



**Kibuchi v Githinji (Environment and Land Appeal E020 of 2021)
[2024] KEELC 6299 (KLR) (1 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6299 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL E020 OF 2021**

JM MUTUNGI, J

OCTOBER 1, 2024

BETWEEN

JULIUS MUNENE KIBUCHI APPELLANT

AND

ALBERN MUGO GITHINJI RESPONDENT

(An Appeal arising from the Judgment of Honourable Magistrate. A.K Ithuku delivered on 23rd September 2021 in CMCC No. 215 of 2015 in the Chief Magistrate's Court at Kerugoya)

JUDGMENT

1. The subject of this appeal revolves around a dispute concerning the boundary between two land parcels, Land Parcel Kabare/Njiku/1241, owned by the Respondent, who was the Plaintiff before the Lower Court and Land Parcel Kabare/Mutige/567, owned by the Appellant who was the Defendant in the Lower Court. According to the evidence presented in the Lower Court, the two parties are neighbours with their respective parcels of land bordering each other. The Respondent alleged the Appellant had unlawfully encroachment onto his land, which prompted him to institute the suit before the Lower Court where he prayed for an order of permanent injunction against the Appellant to prevent the Appellant from interfering with his land and for an order that the Land District Surveyor Kirinyaga, rectify the disputed boundary features. The Appellant contested the Respondent's claim, asserting rightful occupation and development of the portion in question.
2. The Trial Court acknowledged the dispute related to boundary and with the concurrence of the parties referred the matter to the District Land Surveyor and the Land Registrar to inspect the land and provide a report. The report, compiled by the District Land Surveyor, indicated the existence of a gap between the boundary outlined in the Registry Index Map (R.I.M) and the actual boundary on the ground. The report further noted that the Appellant was in occupation of the contested space. The Land Registrar for his part proposed the Registry Index Map be amended to align the same with the actual occupation on the ground by the parties. The Appellant was agreeable to the proposal by the



- Land Registrar but the Respondent disagreed taking the position that he boundary ought to conform to the Registrar Index Map (R.I.M).
3. The Trial Court heard the matter and delivered its Judgment on 23rd September 2021, holding that the Appellant had encroached on the Respondent's land. The Trial Court further held that the Registry Index Map (R.I.M) served as the definitive guide for defining land boundaries and that amending the Registry Index Map (R.I.M) served as the definitive guide for defining land boundaries and that amending the Registry Index Map (R.I.M) to reflect the current occupancy on the ground would be to legitimize the apparent illegality. The Learned Trial Magistrate therefore directed that the ground boundaries be rectified to align with the Registry Index Map (R.I.M). The Learned Trial Magistrate clearly took the position that the Registry Index Map is what defined the parcel boundaries and not occupation and hence where ground occupation conflicted with the Registry Index Map (R.I.M), the ground boundaries ought to be rectified to reflect the Registry Index Map (R.I.M) position.
 4. Aggrieved and dissatisfied with the Lower Court's decision, the Appellant appealed to this Court and filed a Memorandum of Appeal dated 14th October 2021 and a Record of Appeal.
 5. The Appellant's Memorandum of Appeal set out 8 grounds of appeal as follows:-
 1. That the Learned Trial Magistrate erred in law and in fact and misdirected himself in hearing and determining the suit yet the trial court lacks jurisdiction to hear the suit as it offends the express provisions of sections 18 and 19 of the [Land Registration Act](#) No. 3 of 2012;
 2. That the Learned Trial Magistrate erred in law and in fact and misdirected himself in hearing and determining the suit, a boundary issue, which falls within the jurisdiction of the Land Registrar;
 3. That the Learned Trial Magistrate erred in law and in fact and misdirected himself in hearing and determining the suit as the dispute was prematurely before the Trial Court;
 4. That the Learned Trial Magistrate erred in law and in fact and misdirected himself in hearing and determining the suit as it is an established principle of law that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that courts would grant an order and the Plaintiff/Respondent had not established the existence of any exceptional circumstances;
 5. That the Learned Trial Magistrate erred in law and in fact and misdirected himself in hearing and determining the suit as the orders that were sought in the suit could only be issued in an application for Judicial Review or an appeal hence the orders sought were untenable in law;
 6. That the learned trial magistrate erred in law and in fact in allocating the Respondent land beyond the acreage envisaged in his Title Deed Land Parcel No. Kabare/Njiku/1241;
 7. That the learned trial magistrate erred in law and in fact in carving off the Appellant's acreage envisaged in his Title Deed Land Parcel No. Kabare/Mutige/567;
 8. That the learned trial magistrate erred in law and in fact in failing and/or disregarding the Kirinyaga District Land Registrar Report dated 22nd February 2018 indicating that RIM boundary be rectified to conform with the boundary on the ground.
 6. The Appellant prayed that the Court sets aside the Judgment in Kerugoya CMCC No. 215 of 2015 and in place thereof to declare that the Trial Court lacked jurisdiction to hear and determine the suit and dismiss the same with costs.



