



**Ngaruiya (Suing through her Legal Attorney Mungai Ngaruiya) v Farah & 7 others  
(Environment & Land Case E085 of 2021) [2023] KEELC 677 (KLR) (8 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 677 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE E085 OF 2021**

**A NYUKURI, J  
FEBRUARY 8, 2023**

**BETWEEN**

**WANJIKU MUNGAI NGARUIYA (SUING THROUGH HER LEGAL  
ATTORNEY MUNGAI NGARUIYA) ..... PLAINTIFF**

**AND**

**NOORDIN FARAH ..... 1<sup>ST</sup> DEFENDANT  
ERIC OSORO ..... 2<sup>ND</sup> DEFENDANT  
FRANCIS NYAMARI ..... 3<sup>RD</sup> DEFENDANT  
NAFTALI NJUGUNA ..... 4<sup>TH</sup> DEFENDANT  
ABUBAKAR MWAHIMA ..... 5<sup>TH</sup> DEFENDANT  
RUTH MUENI ..... 6<sup>TH</sup> DEFENDANT  
CHRISTOPHER MAKHOHA ..... 7<sup>TH</sup> DEFENDANT  
JAMES KINARA ISOE ..... 8<sup>TH</sup> DEFENDANT**

**RULING**

**Introduction**

1. Before court is a notice of motion dated October 15, 2021 filed by the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants seeking the following orders;
  - (a) That this honourable court be pleased to withdraw this suit ELC suit No E085 of 2021 which is pending before the Environment and Land Court Machakos and proceed to declare the entire suit a nullity and void due to lack of jurisdiction.
  - (b) That the costs of this application be borne by the plaintiff.



2. The application is anchored on the grounds listed on its face as well as the supporting affidavit sworn by Eric Osoro, the 2<sup>nd</sup> defendant. The applicants' case is that the dispute herein is about the position of the boundary between the plaintiff's parcel No Mavoko town block 3/3468 and the defendants' plot which are part of parcel number Mavoko town block 3/3467. It is the applicants' position that by dint of section 18 (2) of the Land Registrar Act No 3 of 2012, this court lacks jurisdiction to entertain this claim.
3. The applicants stated that they were the registered proprietors of parcel number LR No Mavoko town block 3/70692, LR No Mavoko town block 3/70693, LR No Mavoko town block 3/70691, LR No Mavoko town block 3/70673 and LR No Mavoko town block 3/70665 respectively, which parcels were subdivided from LR No Mavoko town block 3/3467. That parcel Mavoko town block 3/3467 is adjacent to the plaintiff's parcel No Mavoko town block 3/3468.
4. According to the applicants, the dispute herein is that the defendants have encroached on the plaintiff's land, which is a boundary dispute, yet it has never been referred to the land registrar, Machakos for determination. The applicants maintain that the plaintiff's allegation is that the county surveyor was seized of the matter is not a substitute for the land registrar's jurisdiction under section 18 (2) of the Land Registration Act.
5. The application is opposed. The plaintiff filed a replying affidavit sworn on November 18, 2021. It is the plaintiff/respondent's case that this court has jurisdiction to hear and determine this matter. He stated that parcel No Mavoko town block 3/3467 does not exist as the same was subdivided into plot No 51220 and 51221. According to the plaintiff, the 8<sup>th</sup> defendant fraudulently and unlawfully hived off a portion of land measuring 6.271 ha from the plaintiff's parcel herein, subdivided the same and issued new titles, which was a calculated theft of the plaintiff's land.
6. The respondent's position is that the dispute herein is not a boundary dispute but, a well calculated theft of the plaintiff's land.
7. The application was canvassed by way of written submissions. On record are the applicant's submissions dated January 13, 2022 as well as the respondent's submissions dated May 3, 2022.

