



REPUBLIC OF KENYA



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**Mwaura v Wanjiru (Environment and Land Appeal E037 of 2021)
[2023] KEELC 17733 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 17733 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E037 OF 2021**

BM EBOSO, J

MARCH 9, 2023

BETWEEN

ROBERT NJOROGE MWAURA APPELLANT

AND

KHADIJA WANJIRU RESPONDENT

*(Being an Appeal against the Judgment of Hon Oscar Wanyaga,
Senior Resident Magistrate, delivered in the Chief Magistrate
Court at Thika on 7/4/2021 in Thika Civil Case No 461 of 2021)*

JUDGMENT

Introduction

1. This appeal challenges a post-judgment ruling rendered on 7/4/2021 by Hon O. M Wanyanga, Senior Resident Magistrate, in Thika Chief Magistrate Court Civil Case No 461 of 2008. The ruling related to two parallel post-judgment applications which the two parties to this appeal had presented to the subordinate court. Robert Njoroge Mwaura [the appellant in this appeal] was the plaintiff in the trial court, while Khadija Wanjiru [the respondent in this appeal] was the defendant. The substantive dispute that fell for hearing and determination in the trial court was a boundary dispute. The trial court heard the dispute in 2013 and rendered a Judgment in the suit in 2018, notwithstanding the prohibitory provisions of Section 18 of the *Land Registration Act*. The trial court said nothing about the fact that the said framework vested in the Land Registrar the primary jurisdiction to determine and fix boundaries. The Judgment of the trial court is, however, not the subject of this appeal. What is the subject of this appeal is the post-judgment ruling rendered on 7/4/2021. I will outline a brief contextual background to the appeal, before I dispose the key issues that fall for determination in the appeal.



Contextual Background

2. The appellant was at all material times the registered proprietor of land parcel number Ruiru East Block 1/336 surveyed and registered as measuring approximately 0.50 hectares [hereinafter referred to as “parcel number 336”]. The respondent was at all material times the registered proprietor of land parcel number Ruiru East Block 1/337, similarly surveyed and registered as measuring approximately 0.50 hectares [hereinafter referred to as “parcel number 337”]. The two parcels abutted each other.
3. Vide a plaint dated 19/6/2008, the appellant sued the respondent in Thika CMC Civil Case No 461 of 2008 alleging that the respondent had, on 18/6/2008, without any lawful justification, entered into parcel number 336, dug trenches on the said land and commenced the laying of a foundation on the land. He sought a permanent injunction stopping the respondent from digging trenches and/or constructing structures on his land. Secondly, he sought an order for demolition of the structures that the respondent had put on the land.
4. The respondent filed a document titled “Plaintiff’s Statement”, dated 21/9/2012, in which she stated that she had deposited building material on her parcel of land, parcel number 337, which measured approximately 0.50 hectares both in the register and on the ground. She further urged the court to let her enjoy quiet possession of her land, parcel number 337. She urged the court to lift the interlocutory injunctive order that had been issued against her on 29/12/2011.
5. During interlocutory proceedings, by consent of the parties to the suit, the trial court [Hon F N Nyakundi] directed the Land Registrar to visit the two suit properties and fix their boundaries. In compliance with the order of the trial court, the Land Registrar visited the two parcels of land in the company of the District Land Surveyor.
6. The Land Registrar subsequently presented to the trial court the District Surveyor’s Report dated 2/4/2009 as well as the Land Registrar’s Dispute Resolution Report dated 29/5/2009. The District Surveyor’s Report indicated that shifts of boundaries had occurred from parcel number 343 up to parcel number 336, thus resulting in reduction of the size of parcel number 336 on the ground. The surveyor’s report picked out the following details relating to the shifts:

S/No	Parcel No.	Ground Area (ha)	Registered Area (ha)
1.	336	0.1725	0.5
2.	337	0.450	0.5
3.	339	0.5050	0.5
4.	341	0.500	0.5
5	343	1.15	0.5

7. The District Land Surveyor observed that it was not possible to fix the boundary between the two parcels which was the subject of the dispute without interfering with the rest of the parcels. He also observed that parcel number 339 had been subdivided while parcel numbers 341 and 343 had



permanent houses. The District Land Surveyor urged the court to visit the site in order to come up with a workable solution.

