



**Likono v Angayia (Environment & Land Case 108 of 2013)  
[2023] KEELC 539 (KLR) (7 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 539 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 108 OF 2013  
DO OHUNGO, J  
FEBRUARY 7, 2023**

**BETWEEN**

**CASPAR MACHANJE PETER LIKONO ..... PLAINTIFF**

**AND**

**TIMOTHY OMUYOMA ANGAYIA ..... DEFENDANT**

**JUDGMENT**

1. By plaint filed on 19<sup>th</sup> April 2013, the plaintiff averred that he was the registered owner of parcel of land known as title number Isukha/Shirere/2231 which is adjacent to parcel of land known as title number Isukha/Shirere/2737 owned by the defendant. That in or about the year 2001, without any colour of right, the defendant closed an access road serving the plaintiff's Isukha/Shirere/2231 by erecting structures thereon and that the Land Registrar Kakamega District convened a boundary dispute hearing on 20<sup>th</sup> November 2008 whereat it was confirmed by way of a written report that the plaintiff's Isukha/Shirere/2231 had indeed been blocked by the defendant by establishing a homestead on the access. The plaintiff also averred that he filed a claim before the then Land Disputes Tribunal Municipality Division Kakamega and later preferred an appeal at the Provincial Appeals Committee Western Province but the Land Disputes Tribunal Act No. 18 of 1990 was repealed before the hearing of the appeal.
2. The plaintiff further averred at paragraph 7 of the plaint that his claim against the defendant "is for an order that the Land Registrar, Kakamega District be directed to open the said closed road of access under the protection of the officer commanding and/or in charge of Kakamega Police Station and for the demolition of any structures constructed thereon by the defendant." The plaintiff therefore prayed for judgement against the defendant for:
  - a. An order for re-opening of the road for access and for demotion of structures erected thereon as per paragraph 7 above.



- b. Costs of the suit.
  - c. Any other or further order the Honourable Court may deem fit to grant.
3. The defendant filed a statement of defence on June 14, 2013 and admitted the ownership of the two parcels as well as the land disputes tribunal proceedings and the ensuing appeal. He denied closing any access road as alleged and averred that he constructed within his Isukha/Shirere/2737. The defendant therefore prayed for this suit to be dismissed with costs.
  4. The plaintiff testified on October 1, 2018, as PW1 and adopted his witness statement filed on April 19, 2013 as his evidence in chief. He reiterated in the statement that was the registered owner of parcel of land known as title number Isukha/Shirere/2231 which is adjacent to parcel of land known as title number Isukha/Shirere/2737 owned by the defendant and that the defendant closed an access road of access serving his land. That the Land Registrar held a meeting at the site on 20<sup>th</sup> November 2008 and confirmed that the defendant had closed the access road by establishing a home on it. He added that his attempt to have the dispute resolved by the Land Disputes Tribunal Municipality Division Kakamega did not yield fruit as the tribunal held that the status quo should be maintained thus prompting him to appeal to the Provincial Appeals Committee but the enabling law was repealed before determination of the appeal. He added that his home cannot be accessed by car.
  5. As fate would have it, the plaintiff passed away on October 18, 2018, shortly after his testimony. He was substituted by his son Godfrey Ambeyi Machanje on 19<sup>th</sup> December 2019. The plaintiff was however not amended to reflect the substitution.
  6. David Masila Kimauro, the Deputy Land Registrar Kakamega County, testified as PW2. He testified that Richard Khamala who was the then Land Registrar Kakamega prepared a report pursuant to a boundary dispute summons for a visit to the parcels on 20<sup>th</sup> November 2008. He produced the report prepared by the said Richard Khamala and added that he could not tell how Richard Khamala arrived at his conclusions in the report. He also stated that the input for the District Land Surveyor is usually important in such reports and although the report states that a land surveyor by the name Mr. Lusimba was in attendance, there is no input by the surveyor in the report.
  7. The plaintiff's case was then closed.
  8. During defence hearing, Timothy Omuyoma Angayia, the defendant, testified as the sole defence witness. He adopted his witness statement dated June 13, 2013 as his evidence in chief. He stated in the statement that he owns Isukha/Shirere/2737 which neighbours the plaintiff's Isukha/Shirere/2231 and that he constructed houses within his Isukha/Shirere/2737. That his said parcel was surveyed, and beacons placed and that he has not closed any access road or done anything outside the demarcations. That there has never been any physical demarcation of the alleged access road and that the road has never been used at any given time. He added that through a court order, the District Surveyor surveyed the land and filed mutation forms with the District Land Registrar and that if the alleged access road is shown on the map, then its exact location on the ground is unknown. That the plaintiff never complained of closure of an access road until October 24, 2008 when the defendant received summons from the lands office after about twenty two years of his use of his land.
  9. The defendant further stated that all developments on his land were done with the plaintiff's full knowledge and without complaints from the plaintiff. The defendant went on to state that he will suffer prejudice if his houses are demolished since he followed the demarcations that were fixed by the district land Surveyor when he bought his portion and that the plaintiff sued him in Kakamega Municipality Division Land Disputes Tribunal Case No. 13 of 2009 over the same issues as the matter



