



Meta & another v Ngugi (Sued as the Administrator of the Estate of Ngugi Mwathi Deceased) (Environment and Land Case E023 of 2022) [2024] KEELC 6834 (KLR) (16 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6834 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE E023 OF 2022
BM EBOSO, J
OCTOBER 16, 2024**

BETWEEN

FREDRICK GATHUNGU META 1ST PLAINTIFF

CECILIA WARINGA KIBIKU (SUING AS TEH ADMINISTRATOR OF THE ESTATE OF JOSEPH KIBIKU GITHINJI - DECEASED) 2ND PLAINTIFF

AND

**DAVID NYAMU NGUGI DEFENDANT
SUED AS THE ADMINISTRATOR OF THE ESTATE OF NGUGI MWATHI
DECEASED**

RULING

1. Through an ex-tempore ruling rendered on 1/11/2022, this Court [Eboso J] struck out this suit on the ground of want of jurisdiction. The court rendered itself thus:

“Ruling

The dispute in this suit relates to boundaries. Section 18 of the *Land Registration Act* expressly bars this court against exercising jurisdiction over boundary disputes unless the Land Registrar has determined and marked the boundaries.

In the circumstances, I have no basis for holding this suit in abeyance in this court. The result is that the suit is hereby struck out for lack of jurisdiction on part of this court at this stage of the dispute. The plaintiffs shall bear costs of the suit.”



2. Three (3) months later, the plaintiffs brought a notice of motion dated 31/1/2023, inviting the court to review the above ruling under Section 80 of the [Civil Procedure Act](#) and Order 45 rule 1 of the [Civil Procedure Rules](#) in the following verbatim terms.
 - “3. That this court be pleased to review its ruling of 1/11/2022 striking out the plaintiff’s suit for want of jurisdiction on the part of the court and upon such review, this court be pleased to reinstate the plaintiff’s suit for hearing and determination on its merits.”
3. The said application is the subject of this ruling. The plea for review is premised on the grounds outlined in the motion and in the supporting affidavit sworn on 31/1/2023 by Fredrick Gathungu Meta. The application was canvassed through written submissions dated 1/7/2024, filed by M/s K. Kibiku & Co. Advocates.
4. The gist of the applicants’ case is that they have discovered new and important evidence which, on exercise of due diligence, was not within their knowledge and could not be produced by them prior to or at the time of the ruling of 1/11/2022. The applicants contend that they have established that the boundaries of Plot No. 27 had already been fixed prior to the said date and the said plot had been registered at the Kiambu Lands Registry as Kabete/Kibichiku/393/27. They add that, following the registration, a certificate of lease had been issued to the previous owners of the said parcel of land on 6/8/1970.
5. The applicants have exhibited a thirty three (33) year lease dated 28/7/1970 between the County Council of Kiambu [the lessor] and Mugaacha Thaara and Njoroge Mugo [the lessees] in which the term of the lease was expressed as commencing on 1/12/1965. They have also exhibited an official search dated 30/3/2001 showing that the said lease was registered in the names of the two lessees on 27/8/1970 and was for a term of 33 years commencing on 1/12/1965.
6. The original defendant in the suit, Ngugi Mwathi, was reported to have died on 15/2/2023. Consequently, on 22/2/2024, he was substituted with David Nyamu Ngugi, his personal representative.
7. The respondent [defendant] opposed the application through a replying affidavit he swore on 8/3/2024 and written submissions dated 16/7/2024, filed by M/s Kiania Njau & Co. Advocates. The gist of the defendant’s case in relation to the application is that, the dispute in the suit not about ownership of Plot No. 27. He adds that the claim for alleged encroachment constituting alleged trespass only be filed after the boundary of the two abutting parcels had been determined by the Land Registrar in tandem with the provisions of Section 18 of the [Land Registration Act](#). It is the case of the defendant that the boundary can only be established by the Land Registrar with the help of the Director of Surveys.
8. The respondent [defendant] further contends that the evidence relied on by the applicants could easily have been obtained and availed prior to the ruling of 1/11/2022 because the evidence was always available and within the reach of the applicants. The respondent add that the fact that a parcel of land is registered does not mean that its boundaries have been determined by the Land Registrar. He urges the Court to dismiss the application.
9. The Court has considered the application; the response to the application; and the parties’ respective submissions. The single question to be determined in this ruling is whether the application satisfies the criteria for review of a court’s own ruling under Section 80 of the [Civil Procedure Act](#) and Order 45 rule 1 of the [Civil Procedure Rules](#).



10. The jurisdiction of a trial court to review its judgment or order is provided under Section 80 of the *Civil Procedure Act* in the following terms:

“Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

11. Legislative principles on the exercise of review jurisdiction over a court’s own rulings are provided in Order 45 rule 1 as follows:

“(1) Any person considering himself aggrieved—

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

12. Review jurisdiction under Order 45 rule 1 of the *Civil Procedure Rules* is exercised on well-settled jurisprudential principles. In *Sanitam Services (E.A.) Limited v Rentokil (K) Limited & another* [2019] eKLR the Court of Appeal outlined the following criteria upon which trial courts exercise review jurisdiction under Order 45 rule 1 of the *Civil Procedure Rules*:

“Jurisdiction to review a judgment or order of a court is donated by Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*. By those provisions of law any person considering himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or is aggrieved by a decree or order by which no appeal is allowed and who from the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason – a person who fits within those categories may apply for a review of judgment or to the court



which passed the decree or made the order and this should be done without unreasonable delay.”

13. In *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR the Court of Appeal emphasized the principle in the following words:

“Section 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules* gives the court unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. However, as it has been constantly stated this discretion should be exercised judiciously and not capriciously.....”