8. On his part, the Land Registrar made a finding to the effect that the boundary dispute was caused during subdivision of the plots in the area by the surveyor who surveyed the area before people had settled there. He added that it had become hard to fix only one or two boundaries because people had already built permanent houses in almost all the plots. He advised that the status quo had to be maintained pending resolution of the matter by the court.
9. Against the above background, the trial court [Hon Ndeda PM] conducted trial on 4/2/ 2013 during which he took the evidence of the appellant. The appellant was cross-examined. His evidence was that when the Land Registrar went to the suit properties, he declined to fix boundaries. The defendant did not tender evidence during trial.
10. Ultimately, the case was assigned to Hon C. A Otieno-Omondi who rendered the Judgment dated 13/12/2018. She found that the appellant had “proved that he was the owner of Ruiru East Block 1/336” and on that basis, she granted the appellant a permanent injunction stopping the defendant against digging trenches and/or constructing structures on land parcel number Ruiru East Block 1/336. On the appellant’s plea for an order for demolition of the impugned structure, she found that the appellant had stated in one of the affidavits sworn during interlocutory proceedings that “the defendant [read “the respondent”] had commenced construction on her plot before they could settle his claim with regard to the boundary”. Based on the above deposition in one of the affidavits filed during interlocutory proceedings, the Learned Magistrate found that the respondent commenced construction on her plot, hence the order for demolition of her structure would not issue against her.
11. There is no record to suggest that either of the two parties to this appeal appealed against the Judgment of the trial court.

Post-Judgment Applications

12. What followed the Judgment is that after about 14 months, the appellants filed an application dated 17/2/2020 in the suit, urging the court to order the District Land Surveyor to expeditiously visit the two properties to align their boundaries “as per the current survey map and file his report in court.”
13. The respondent too filed a post-judgment application dated 12/1/2021 praying for various post judgment reliefs. First, he prayed for an order directing the Ruiru Sub-County Police Commander; the Ruiru Deputy County Commissioner (DCC); and the Ruiru Sub County Criminal Investigations Officer to “enforce the orders” of the trial court against the appellant. Second the respondent prayed for a post-Judgment order cancelling the notice dated 5/12/2020 issued to him by the appellant in relation to land parcel number Ruiru East Block 1/337. Thirdly, the respondent prayed for an order citing the appellant for contempt of the Judgment of the trial court. Fourth, she prayed for an order directing the respondent to remove beacons and/or structures erected on land parcel number Ruiru East Block 1/337 and the resultant subdivisions thereof and restore the boundaries thereof, and in default, the respondent be at liberty to do so. Fifth, the respondent prayed for a post-judgment order of permanent injunction restraining the appellant against trespassing on, entering or dealing adversely with land parcel number East Block 1/337 and the resultant subdivisions therefrom. Lastly, the respondent prayed for a post judgment order for compensation against the appellant.
14. The two post-judgment applications fell for hearing and determination before Hon. Wanyaga. The Learned Magistrate made extensive reference to the Land Registrar’s Report and the District Land



Surveyor's Report alluded to in the opening paragraphs of this Judgment and rendered himself on the appellant's application dated 17/2/2020 as follows;

“It is clear from the foregoing that the substantial prayer in application dated 17/2/20 (prayer 3) was issued way back in 22/7/08. Both the Land Registrar and District Surveyor filed their respective reports (contents quoted above) in court. The court made its judgment after the said reports had been filed. It follows therefore that the prayer is res judicata as the order was issued. The issue of structures allegedly on plaintiff's land was in issue in the judgment in this matter as clearly noted that prayer b) was for demolition of structures in his land. If dissatisfied with the outcome of the reports and/or judgment, there were legal avenues for doing so but not filing a fresh application seeking similar orders as he did in 2008. All the above issues being raised by the plaintiff are issues raised or that ought to have been raised before judgment was passed. If dissatisfied with the outcome of the case, the avenue of appeal was always available.

