



REPUBLIC OF KENYA



**Mwangi v Kaboro (Environment and Land Appeal E004 of 2023)
[2024] KEELC 6546 (KLR) (9 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6546 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL E004 OF 2023**

JM MUTUNGI, J

OCTOBER 9, 2024

BETWEEN

CICILY WANJIKU MWANGI APPELLANT

AND

JULIUS NJIRU KABORO RESPONDENT

(An Appeal arising from the Judgment of Honourable Magistrate. A. LOROT delivered on 25th November 2022 in Chief Magistrate's ELC Case No. 103 of 2017 in the Chief Magistrate's Court at Wang'uru))

JUDGMENT

1. The subject of this appeal is a dispute concerning the boundary between two land parcels, No. Mwea/Murinduko/1096 owned by the Respondent and Mwea/Murinduko/1383 owned by the Appellant. According to the evidence presented in the Lower Court, the two parties are neighbours with their parcels of land bordering each other. The Respondent alleged the Appellant had illegally encroached onto his land. The Respondent sought a declaration that land parcel No. Mwea/Murinduko/1096 belonged to him and requested a permanent injunction against the Appellant to prevent her from interfering with his use and occupation of the land. In response, the appellant denied the Respondent's allegation and raised a Counterclaim, claiming that it was the Respondent who had illegally invaded her land and built a part of his house on it. She sought an order for the removal of the Respondent's part of the house from her land.
2. As the case involved a boundary dispute, the Subordinate Court, on 17/04/2018, directed both the District Surveyor and the Land Registrar of Kirinyaga to visit the site to establish the boundaries of the disputed land and ordered them to submit a report to the court. The Surveyor's report was filed in Court on 26th September 2022, and inter alia the report showed that the ground measurements for land parcel Mwea/Murinduko/1096 indicated that it had more acreage than what had been indicated on the title, while Mwea/Murinduko/1383 showed that it was bigger on both the title and the ground



than what it should be on the ground. The Surveyor recommended that the boundaries of the parcels of land be measured as before the subdivision of Mwea/Murinduko/1095.

3. Given the report, the Trial Court retired to make a Ruling that was delivered on 25th November 2022. The Trial Court ordered that:
 1. The District Surveyor Ministry of Lands and Physical Planning, Kirinyaga do set the boundaries for the parcels of land parcel No. Mwea/Murinduko/1096 and land parcel No. Mwea/Murinduko/1383 as they were intended during the subdivision of land parcel No. Mwea/Murinduko/1095.
 2. The parties shall bear the costs of the new set of boundaries which shall also be reflected on all the Registry records, and where the record as existing right now has an error, the new set of boundaries as reflected in both the ground and on the title shall be corrected and reflected properly on both paper and ground.
 3. As this was a boundary dispute between neighbours, each shall bear own costs.
 4. Aggrieved and dissatisfied with the court's decision, the Appellant appealed to this Court and filed a Memorandum of Appeal dated 20th July 2023 and a Record of Appeal of even date.
 5. The Appellant's Memorandum of Appeal set out 6 grounds of Appeal. The grounds are as follows: -
 1. That the Learned Trial Magistrate erred in Law and fact in entertaining a boundary dispute over which he had no jurisdiction.
 2. That the Learned Trial Magistrate erred in Law and fact in delivering a Judgement in a matter where no oral evidence was adduced and tested in Court.
 3. That the Learned Trial Magistrate erred in Law and fact in deciding on a matter in a summary manner.
 4. That the Learned Trial Magistrate erred in Law and fact in relying on a report by a Surveyor who was never cross-examined on its contents.
 5. That the Learned Trial Magistrate clearly denied the Appellant a right to be heard in Court.
 6. That the Learned Trial Magistrate erred in Law and fact as his decision was against the weight of evidence on record.
6. The Appellant prayed that the Court allows her Appeal and also allows the suit in Wang'uru Civil Case No. 103 of 2017. The Appeal was canvassed through written submissions.
7. The Appellant filed her written submissions on 10th June 2024, and inter alia contended that the trial Court did not have jurisdiction and, therefore, should not have issued any orders, regardless of the perceived fairness of the decisions made regarding the dispute. The Appellant contended that the Trial Court having acted without any jurisdiction, the proceedings and the decision made were void. She claimed that the impugned Judgment was based solely on the Surveyor's report, without her being given the opportunity to question the Surveyor. This, she argued, deprived her of the right to a fair hearing. Further, she stated that the Court's decision was against the weight of evidence on record as the pleadings and evidence produced by the parties was never considered. She added that despite this being said to have been a boundary dispute the evidence by the parties pointed to a land ownership dispute which was disregarded by the Trial Court. In her submissions she relied on the Cases of; Willis