7. The Appellant filed his written submissions on 21st February 2024 and he contended the properties in question were registered under the now-repealed Registered Land Act Cap 300 Laws of Kenya and he submitted that despite the District Land Registrar filing a report with his recommendation, the Trial Court disregarded the report and issued a Judgment that contradicted the findings of the report. The Appellant further contended that the trial Court lacked jurisdiction as the boundary dispute fell under the mandate of the Land Registrar. The Appellant further argued that the Trial Court should have adopted the report and ordered implementation, rather than rendering a decision not prayed for in the Plaint. The Appellant submitted that the Trial Court erred in rejecting the findings and recommendations of the report in regard to the fixing and establishment of the boundaries as sought by the Respondent and proceeding to issue an order that was not prayed for in the Plaint.
8. The Respondent filed written submissions dated 16th April 2024. The Respondent argued that the Land Registrar had prepared and filed a report in Court, which effectively had dealt with the dispute relating to the boundary and the Trial Court as such was not dealing with the issue of boundary. The Respondent contended the Trial Court had jurisdiction to determine whether the Appellant had encroached onto his land and whether to issue an injunction against the Appellant to prevent further encroachment on the land. The Respondent emphasized that the Land Registration Act does not entirely remove the Court's jurisdiction to decide a boundary dispute when the boundary has been established by the Land Registrar. He asserted that the Report clearly showed that the Appellant had encroached on the Respondent's parcel, as the boundary on the ground differed from the boundary as per the Registry Index Map. The space between the boundary as per Registry Index Map and the actual boundary on the ground was occupied by the Appellant.
9. I have considered the record of the appeal and the parties' submissions and the issues that arise for determination in the appeal are as follows:-
 1. Whether the Trial Court had jurisdiction to hear and determine the matter and whether the matter constituted a boundary dispute
 2. Whether the Trial Court erred in law and fact in issuing a permanent injunction restraining the Appellant from interfering with the Respondent's suit land.
10. This being an appeal of first instance, the Court is duty bound to appraise and re-evaluate the evidence in keeping with the principle enunciated in the Court of Appeal Case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123.

Whether the Trial Court had jurisdiction to hear and determine the boundary dispute.

11. From the proceedings and evidence presented in the lower court, it is apparent that the dispute between the two parties concerned the delineation of the boundary between Land Parcel Kabare/Njuki/1241 of the Respondent and Land Parcel Kabare/Mutige/567 of the Appellant. The boundary as per the Registry Index Map varied with the physical boundary on the ground. The Appellant occupied the portion of land on the ground that was the variance between the boundary as per the Registry Index Map and the physical boundary on the ground. The Appellant laid ownership claim to the portion he occupied. The District Surveyor's report confirms the existence of a variance between the boundary as per the Registry Index Map and the existing boundary on the ground. The report indicated that the portion under dispute is occupied by the owner of Land Parcel No. Kabare/Mutige/567 who is the Appellant herein. The Registrar recommended rectifying the Registry Index Map to align with the actual ground position. The Trial Court however determined the boundary ought to be as delineated by the Registry Index Map (R.I.M) and ordered rectification of the boundary to conform with the Registry Index Map.



12. The Appellant argued that the Trial Court overstepped its authority by disregarding the recommendation of the Land Registrar. He argued that the Lower Court did not have jurisdiction to adjudicate the boundary dispute, as such disputes within the purview of the land registrar to resolve for land with general boundaries.
13. The Land Registrar and the Surveyor have mandate under the provisions of Section 18 and 19 of the [Land Registration Act](#) 2017 to establish, determine and fix the boundary of any registered parcel of land. Section 18 of the Act provide 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).”
14. It is evident from the provisions of Section 18 and 19 of the [Land Registration Act](#), that the Court has no jurisdiction to deal with disputes relating to boundary and that such mandate is vested on the Land Registrar acting in concert with the Surveyor. The rationale for divesting the Court of jurisdiction is easy to understand. The procedure and process of ascertaining, defining and establishing boundaries is technical and requires experts in that field and the Court does not possess such technical ability or expertise. Besides the Land Registrar and the Surveyor are the custodians of the land records and hence well positioned and suited to handle such disputes. They have technical ability and expertise to deal with boundary disputes and the [Land Registration Act](#), 2012 entrusts the Land Registrar and the Surveyor with that responsibility.
15. Section 19 of the [Land Registration Act](#) 2012 provides 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 the survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.



