated and possibly resolved simply through a surveyor...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.”

52. Further, in the case of *Willis Ochola vs Mary Ndege* (2016) eKLR, the court held:

“That in terms of Section 18 (2) of the *Land Registration Act*, proprietors of registered land with a boundary dispute are obligated to first seek redress or solution from the Land Registrar before moving or escalating the dispute to this court. That where such a party fails to do so, and comes to court without first seeking redress from the Land Registrar, the court being a court of law, has to remind such a party that he/she has moved the court prematurely. That the provisions of Section 18 (2) of the *Land Registration Act* shows clearly that the court is without jurisdiction on boundary disputes of registered land until after the land Registrar’s determination on the same has been rendered.”

53. From the above case law and provisions of law, it is clear that any dispute relating to boundaries ought to be resolved by the Land Registrar in the first place, before coming to court. This was the holding of the court in the case of *George Kamau Macharia v Dexka Limited* [2019] eKLR:

“Registry Index Map (RIM) only indicates approximate boundaries and the approximate situation on the ground. Even if this Court was to hear and determine this matter it will still require the input of the Land Registrar. The framers of section 18(2) of the *Land Registration Act* placed this matter before the Land Registrar who has the technical advice and resources of the District Surveyor to determine and ascertain the boundaries. 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.”

54. Where the Law has set out the clear procedure for redress, or mechanisms for dispute resolution, then the parties are obligated to follow the laid down procedures before appearing in court. See the case of *Kimani Wanyoike versus Electoral Commission Civil Appeal No. 213 of 1995 (UR)*, where the Court held that:-

‘Where there is a law prescribed by either *the Constitution* or an Act of Parliament governing a procedure for the redress of any particular grievance that procedure should be strictly followed’.

55. In the case of *Speaker of the National Assembly v Karume (Civil Application 92 of 1992)* [1992] KECA 42 (KLR) (29 May 1992) (Ruling), the Court held:

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”



56. What is clear is that the dispute before the trial court was not a challenge over the Certificate of titles held by either the Appellant or the Respondent, but a boundaries dispute, or physical identification of each parcel of land. Therefore, the dispute before the trial court was a boundary dispute, which falls under section 18 and 19 of the *Land Registration Act*. therefore the trial court ought to have referred the matter to the Land Registrar for hearing of the boundary dispute. This court finds and holds that the trial court had no jurisdiction to hear and determine a boundary dispute before referring it to the Land Registrar.

ii) Whether the Appeal is merited?

57. In its findings, the trial court issued four substantive order. The first order was a declaration that the Plaintiff(Respondent) was the legal owner of land parcel No. Kakuzi/ Kirimiri/ Block 8/ 349. As the court held earlier, the Respondent as the Plaintiff before the trial court was a holder of certificate if title for the above parcel of land. There was no dispute over the said certificate of title. The said certificate of title was not challenged under any of the exceptions provided in section 26(1) a& b of the *Land Registration Act*. The Respondent being the registered owner of the land parcel no. Kakuzi/ Kirimiri/ Block 8/ 349, then the trial court had no option but to declare him as the legal owner of this parcel of land .The Appellant was not claiming this title at all.
58. The second order issued by the trial court was for the Defendant(Appellant) to give vacant possession of the portion of land he does not occupy to the plaintiff, otherwise he be forcibly evicted. This order is a bit confusing, in that it refers to the land that the Defendant does not occupy, and if he does not occupy it, how can she give vacant possession to what she does not occupy?
59. However, this court can take it that there was a typographical error, which error was not corrected. The court has considered the Plaint filed before at the trial court, and has noted that prayer no b was to the effect ‘ the defendant be ordered to forth with render vacant possession of the portion he does occupy to the plaintiff, otherwise he be forcibly evicted at his own costs”
60. Given that prayer No b, on the statement of claim was for vacant possession of the portion of land that he does occupy, then this court will presume that the trial court meant the portion of land that he does occupy, but not the portion of land that he does not occupy.
61. Be that as it may, the Appellant,(as Defendant) had denied that she was in occupation of the Plaintiff's(Respondent) portion of land. This court has found and held that the dispute is a boundary dispute, which ought to have been referred to the Land Registrar, but which was not, and thus the trial court had no jurisdiction. Without jurisdiction, then the trial court ought to have referred the dispute to the right forum. See the case of *Speaker of the National Assembly v Karume (Civil Application 92 of 1992)* [1992] KECA 42 (KLR) (29 May 1992) (Ruling).
62. The Appellant denied to have been in occupation of the Respondent’s parcel of land. This court does appreciate that the trial court did visit the locus quo, in the presence of the County Surveyor. The trial court made some observations, and thereafter the surveyor prepared a Report, which was produced in court as an exhibit.
63. This court also note that in the site visit, the Land Registrar was not present, but the Muranga County Surveyor, Mr Ndivu was present, and the trial court noted that the Surveyor showed the trial court the boundaries as per the R.I.M. Further the trial court observed that there was encroachment from land parcel no. 354, down to 349 upto 354.
64. It was further observed that the Surveyor was to meet with all the proprietors of the affected parcels of land, and then prepare a Report. From the court record, the Surveyors Report dated 16th May 2023,