Ocholla –vs- Mary Ndege (2016) eKLR, Phoenix of EA Assurance Company Limited –vs- S.M Thiga T/A Newspaper Service (2019)eKLR, and Jackson Ndwiga –vs- Elizabeth Thara Ngahi (2021)eKLR.

8. The Respondent filed his undated written submissions that were similar to what he had previously submitted in the Trial Court. He asserted he was the owner of land parcel No. Mwea/Murinduko/1096, which is 0.36 Hectares in size. According to him, the previous owner of land parcel No. Mwea/Murinduko/1095 encroached on his land in 2010, leading him to seek help from the County Surveyor and County Land Registrar. In 2012, these officials visited the site of both parcels and corrected the boundary. However, the owner of Mwea/Murinduko/1095 was still not satisfied and removed the beacons. The Respondent stated that the beacons were replaced in 2013, and he was warned not to remove them again. He further claimed that the owner of Mwea/Murinduko/1095 subdivided his land, resulting in two new parcels: Mwea/Murinduko/1382 and Mwea/Murinduko/1383. The latter was sold to the Appellant in 2016, along with a title deed for 0.39 Hectares, instead of the expected 0.16 Hectares, leading to the current dispute.
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's had jurisdiction to hear and determine the dispute between the parties.
 2. Whether the Trial Court violated the Appellant's right to be heard by not allowing her to Cross-examine the Surveyor who authored the Surveyor's report.
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 claim filed by the Respondent in the Lower Court, it is evident that his claim was on encroachment on his parcel of land by the Appellant herein. The Respondent averred that the Appellant had encroached into his parcel of land and had cultivated it without his consent. These allegations were denied by the Appellant, who raised a Counterclaim and alleged that it was the Respondent who had encroached onto her land and had built a part of his house in her parcel of land. From the available evidence on record, there is no doubt that the Respondent herein is the registered owner of land parcel Number Mwea/Murinduko/1096, while the Appellant is the registered owner of Mwea/Murinduko/1383.
12. The Appellant contended that the Trial Court overstepped its authority by determining a boundary dispute case. She argued that the Lower Court did not have jurisdiction to adjudicate the boundary dispute, as such disputes fell within the purview of the Land Registrar to resolve under the provisions of Section 18 and 19 of the *Land Registration Act*, 2012.
13. This allegation put to question the jurisdiction of the Lower Court to hear and determine the dispute. Undoubtedly, the dispute between the parties related to a boundary dispute. The Trial Court noted this much in its Judgment dated 25th November 2022, where the Learned Magistrate stated, 'I noted that my brother Hon. Kiama had recognized the dispute as a boundary dispute.'
14. Sections 18 of the *Land Registration Act* No 3 of 2012 provides 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)."
15. It is clear that Section 18(2) of the *Land Registration Act*, prohibits Courts from entertaining proceedings relating to boundary disputes. It states as follows;
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."
16. From the above legal provision, it is clear that courts do not have jurisdiction to entertain disputes relating to registered land boundaries, unless the boundaries have been determined and fixed by the Land Registrar. For this Court to arrive at a finding on whether the Lower Court had jurisdiction to hear the dispute on boundary or not, this Court has to first determine whether the boundaries in the disputed parcels of land have been fixed or not.
17. The procedure for fixing boundaries is provided under Section 19 of the *Land Registration Act* and is set in mandatory language. Section 19(2) provides as follows:
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."
18. The Lower Court appreciated it had no jurisdiction to deal with what was essentially a boundary dispute and directed the County Land Registrar and Land Surveyor to visit the two parcels of land and prepare a report. The said Report was filed in court, which showed that the County Registrar and Surveyor had previously visited the parcels, erected beacons and that fencing had been done according to the beacons. However, there is no evidence that the boundaries for these two parcels of land were shown to have been fixed and there was no notation made in the title register to confirm that the boundaries had been fixed.
19. In the Case of *Azzuri Limited v Pink Properties Limited* [2018] eKLR, the Court of Appeal stated as follows as regards the application of Section 18 of the *Land Registration Act*;

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*.