- (3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this Section.”
16. Based on the pleadings and evidence presented before the Court, the issue involved the ownership of the disputed portion of land occupied and utilized by the Appellant. With the consent of both parties, the Court directed the District Land Surveyor and the District Land Registrar to visit the land, prepare a report on the boundaries and fix them. The Land Registrar and the Surveyor were directed to file their report in Court. Subsequently, the District Land Surveyor visited the site and placed the beacons, as acknowledged on 2nd August 2018 by the Appellant’s Advocate on record, while the District Land Registrar filed the report, as directed by the Trial Court. The report was admitted as part of the record and evidence.
17. The Trial Court, in its Judgment, noted that “I have seen a proposal by the Registrar that the Registry Index Map (R.I.M) should be rectified to conform with the occupation on the ground. This is the position submitted by the Defendant. The Plaintiff, of course is of the contrary view. He argues that the Registry Index Map (R.I.M) should be the guide. If the map were to be rectified, then it means what Plaintiff refers to as encroachment would have been regularized.”
18. Section 19 of the *Land Registration Act*, 2012 outlines the procedure for determining the exact boundaries of land parcels. From the evidence and the proceedings in the Lower Court, the Land Registrar and the Surveyor were to visit the land parcels and to ascertain and fix the boundaries. The Land Registrar and the Surveyor visited land parcels Kabare/Mutige/567 and Kabare/Njiku/1241 as directed by the Court and inter alia made the following observations/findings:-
- i. That the boundary as per the Registry Index Map (R.I.M) differed with the marked boundary on the ground;
 - ii. That the disputed portion on the ground was occupied by the owner of Kabare/Mutige/567 who had a house and coffee trees thereon.
 - iii. That both parties had respectively restricted their farming activities up to the boundary on the ground.
19. The Land Registrar on the basis of their observations/findings made a recommendation that Registry Index Map be amended to conform with the ground position. The Appellant was agreeable to the recommendation obviously because it favoured the status quo, which as per the Registry Index Map he had encroached onto what was the Respondent’s land.
20. The Trial Court while noting the report by the Land Registrar, did not agree with the recommendation of the Land Registrar that the Registry Index Map be amended to conform with the ground position of the boundary as the Court was of the view that would effectively be regularising an illegality as the Appellant was clearly found to be in encroachment of the Respondent’s land. The Appellant for his part had no problem with the recommendation and his concern was that the Learned Trial Magistrate in his Judgment failed to adopt the Land Registrar’s recommendation to have the Registry Index Map rectified to reflect the status as existed on the ground.
21. The main issue to determine in this appeal is whether the Lower Court by virtue of the provisions of Section 18(2) of the *Land Registration Act*, 2012 lacked jurisdiction to handle the matter since the matter touched on a boundary dispute. In determining the issue the Court needs to consider the provisions of Section 18(2) of the *Land Registration Act*, 2012 in conjunction with those of Section



13(2)(a) of the Environmental and Land Court Act, 2011. Section 13(2)(a) of the [Environment and Land Court Act](#) provides as follows:-

“In exercise of its jurisdiction under Article 162(2) (b) of [the Constitution](#), the Court shall have power to hear and determine disputes—

- a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

22. Section 9 of the [Magistrates’ Courts Act](#), 2015 enacted following the amendment of Section 26 of the [Environment and Land Court Act](#), 2011 provides as follows:-

“In the exercise of the jurisdiction conferred upon it by section 26 of the [Environment and Land Court Act](#) (No. 19 of 2011) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to —

- i. environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

23. Evidently having regard to these provisions both the Magistrates’ Courts and the Environment and Land Court have jurisdiction to handle matter touching on boundary disputes as long as the provisions of Section 18 and 19 of the [Land Registration Act](#), 2012 have been complied with.

The Court of Appeal in the Case of Menkar Limited V Ratilal Ghela Samat Shah & 2 Others (2019) eKLR stated as follows;

“Having considered the motion Komingoi, J., was persuaded the ELC had jurisdiction to hear the suit, her decision was also informed by the holding of Kibunja, J., in Willis Ocholla v. Mary Ndege Kisumu ELC Land Case No. 137 of 2015 (2016) eKLR when making the following observations in a pertinent portion of the impugned ruling;

“Section 18(2) of the [Land Registration Act](#) is set in mandatory terms. It means any issue relating to a dispute as to boundaries are within the Land Registries’ mandate. I agree that the Plaintiffs ought to have taken the dispute to the Land Registrar in accordance with Section 18 of the [Land Registration Act](#), 2012”.