Notably, the registrar in his report noted that parties ought to maintain the status quo as it existed as the time of his report in 2009. The surveyor on his part noted that it is not possible to fix the boundary between the two parcels without interfering with the rest of the parcels. The report was also in 2009. The plaintiff has come to court 11 years later seeking that a similar exercise be carried out.”

15. On the respondent's application dated 12/1/2021, the Learned Magistrate rendered himself as follows:

“There is no dispute that land parcel no LR Ruiru East/Block 1/337 belongs to the defendant. Further, considering the report by both the surveyor and the land registrar, it is fair to issue prayers 5, 6 8 and 9 of the application dated 12th January 2021.”

16. In a nutshell, the Learned Magistrate rejected the appellant's application but granted the respondent's application in terms of various reliefs, including a permanent post-judgment injunction. The only relief that was not granted to the respondent was the order relating to compensation.

17. Aggrieved by the ruling, the appellant brought this appeal through a memorandum of appeal dated 6/5/2021. The Memorandum of Appeal was amended on 3/12/2021. The appellant advanced the following grounds of appeal:

1. That the learned trial magistrate erred in fact and in law by sitting as an appellate court thereby reversing the judgment and decree issued in favour of the appellant herein on 13/12/2018 by issuing orders of permanent injunction against the appellant herein vide a ruling and order dated 7/4/2021 and premised on a post judgment application by the respondent.
2. That the learned trial magistrate erred in fact and in law by issuing final orders of permanent injunction against the appellant herein based on the respondent's application dated 12/1/2021 yet the said respondent's application was premised on provisions of law that pertain to temporary injunctions.
3. That the learned trial magistrate erred in fact and in law in introducing extraneous issues alien to the appellant herein and adjudicating on the same by issuing reliefs and remedies that were neither sought nor the subject of the respondent's application dated 12/1/2021 to wit removal of beacons and/or structures erected on the land otherwise previously known as LR Ruiru East Block 1/337 and the resultant subdivisions thereof and restoration of the boundary fence thereof forthwith thereby denying the appellant the right to be heard in opposition of the said issue.



4. That in issuing the reliefs for removal of beacons and/or structures allegedly erected on the land otherwise previously known as LR Ruiru East Block 1/337 and restoration of the alleged boundary fence, the learned trial magistrate irregularly determined the boundaries between LR No. Ruiru East Block 1/336 and Ruiru East Block 1/337 in the absence of evidence on the extent of the boundaries between the subject parcels of land, in the absence of a trial and in total disregard of the survey report filed by the appellant herein. The effect of the said determination is the illegal alienation of the appellant's parcel of land thereby occasioning an injustice and prejudice to the appellant herein.
 5. That the learned trial magistrate erred in fact and in law by issuing orders of permanent injunction against the appellant herein in the absence of evidence to determine the extent of boundaries between LR No. Ruiru East Block 1/336 and Ruiru East Block 1/337. That the absence of a determination of the boundaries as between the aforesaid parcels of land renders both the ruling dated 7/4/2021 and the judgment dated 13/12/2018 unenforceable.
 6. That the learned trial magistrate erred in fact and in law in holding that the appellant had come to court 11 years later yet the judgment in court was issued on 13/12/2018 with the appellant's application being filed on 17/2/2019.
 7. That the learned trial magistrate erred in law and in fact by failing to comprehend the appellant's application, failing to consider the appellant's affidavits and submissions.
 8. That the learned trial magistrate's ruling was openly biased.
 9. That the learned trial magistrate did not exercise his discretion judiciously.
18. The appellant urged the court to grant him the following verbatim reliefs:
- a. That this appeal be allowed.
 - b. That this honourable court be pleased to set aside the ruling, order and any consequential orders and actions with respect to the ruling and order of the Honourable O. M Wanyaga dated 7th April 2021 and delivered on 15th April 2021 via email.
 - c. That this honourable court be pleased to direct and/or compel the District Surveyor to align the boundary of land parcel numbers Ruiru East/Block 1/336 and Ruiru East Block 1/337 as per the current survey maps and in accordance with the *Survey Act*.
 - d. That in the alternative, this honourable court be pleased to order an independent surveyor to align the boundary of land parcels number Ruiru East/Block 1/336 and Ruiru East Block 1/337 as per the current survey maps in accordance with the *Survey Act*.
 - e. That this honourable be please to award costs of this appeal to the appellant herein.
 - f. Any other relief that this honourable court may deem fit to grant.