‘.....The main grounds for review are therefore; discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay.’”

14. The court in the case of *Republic v Advocates Disciplinary Tribunal Ex-parte Appollo Mboya* [2019] eKLR identified the following principles that guide the court on review applications:

- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
- ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
- v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
- vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
- vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
- viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
- ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.



- x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.
15. Have the applicants met the threshold for review under Order 45 rule 1 of the Civil Procedure Rules? I do not think so. First, the evidence which the applicants have presented speak to the fact of registration of Plot No. 27 by the relevant Land Registry. They contend that they now have evidence that they now have evidence that plot No. 27 was in 1970 registered as Kabete/ Kibichiku/393/27. It is their case that because of the registration, the boundaries of the land must have been established. Clearly evidence relating to registration of the land was available in the Lands Registry. If the applicants exercised due diligence, they could have obtained the alleged new evidence. The Lease which they have exhibited is dated 28/7/1970 and is a document that was available in the parcel file. The search which they have exhibited was issued in 2001, more than 20 years ago. If they wanted a current search, the same could have been availed to them by the Land Registry upon paying the requisite statutory fee. In brief, the documents which the applicants are waving are documents that were within their reach on exercise of proper diligence.
16. Even if this court were to find that indeed the above documents were not within the reach of the applicants, I do not think the applicants have demonstrated that the boundaries relating to the two parcels have been determined as contemplated under the Land Registration Act and the fact of determination has been noted in the relevant registers in terms of the requirements of Sections 18 and 19 of the Land Registration Act.
17. For the avoidance of doubt, Sections 18 and 19 of the Land Registration Act which deal with land boundaries provide as follows:-

“Boundaries

18(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).”

“Fixed boundaries

19(1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

(2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position



of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.

- (3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.”

18. Not too long ago, the Court of Appeal was confronted with a jurisdictional question similar to the one that led to the impugned ruling. The Court of Appeal considered the framework in Sections 18 and 19 of the *Land Registration Act* and made the following relevant pronouncements in *Azzuri Limited v Pink Properties Limited* (Civil Appeal 93 of 2017 [2018] KECA 392 (KLR):

(21) On our part, looking at the impugned judgment, it is clear to us that the decision of the trial court was primarily based not only on the weight of the evidence, but on the failure by the appellant to follow the laid down grievance handling mechanism; namely, referral of the dispute to the Land Registrar as per section 18 of the *Land Registration Act*. It is common ground that the suit land is in a general boundary area (as opposed to a fixed boundary area). Resolution of disputes in a general boundary area is provided for under section 18 (supra) which states:

- (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). (Emphasis added)

(22) 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; while disputes pertaining to lands with fixed boundaries may be investigated and possibly resolved simply through a surveyor. It was in appreciation of this provision that the learned Judge went on to hold in part that:

“Having found an existing dirt road, which is a physical feature, and the Defendant’s wall in place, it was incumbent on the Plaintiff, to report any issue of encroachment by its neighbours to the Land Registrar so that he could fix the boundaries and ascertain if indeed there was encroachment. Instead, the Plaintiff resorted to reporting the issue to the Assistant County Commissioner, Malindi who summoned the Defendant vide his letter dated 30th December, 2014. When the efforts by the County Commissioner to resolve the dispute failed, the Plaintiff involved the District Surveyor who prepared a report, which is the basis of the



current suit. The filing of the current suit before referring the dispute to the Land Registrar was contra-statute”.

- (23) 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. Further and still on that aspect, this court has in the case of *Kimani Wanyoike v Electoral Commission* Civil Appeal No. 213 of 1995 (UR) 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’.

In this case, reference of the dispute to the Environment and Labour Court at first instance was proscribed by statute and on that account alone, the appellant’s case was a nonstarter. Although this matter would have rested on this point of jurisdiction, we will deal with the issue of evidence purely because counsel made submissions on the same and there was a determination by the Judge.”

19. It is clear from the above framework and interpretation by the Court of Appeal that in a boundary dispute, the first port of call is the Land Registrar. Secondly, in the absence of a determination by the Land Registrar, the courts are expressly precluded against entertaining boundary disputes. Thirdly, in the absence of a determination by the Land Registrar and a note in the land register, the cadastral maps and any filed plans or mutation maps are deemed to be only indicative of the approximate boundaries and the approximate situation of the parcel of land.
20. It follows from the above analysis that, to merit a review, the applicants were required to demonstrate that they had discovered that, the circumstances contemplated under Section 18 and 19 of the *Land Registration Act* in terms of determination of the boundaries and noting of the fact of determination in the relevant land registers, existed prior to the filing of the suit. They were also required to tender evidence demonstrating that: (i) a boundary determination had been made by the Land Registrar prior to the initiation of the suit and (ii) notes relating to the boundary determination had been made in the relevant land registers prior to the initiation of the suit. They have not done that. Clearly, the applicants have not satisfied the requirements of Section 18 of the *Land Registration Act*.
21. For the above reasons, the court finds that the application dated 31/1/2023 does not satisfy the threshold for review of a court’s own ruling under Sections 80 of the *Civil Procedure Act* and Order 45 rule 1 of the Civil Procedure Rules. Consequently, the application dated 31/1/2023 is dismissed for lack of merit.
22. In tandem with the general principle in Section 27 of the *Civil Procedure Act*, the applicants will bear costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 16TH DAY OF OCTOBER 2024

B M EBOSO

JUDGE

In the presence of:

Ms Kamau for the Applicant



Mr Njau for the Respondent

Court Assistant: Hinga