“The Judge however found no merit in the appellant’s application and declined to strike out the respondents’ plaint citing also the case of D.T Dobie Company (K) Limited v. Muchina (1982) KLR where the court relied on Wenlock v. Moloney (1965) 1 WLR 1238 where it was stated that;

“This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts for the case in order to see whether the Plaintiff really has a cause of action. To do this is to usurp the position of the trial judge and to produce a trial of the case in chambers on affidavits only without discovery and without oral evidence tested by cross examination in the ordinary way. This seems to be an abuse of the court and not a proper exercise of that power.” Per Danckwerts L. J at P. 1244.



Further in the DT Dobie Case (supra) Madan, J A who wrote the lead Judgment with which both Miller and Potter JJA concurred stated as follows;

“No suit ought to be summarily dismissed unless it appears so hopeless that it is plainly and obviously so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without full facts of the case before it.”

Although the trial court appeared to agree that Section 18 (2) of the RLA vested the jurisdiction of determining boundary disputes on the Land Registrar, the court went further and directed that the Land Registrar, Mombasa do conduct the required process of determining the boundaries of the subject parcels of land as envisaged under Section 18, 19 and 20 of the [Land Registration Act](#) and moreover a report to be filed in Court within sixty (60) days from the date of the ruling. That is the order that provoked the instant appeal”

24. The Court went on to make a final finding that:-

“...Having looked at the two enactments within the context of the case before us, we do not think that the jurisdiction of the ELC is divested especially where the issues in dispute are intertwined with others. As the Judge unravels the intricate web of disputes, we find nothing wrong in the order requesting the Land Registrar who is the custodian of the official records of land ownership to avail them to assist the court make a determination on the germane issue of whether the wall constructed on the disputed plot is within its boundary and whether there was trespass. As correctly pointed out by the Judge, the court is enjoined under Article 159(2)(d) of [the Constitution](#) to ensure the ends of justice are met by overlooking technicalities and addressing substantive issues. Striking the entire suit would not serve the ends of Justice”

25. I have referred to the above Court of Appeal decision extensively to illustrate that indeed Section 18(2) of the [Land Registration Act](#), 2012 cannot be looked at in isolation in determining whether or not a Court has jurisdiction to entertain a suit that touches on a boundary dispute. What I understand the provision to underscore is that a Court cannot assume the role of the Surveyor and the Land Registrar to determine a boundary dispute as that obviously requires some technical expertise. Where it is demonstrated the boundary has been ascertained as required under the provisions of Section 19 of the [Land Registration Act](#), 2012 the Court can entertain the suit and render a decision taking into account the findings of the Land Registrar and the Surveyor as envisaged under Section 19 of the [Land Registration Act](#) 2012.

26. In the present matter the parties acknowledged the dispute between them touched on the positioning of their common boundary and by consent they agreed to have both the Surveyor and the Land Registrar to visit their respective parcels of land and establish the correct boundary. The Land Registrar and the Surveyor visited the parcels of land Kabare/Mutige/567 and Kabare/Njiku/1241 and were unanimous that the Registry Index Map boundary and the physical boundary on the ground differed as the Appellant’s physical boundary extended onto the Respondent’s Land Parcel Kabare/Njiku/1241. The appellant was in occupation of and had effected developments on the portion that he had encroached onto the Respondents land parcel. The illustrated sketch plan by the Surveyor clearly showed there was encroachment by Appellant onto Land Parcel Kabare/Njiku/1241.



27. The Land Registrar perhaps owing to the usage of the portion under dispute recommended the rectification of the Registry Index Map to conform with the ground position. With respect, the Registry Index Map defines the approximate boundaries of parcels of land and the owner of a registered parcel of land is expected to use the services of Surveyor when fencing and/or effecting any developments of a permanent nature to ensure he/she confines his activities on his parcel of land. If one effects developments without obtaining the services of a Surveyor, he takes the risk that his developments could encroach onto another person's land.
28. The Learned Trial Magistrate was not bound to accept the opinion/recommendation of the Land Registrar in the face of the Survey report that clearly showed there was encroachment. The recognised boundary was the one as per the Registry Index Map. If the Registry Index Map was to be altered to accommodate the encroachment by the Appellant the Respondent would have been entitled to compensation for the encroached portion. I am satisfied the Learned Trial Magistrate rightly and properly declined to accept the opinion/recommendation of the Land Registrar to amend the Registry Index Map as there was no proper basis to do so. The effect of the recommendation if upheld was to reduce the Respondent's Land Parcel Kabare/Njiku/1241 by the portion the Appellant had unlawfully occupied without any compensation.
29. On the basis of my evaluation of the grounds of appeal and the record, I cannot fault the Learned Trial Magistrate on the decision he arrived at. I find no merit in the appeal and I dismiss the same with costs to the Respondent.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 1ST DAY OF OCTOBER 2024.

J. M. MUTUNGI

ELC - JUDGE