The Court then went on to cite the provisions of Section 18 of the *Land Registration Act* and proceeded 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,



while disputes pertaining to lands with fixed boundaries may be investigated and possibly resolved simply through a Surveyor.

It means therefore, that the first point of call by the Plaintiff was to have this dispute resolved by the Land Registrar or Surveyor who are mandated by law to determine land dispute relating to boundaries. The Supreme Court alluded to this when it discussed the doctrine of exhaustion in the case of *Albert Chaurembo Mumba & 7 Others -v- Maurice Munyao & 148 Others* S. C Petition No. 3 of 2016 [2019 eKLR] where it said; at paragraph 118;

“... it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of Superior Courts is not a substitute for known legal procedures. Even where Superior Courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.”

20. Again, the Court of Appeal in *Case of Estate Sonrisa Ltd & Another –v- Samuel Kamau Macharia & 2 others* [2020] eKLR, held as follows:-

“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.”

21. In the instant matter though it is evident that both the Land Registrar and the Surveyor have previously visited the suit parcels of land, and established the boundary by placing beacons, no note appears to have been made in the title register by the Land Registrar affirming that the boundaries had been fixed. That it seems, was the only omission as the County Surveyor in his report acknowledges the beacons that were fixed earlier with the Land Registrar were visible. In my view the Learned Trial Magistrate never conferred himself the jurisdiction to hear and determine a matter that constituted a dispute touching on a boundary dispute. He did the right thing to refer the matter to the Land Registrar and the Surveyor to deal with. The Land Registrar/Surveyor furnished a report that indicated the boundaries had been established and fixed.
22. The rationale of Section 18 and 19 of the *Land Registration Act*, 2012 is that disputes touching on boundary relating to registered land ought to be handled by the experts who have the technical ability to resolve them and not by the Courts who lack the technical ability to deal with and resolve such matters. The Land Registrar being the custodian of all the land records and the department of Survey being the persons who approve all the Land Surveys on behalf of the Director of Surveys are clearly the appropriate persons to adjudicate, establish and fix parcel boundaries and Section 18 and 19 of the Act properly mandates them to carry out this function. All parcels of land registered under the *Land Registration Act*, 2012 have defined boundaries in the Registry Index Map (RIM) and any amendment to the Registry Index Map can only be effected by the Surveyor in liaison with the Land Registrar, and that explains why any boundaries determinations and amendments need to be noted in the register.
23. In the premises, I find that the Learned Trial Magistrate never assumed jurisdiction over what was otherwise a boundary dispute and in making the reference to the Land Registrar and the County Surveyor to establish and fix the boundary between land parcels Mwea/Murinduko/1096 and 1383 he made the right call. While I find no merit in the appeal I would for clarity purposes and so that there



is compliance with Sections 18 and 19 of the *Land Registration Act*, 2012 Substitute Order (1) made by the Learned Trial Magistrate with the following order:-

1. That the Land Registrar, Kirinyaga and the County Surveyor, Ministry of Lands Housing and Urban Development, Kirinyaga to visit land parcels Mwea/Murinduko/1096 and Mwea/Murinduko/1383 and to establish and fix their boundaries having regard to the initial subdivision of land parcel Mwea/Murinduko/1095 pursuant to the provisions of Section 18 and 19 of the *Land Registration Act*, 2012.
24. Orders (2) and (3) issued by the Learned Trial Magistrate shall remain and subject to the Substitution of Order (1) above in place of Order (1) in the Trial Magistrate's Judgment. The Appeal is ordered dismissed with no order as to costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 9TH DAY OF OCTOBER 2024.

J. M. MUTUNGI

ELC JUDGE