herein. That the tribunal matter was heard to its final determination and being dissatisfied with the decision, the plaintiff appealed through Western Provincial Appeals Committee Case No. 7 of 2010, a matter which is still pending. The defendant added that he is aware that the Land Registrar wrote the report which was produced by PW2 and that the access exists on the map but not on the ground.

10. Defence case was then closed. Parties thereafter filed and exchanged written submissions.
11. The plaintiff filed his submissions on September 28, 2022 and raised only one issue for determination: whether the plaintiff has established a case for reopening of a road of access closed by the defendant. The plaintiff submitted that indeed the defendant closed a road of access and has constructed a house, latrine and structures thereon which was also confirmed by the land registrar in his report. That the report contains sufficient details including the maker, the issue in dispute, observations made, the actions taken and the conclusions thereof and as such it is a useful document which this court should rely on in resolving the dispute. The plaintiff concluded by submitting that the closure of the said road access has forced him and his family to use an alternative but treacherous route to access the main road thus causing them hardship. Relying on the case of *Kamau - v - Kamau* [1984] eKLR, the plaintiff urged the court to grant the orders.
12. The defendant filed his submissions on October 3, 2022 and equally submitted on one issue for determination: whether the plaintiff is entitled to the reliefs sought in the plaint. The defendant argued that the proceedings and the decision of the Land Registrar were improper as he failed to take evidence of persons who knew the original boundary as well as the history of the dispute and further that no report from the surveyor present was attached to that of the registrar to guide him. That the registrar just made an observation and concluded that the road access had been closed by the defendant. The defendant further submitted that in general boundary survey, the extent of encroachment is vital and as such, the registrar ought to have captured the extent of encroachment which he failed to do. The defendant relied on the case of *Azzuri Limited v Pink Properties Limited* [2018] eKLR and concluded by stating that the plaintiff's allegations came to nought.
13. I have considered the parties pleadings, evidence and submissions. The issues that arise for determination are whether this court has jurisdiction and whether the reliefs sought issue.
14. It bears reiterating that jurisdiction is everything and that a court cannot make any further step without it. See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR. As was restated by the Supreme Court in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR:

A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. ....

15. The Court of Appeal emphasised the decisive nature of the issue of jurisdiction when it stated in *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR as follows:

... Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. ...