### **Submissions**

8. Counsel for the applicants submitted that the pleadings show that the plaintiff is the registered proprietor of title No Mavoko town block 3/3468 and one James Isoe was the registered proprietor of Mavoko town block 3/3467. That the latter subdivided parcel Mavoko town block 3/3467 into several parcels and sold some of them to the applicants. Counsel maintained that the two parcels are adjacent to each other and therefore a claim of encroachment by either of the parties will be a land boundary dispute.
9. Counsel maintained that parcel No Mavoko town block 3/3467 was subdivided into plots 51220 and 51221 and that the plaintiff's allegations that the 8<sup>th</sup> defendant hived off a portion measuring 6.271 ha of the plaintiff's portion and unlawfully and fraudulently proceeded to merge with plot No 51221 confirms that this is a boundary dispute.
10. It was the applicant's position that the surveyors report attached to the plaintiff's replying affidavit was to establish the position of the boundary beacons of the parcel on the ground in relation to the parcel boundary, road reserve and neighbouring parcel 51221. Counsel maintains that the report clearly acknowledges that there is a boundary dispute.



11. Relying on section 18 (2) of the [Land Registration Act](#) No 3 of 2012, counsel contended that this court lacks jurisdiction to determine a boundary dispute. In relation to general boundaries. Counsel argued that it is the duty of the land registrar to fix boundaries of registered land. Reliance was placed on the cases of [George Kamau Macharia v Dexka Limited](#) [2019] eKLR and [William Gacani Mbaria v Charles Kirimi Mbui](#) [2018] eKLR, for the proposition that section 18 (2) of the [Land Registration Act](#), places jurisdiction to determine boundary disputes for general boundaries in the land registrar.
12. On their part, counsel for the respondent submitted that in the amended pleadings, the plaintiff pleaded fraud and illegality as against the 8<sup>th</sup> defendant, trespass against all the defendants and illegal construction of permanent structures by the 1<sup>st</sup> – 7<sup>th</sup> defendants. Counsel’s view was that the issue before the court was not a boundary dispute as contemplated under the provisions of section 18 (2) of the [Land Registration Act](#) as several other issues exist for the court’s determination, which issues are not within the jurisdiction of the land registrar but this court.
13. It was argued for the respondent that the 8<sup>th</sup> respondent fraudulently and illegally trespassed and hived off about 6.271 ha from the plaintiff’s land and proceeded to subdivide the same and sell the same to unsuspecting members of the public who include the 1<sup>st</sup> – 7<sup>th</sup> defendants.
14. Counsel referred to the [Black’s Law Dictionary Online Legal Dictionary](#) 2<sup>nd</sup> edition, which define a boundary dispute as a “law suit that determines the boundary of lands and is a dispute between two adjoining land owners.” According to the respondent, the facts herein do not amount to a boundary dispute.
15. It was contended for the respondent that the general powers of the land registrar under section 14 of the [Land Registration Act](#) do not include granting temporary reliefs to an aggrieved party to stop construction pending determination of a boundary dispute or orders of eviction or cancellation of a title deed illegally issued. Counsel maintained that section 18 (2) are only applicable where the dispute is purely a boundary dispute and there are no other legal issues to be determined.
16. Counsel relied on section 13 (2) (a) and (7) of the [Environment and Land Court Act](#) to argue that this court has jurisdiction to determine boundary disputes and grant interim or permanent preservative orders. Counsel emphasised that where there are multiple issues including a boundary dispute, the court may seek the intervention of the land registrar to give a report on the boundary issue to enable this court make a just determination of all issues before it.
17. Reliance was placed on the cases of [Taib Investments Limited v Fahim Salim Said & 5 others](#) [2016] eKLR, [Geoffrey Mungai Njenga & another v Registrar of Titles & another](#) [2021] eKLR, [Agatha Jeruto Kimaswai v Attorney General & 3 others](#) [2021] eKLR and [George Mkuzi v Modern Coast Builders & Contractors Ltd & another](#) [2021] eKLR, for the proposition that where there are multiple issues, some of which ought to be determined by other bodies and the issues cannot be determined separately, then this court is exercising its jurisdiction under article 162 (2) (b) of the [Constitution](#) ought to hear and determine the matter.