Submissions

19. The appellants filed written submissions dated 4/3/2022 through M/s Muturi Mitau & Associates Advocates. On their part, the respondents filed written submissions dated 1/7/2022 through M/s M.M Gtonga Advocates. I will not rehash the submissions. Where necessary, I will refer to and analyse the parties' submissions when disposing the issues that fall for determination in the appeal.



Analysis and Determination

20. I have read and considered the original record of the trial court; the record relating to this appeal; and the parties respective submissions in this appeal. I have also considered the legal frameworks and the jurisprudence relevant to the issues that fall for determination in this appeal. Parties did not agree on a common set of issues to be determined by this court.
21. Taking into account the grounds of appeal and the parties' respective submissions, the three key issues that fall for determination in this appeal are: (i) Whether the trial court erred in granting the respondent all or any of the post-judgment orders that it granted her; (ii) Whether the trial court erred in rejecting all or any of the reliefs sought by the appellant post-judgment; and (iii) What order should be made in relation to costs of this appeal. Before I sequentially dispose the three issues, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.
22. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of [*Susan Munyi v Kesbar Shiani*](#) (2013) eKLR as follows:-
- “As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”
23. The above principle was similarly outlined in [*Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates*](#) [2013] eKLR as follows:
- “This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
24. Before I turn to the key issues in this appeal, it is important to observe that the boundary dispute that gave rise to the impugned ruling arose prior to the enactment of the land laws of 2012. Indeed, the suit giving rise to this appeal was filed in 2008. Subsequently, in 2012, Parliament enacted the [*Land Registration Act*](#). Section 18(2) of the said Act expressly prohibits courts against entertaining boundary disputes prior to determination of the relevant land boundaries by the Land Registrar. Further, Parliament enacted an elaborate framework on how the Land Registrar is expected to determine and fix boundaries and adjudicate boundary disputes.
25. Sections 18 and 19 of the [*Land Registration Act*](#) contain the following framework on what was expected to be done following the divesture of primary jurisdiction from the trial court:

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- (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.

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- (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.”

- 26. Did the trial court comply with the above framework? Certainly not. All the trial magistrates who dealt with the case post-2012 appear not to have been aware of the fact that they were dealing with a boundary dispute and that they did not have jurisdiction to entertain the dispute at that point. They failed to appreciate that Sections 18 and 19 of the *Land Registration Act* obligated the Land Registrar to determine and fix boundaries and thereafter make entries in the relevant land registers. They failed to appreciate that under the new law, until the Land Registrar determines land boundaries, the courts have no jurisdiction over boundary disputes.
- 27. The result is that the trial court rendered a Judgment whose enforcement caused more problems than resolving the dispute. The trial magistrate issued a permanent injunction without a determination of the boundaries.
- 28. The Learned Magistrate who disposed the two post-judgment applications equally fell into serious errors. He relied on the 2009 Land Registrar’s Report and the Land Surveyor’s Report as conclusive evidence of adjudication and settlement of the boundary dispute yet the duo were categorical that they



were leaving it to the court to come up with a workable solution to the boundary dispute. Indeed, the Land Surveyor stated thus:

“It is my view that the court does visit the site in order to come up with a workable solution.”

29. On his part, the Land Registrar stated thus:

“Parties are advised to maintain status quo until the matter is dealt with by the court to give its decision on the next step.”

30. The above positions by the Land Registrar and the District Land Surveyor were taken in 2009 prior to the enactment of the *Land Registration Act* of 2012. The said Act divested primary jurisdiction from the courts. This was the position in law in 2013 when the suit was heard and in 2018 when the Judgment was rendered. I have said enough about the post-2012 trial and the post-2012 Judgment by the trial court. However, because the Judgment of the trial court is not the subject of this appeal, there isn't much I can do about it in this appeal. I now turn to the three issues that fall for determination in this appeal.