16. There is no dispute, as between the parties herein, that the plaintiff is the registered owner of parcel of land known as title number Isukha/Shirere/2231 which is adjacent to parcel of land known as title number Isukha/Shirere/2737 owned by the defendant. It is equally not in contention that a dispute arose between the parties in which the plaintiff claimed that the defendant blocked an access road to the plaintiff's Isukha/Shirere/2231 by constructing a home on it. The dispute led to the filing, by the plaintiff against the defendant, of Kakamega Municipality Division Land Disputes Tribunal Case No. 13 of 2009. Both parties produced the tribunal proceedings. The tribunal delivered its verdict on 12<sup>th</sup> January 2010 and found that even though the defendant had blocked the plaintiff's access, the status quo should remain since the plaintiff had alternative access and since the plaintiff had sat on his rights for 23 years. It is further not in dispute that the plaintiff was dissatisfied with the decision and appealed through Western Provincial Appeals Committee Case No. 7 of 2010 but the appeal stalled due to repeal of the Land Disputes Tribunals Act, 1990.
17. It is apparent that the dispute between the parties is essentially a boundary dispute which boils down to the question of location of the defendant's Isukha/Shirere/2737 as well as the developments thereon vis a vis location of an access road to the plaintiff's adjacent Isukha/Shirere/2231. The two parcels are registered land.
18. Section 18 (2) of the [Land Registration Act](#), 2012 expressly bars this court from entertaining any action or other proceedings relating to a dispute as to boundaries of registered land unless the boundaries have been determined in accordance with Section 18 of the Act. Provisions similar to section 18 of the [Land Registration Act](#), 2012 were found at section 21 of the Registered [Land Act](#) (repealed).
19. It is not in dispute that the plaintiff approached the Land Registrar to resolve the dispute under section 21 (2) of the Registered [Land Act](#) which was in force when the dispute arose but which was later repealed and that after issuing summons, Richard Khamala who was the then Land Registrar Kakamega visited the parcels on November 20, 2008 in the company of a surveyor by the name Mr Lusimba as well as the parties herein and prepared an undated report which was produced in evidence. That the Land Registrar proceeded as he did is confirmation that the boundaries of the two parcels as well as the access road were not fixed.
20. To better appreciate the nature of the boundaries and what was expected of the Land Registrar, I find it appropriate to reproduce section 21 of the [Registered Land Act](#) (repealed) in its entirety:
  - (1) Except where, under section 22, it is noted in the register that the boundaries of a parcel have been fixed, the registry map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.
  - (2) Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary.
  - (3) Where the Registrar exercises the power conferred by subsection (2), he shall make a note to that effect on the registry map and in the register and shall file such plan or description as may be necessary to record his decision.
  - (4) No court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section.



- (5) Except where, as aforesaid, it is noted in the register that the boundaries of a parcel have been fixed, the court or the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as it or he thinks fit.
21. It follows therefore that the registry map and any plan that the Land Registrar held as he embarked on the exercise only indicated the approximate boundaries and the approximate situations of the parcels. The registrar was required to determine and indicate the position of the uncertain or disputed boundaries and to make a note to that effect on the registry map and in the registers of the parcels and to file the plan or description as may be necessary to record his decision.
22. Neither the plaintiff nor the registrar produced registry map, the registers of the parcels or any plan that describes the boundaries and the offending structures. The report prepared by Richard Khamala merely contains an observation that “the road of access serving Isukha/Shirere/2231 has been closed by the defendant and same is shown on the map”. The report also has a ruling to that the plaintiff herein “was right to have the disputed road of access reopened. Since the defendant has established a homestead on it. I refer the matter to the Hon. court of law for more orders.”
23. Just like section 21 of the *Registered Land Act* (repealed), section 19 of the *Land Registration Act*, 2012, spells out how the registrar is to fix boundaries: after notifying and giving all persons appearing in the register and occupiers of the land adjoining the boundaries in question an opportunity of being heard, he should 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. The plan should be verified by the office or authority responsible for the survey of land. Other than having some sort of a hearing, the registrar did not take any of the other required steps. In other words, the boundaries remain unfixed thereby depriving this court of jurisdiction.
24. The Court of Appeal stated in *Azzuri Limited v Pink Properties Limited* [2018] eKLR as follows regarding the application of section 18 of the *Land Registration Act*, 2012:
- (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. ...
- 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.
25. The parties herein should move with speed to get the land registrar to fix the boundaries. Even after the boundaries are fixed, the parties would do well to obtain clear survey evidence indicating the position of the access road vis a vis the position of the offending structures before moving the court.
26. Considering that the court has no jurisdiction in the matter, the plaintiff’s case is beyond redemption. See *Phoenix of EA Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR. I therefore strike out suit. No order on costs.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 7TH DAY OF FEBRUARY 2023.**

**D. O. OHUNGO**

**JUDGE**



Delivered in open court in the presence of:

Mr Nyikuli for the plaintiff

Ms Nafuye for the defendant

Court Assistant: E. Juma