### **Analysis and Determination**

18. I have carefully considered the application, the replying affidavits, submissions and authorities cited. The sole issue that arise for determination is whether this court lacks jurisdiction to determine this matter.
19. The applicants’ contention on lack of jurisdiction is anchored in section 18 (2) of the [Land Registration Act](#). That section provides as follows;



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.

20. Section 18 (3) and 19 of the *Land Registration Act* gives the land registrar the power to hear boundary disputes and upon determination, he may fix the precise position of the boundaries in issue.
21. Section 18 (2) of the *Land Registration Act* is couched in mandatory terms and therefore this court cannot determine matters touching on general boundaries and or where boundaries have not been fixed. That is the preserve of the land registrar. The jurisdiction of this court to determine boundary disputes provided for in section 13 (2) (a) of the *Environment and Land Court Act* ought to be distinguished from the jurisdiction of the land registrar under section 18 (2) of the *Land Registration Act*. The provisions of section 13 (2) (a) of the *Environment and Land Act* refers to boundaries, which in my view are fixed boundaries. section 18 (2) of the *Land Registration Act* is specific only to boundaries of registered land which have not been determined as those are boundaries based on cadastral map which are approximate boundaries and not fixed boundaries.
22. In determining the nature of the dispute herein and whether the same falls within the purview of section 18 (2) of the *Land Registration Act*, I must interrogate the plaintiff's complaint and the reliefs sought. In the amended plaint filed on November 18, 2021, the plaintiff states that the 8<sup>th</sup> defendant while subdividing his parcel Mavoko town block 3/51221, hived off 6.271 ha from the plaintiff's parcel Mavoko town block 3/3468, illegally subdivided it into several portions, created new numbers and disposed off and transferred the same to members of the public including the 1<sup>st</sup>-7<sup>th</sup> defendants. The plaintiff sought for a permanent injunction, against the defendants, an order cancelling the alleged unlawful subdivisions/mutations in respect of parcel 3/3468 and the resultant titles, an order of eviction and an order of general damages.
23. It is not in dispute that parcel number Mavoko town block 3/3468 belongs to the plaintiff and Mavoko town block 3/51221 belonged to the 8<sup>th</sup> defendant and the same was subdivided to result in titles owned by the 1<sup>st</sup> to 7<sup>th</sup> defendants. I have also looked at the mutation provided by the applicants and marked as JKI -3 and the layout produced by the respondent and marked as MN-1, it is clear that there is no dispute as to where the boundary line lies between parcel Mavoko town block 3/3468 and Mavoko town block 3/51221 is.
24. According to the plaintiff, part of his land parcel Mavoko town block 3/3468, measuring 6.271 ha was hived off by the 8<sup>th</sup> Defendant at the time the latter was subdividing his parcel Mavoko town block 3/51221. Further that titles were created in his land, sold and transferred to the 1<sup>st</sup> to 7<sup>th</sup> defendants and other members of the public. The plaintiff argues that the subdivision/mutation and creation of new titles on his parcel of land was fraudulent and that the resultant titles ought to be cancelled.
25. In my considered view, the plaintiff's complaints of fraud and illegal subdivision of his parcel of land and his prayer for cancellation of resultant titles, eviction and general damages for trespass cannot be matters that can be determined by the land registrar. While the report by the surveyor produced by the plaintiff may require the land registrar's input, the dispute herein is not just about the boundary. In the premises, the application dated October 15, 2021 lacks merit and the same is hereby dismissed with no order as to costs.
26. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 8<sup>TH</sup> DAY OF FEBRUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**



**JUDGE**

**In the presence of;**

**Ms. Mwonya for 2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup> and 8<sup>th</sup> Defendants**

**Mr. Okello for 7<sup>th</sup> Defendant**

**No appearance for Plaintiff**

**No appearance for 1<sup>st</sup> and 8<sup>th</sup> Defendants**

**Josephine – Court Assistant**