31. The first issue is whether the trial court erred in granting the respondent all or any of the post-judgment reliefs that were granted to her. The post-judgment jurisdiction of a civil court in Kenya's civil justice system is largely limited to enforcing the court's judgments. Kenya's justice system does not countenance the re-opening of fresh trials in a case where there is a duly rendered judgment.

32. The respondent sought various reliefs in her post-judgment application dated 12/1/2021. Among the reliefs sought was a prayer for a permanent injunction restraining the appellant. Another prayer was an order compelling the appellant to remove certain beacons and structures from what the respondent described as parcel number 337. The respondent even prayed for an order of compensation. All the above reliefs were sought in a post-judgment application. Secondly, the respondent did not have a counterclaim in the disposed suit. Thirdly, judgment in the suit had been entered in favour of the appellant who was the respondent in the post-judgment application.

33. Given the above circumstances, this court has no doubt that the application dated 12/1/2021 was misplaced and completely incompetent. The Learned Magistrate clearly erred in entertaining post-judgment applications and granting post-judgment injunctive reliefs to a party who, in the first place, did not have a counter-claim in the disposed suit. Worse still, the beneficiary of the post-judgment injunctive orders was a judgment debtor in the final decree of the trial court. The remedy available to the respondent was to move the Land Registrar to discharge his statutory mandate under Sections 18 and 19 of the *Land Registration Act* by determining and fixing the boundaries of all the affected parcels of land. Upon determination of the boundaries, the respondent would be at liberty to initiate a fresh suit to ventilate any grievance she would have.

34. For the above reasons, it is my finding that the Learned Magistrate erred in granting the respondent the post-judgment reliefs that he granted her.

35. The second issue is whether the trial court erred in rejecting all or any of the reliefs that were sought by the appellant post-judgment. I have said that the jurisdiction of the trial court had been ousted by Section 18 (2) of the *Land Registration Act* at the time the trial court conducted trial and subsequently rendered a judgment. I have also said that the proper entity to adjudicate the dispute at that point was the Land Registrar. Due to the error of the trial court, it ended up rendering a Judgment that offered nothing in terms of determining the correct land boundaries of the affected parcels.



36. Given that the trial court lacked jurisdiction to entertain the dispute ab initio and had already rendered a judgment in the matter, the reliefs which the appellant sought were not available on the platform of the spent suit. The recourse available to the appellant was to move the Land Registrar to determine the boundaries within the framework of Sections 18 and 19 of the Land Registration Act 2012. In the event that the Land Registrar failed to discharge his statutory duty, the appellant was at liberty to initiate appropriate judicial review proceedings to compel him to perform his statutory duty. Consequently, my finding on the second issue is that the post-judgement reliefs that the appellant sought were not available on the platform of the spent suit.
37. On costs, this appeal has partially succeeded and partially failed. In the circumstances, parties will bear their respective costs of the appeal.

Summary of Findings

38. My finding on the first issue is that the Learned Magistrate erred in granting the respondent all the reliefs that he granted her post- judgment. My finding on the second issue is that, for reasons quite different from those that were advanced by the Learned Magistrate, the key relief sought by the appellant was not available because the mandate to determine and fix boundaries of registered land was vested in the Land Registrar, and not the Land Surveyor, and an application for an order compelling the Land Registrar to discharge his statutory mandate could not be ventilated on the platform of a spent suit.
39. Because the errors leading to this appeal were committed by the Learned Magistrate parties will bear their respective costs of the appeal.

Disposal Orders

40. In the end, this appeal succeeds in the following terms:
1. The orders made in favour of Khadija Wanjiru in Thika CMC Civil Case No. 461 of 2008 in the ruling rendered by Hon O. Wanyanga on 7/4/2021 are set aside in their entirety and are hereby substituted with an order dismissing the application dated 12/1/2021.
 2. Parties shall bear their respective costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 9TH DAY OF MARCH 2023

B M EBOSO

JUDGE

Mr. Muthoka for the Appellant

Mr. Mwereru for the Respondent

Court Assistant: Hinga