contains conclusions and recommendation. Of particular concern to this court is that:- the owner of land parcel no Kakuzi/ Kirimiri/ Block 8/ 351, one Joseph Njenga Kaguma(deceased), who was represented by Jane Wangari Njenga , should surrender this title deed number Kakuzi/ Kirimiri/ Block 8/ 351, and be registered as the owner of land parcel no Kakuzi/ Kirimiri Block 8/ 349.

65. From the above findings, it is very clear that there is a dispute over the identification of the registered parcels of land on the ground. This problem cannot be resolved by evicting one party. The concerned government officers should visit the disputed parcels of land, involve all the parties and pick out the boundaries, and the parcels of land as per the Registered Index Map, Survey plan and the title deeds.
66. The [Land Registration Act](#) is very clear on which office should carry out the above stated exercise, AS this office is that of the Land Registrar, assisted by the County Surveyor. Sections 18 and 19 of the [Land Registration Act](#) provide as follows:

“Section 18 of the [Land Registration Act](#) states as follows:

- (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).

Section 19 of the [Land Registration Act](#) stipulates as follows:

- (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.”



67. The parties herein ought to have given the Land Registrar a chance to address the boundary dispute herein. This court will be guided by the holding of the Court of Appeal in the case of the Estate of Sonrise 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.”

68. Having found that the dispute herein ought to have been referred to the Land Registrar, and also considering that the Surveyor’s Report indicated that there was a road running along land parcels nos 342, 349, 350 and 367 and many others which could have affected the sizes of these parcels of land, this court finds that it was not certain that the Appellant had occupied the land parcel No. Kakuzi/ Kirimiri/ Block 8/ 349, which is registered in the name of the Respondent herein.

69. There was also undisputed evidence that the Appellant and her family have been in occupation and possession of the disputed parcel of land since 1977. The Respondent has not been in occupation, of the said parcel of land and for a family that has been in long occupation of a portion of land to be dislodged, then it should be very clear that they are occupying another person’s parcel of land. That ascertainment can only be done by the Land Registrar, who has such mandate as per the Land Registration Act.

70. As submitted by the Appellant, the Surveyor’s Report is contradictory as on one hand it stated that the Respondent’s land was affected by the road, and then on another hand it stated that the Appellant wrongly entered into and developed the Respondent parcel of land. Therefore this court finds wholly that the trial court could not rely only on the Surveyor’s Report to come to a conclusion that the Appellant had encroached on the Respondent’s parcel of land being Kakuzi/ Kirimiri Block 8/ 349.

71. The best available option was for the Land Registrar to visit the disputed parcels of land and fix the boundaries and identify each proprietors parcels of land on the ground. As was held by the Court of Appeal in the case of Estate of Sonrise ltd Another(Supra) it is only after determining the dispute that parties can move to court to challenge it”.

72. The boundary dispute herein ought to have been referred to and resolved by the Land Registrar in the first instance, which was not the case herein. This court has found and held that the trial court had no jurisdiction to hear the boundary dispute herein as filed by the Respondent. This court too has re-analysed and re- considered the available evidence before the trial court, and finds that the said evidence was not sufficient to sustain the Respondent’s claim and/or proof it on the required standard of balance of probabilities.

73. For the above reasons, this court finds that the instant Appeal is merited, and thus the same is allowed entirely. Further the trial court’s Judgement delivered on 16th August 2023, and all consequential orders



be and are hereby vacated and / or set aside, and the Respondent's claim before the trial court is dismissed, save for a finding that he is the holder of the Certificate of title for Kakuzi/ Kirimiri/ Block 8/ 349, which the Appellant herein is the holder of Certificate of title for Kakuzi/ Kirimiri/ Block 8/ 351.

74. On the issue of costs, the court finds that section 27 of the *Civil Procedure Act* is very clear that costs are awarded at the discretion of the court. However, costs follow the event, and are awarded to the successful litigant. The Appellant is the successful litigant, and is thus awarded costs of this Appeal together with costs of the trial court's suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 10TH DAY OF SEPTEMBER, 2024.

L. GACHERU

JUDGE

10/9/2024

Delivered online in the presence of:

Joel Njonjo Court Assistant

N/A for the Appellant(though served with Judgment Notice)

N/A for the Respondent (Though served with Judgment Notice)

L. GACHERU

JUDGE

10/9/2024

