



REPUBLIC OF KENYA



**Muchiri v Karanja (Environment and Land Appeal E072 of 2021)  
[2023] KEELC 16760 (KLR) (6 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16760 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E072 OF 2021**

**BM EBOSO, J**

**MARCH 6, 2023**

**BETWEEN**

**SIMON MUCHIRI ..... APPELLANT**

**AND**

**PAULINE WAHU KARANJA ..... RESPONDENT**

*(Being an Appeal against the Judgment of Hon J. A Agonda (SPM) delivered in the Senior Principal Magistrate Court at Ruiru on 30/8/2021 in Ruiru MCE & L Case No 120 of 2019)*

**JUDGMENT**

**Background**

1. This appeal challenges the Judgment rendered on 30/8/2021 by Hon J. A Agonda (PM) in Ruiru SPMC Environment & Land Case No 120 of 2019. The appellant was the plaintiff in the said suit. The respondent was the defendant. The trial court was invited to determine a boundary dispute and issue a mandatory injunction directing the respondent, through the Sub-County Land Surveyor, to remove what the appellant described as “illegal boundary on parcel of land No Ruiru/Ruiru East Block 2/89 encroaching on the main road”.
2. The original record of the trial court shows that on 1/11/2019, the respondent filed a memorandum of appearance through M/s A K Macharia & Co Advocates. It also shows that on 26/11/2019, the respondent filed a statement of defence through the same law firm. Indeed, the trial magistrate acknowledged this fact in paragraph 2 of page 1 of the impugned Judgment. It is not clear why the same trial magistrate, at the last paragraph of page 4 of the impugned Judgment, observed that the



respondent did not file a defence and that the suit had proceeded for hearing as an undefended cause. She rendered herself thus:

“The defendant herein did not file his defence despite having been duly served with the summons and pleadings. Therefore, request for judgment was entered against him. The suit therefore proceeded as an undefended suit and the onus of proof is still on the plaintiff.”

3. In her statement of defence, the respondent denied the allegations of encroachment onto the road and stated that she had been wrongly sued. She contended that the appellant’s suit was bad in law, defective, ambiguous and did not disclose a reasonable cause of action against her.
4. At the hearing, the appellant testified and further led evidence by a private surveyor. The respondent too testified. The respondent testified that the land on which she lived belonged to her late husband’s family.
5. Ultimately, the trial magistrate rendered the impugned Judgment in which she observed severally that she did not have jurisdiction to adjudicate the boundary dispute by dint of the framework in section 18 of the *Land Registration Act*. She nonetheless proceeded to determine the merits of the suit and made the following finding:

“Having carefully considered the available evidence, the court finds that the plaintiff herein hired the services of Land Surveyor, Thika, to shed light on the extent of boundary into the defendant’s land and the encroachment into the public land i.e the road accessing the plaintiff’s suitland whereas the defendant indicates that there was no encroachment into the plaintiff’s land. I further stress that the land registrar ought to have been involved into the survey process which was not the case of the instant suit here.

Consequently, the court finds that the plaintiff has not proved his case on the required balance of probabilities and therefore the plaintiff’s claim vide the plaint dated 24th September 2014 is not merited and the same is dismissed entirely with no order as to costs.”

## Appeal

6. Aggrieved by the Judgment, the appellant brought this appeal, advancing the following verbatim grounds:
  1. The Honorable Magistrate erred in law and in fact in holding that the plaintiff ought to have involved the registrar in the survey process while along he was part of the process [sic].
  2. The Honorable Magistrate erred in law and in fact in failing to appreciate the evidence that tended to show that the lands registrar through the surveyor was part of the survey process.
  3. The Honorable Magistrate erred in law and in fact in misdirecting herself that the surveyor, a government employee, is a different entity from the lands registrar whereas the offices are intertwined and work in tandem.
  4. The Honorable Magistrate erred in law and in fact in failing to appreciate the fact that the survey was done by the surveyor relying on the records kept by the registrar of lands hence there was no deviation.
  5. The Honorable Magistrate erred in law and in fact in reaching at the wrong finding that the claim is not merited after she arrived at a wrong inference that the lands registrar had not been involved.



6. The Honorable Magistrate erred in law and in fact in holding that the claim was not merited when all the evidence showed that a great injustice has been occasioned by the defendant's encroachment, which the surveyor had sought to rectify, and this only called for court's implementation of the survey report.
7. The Honorable Magistrate erred in law by failing to appreciate the fact that there was no appeal to the surveyor's report and that implementing it would only mean justice for the plaintiff and others using the road encroached by the defendant.
8. The Honorable Magistrate erred in fact in implying that there was no defence filed and the matter proceeded for formal proof which is not the case.
7. Each of the above grounds of appeal has been deliberately reproduced verbatim to avoid according them meanings that may not have been intended by the appellant. The errors in the grounds have been retained for the same reason.

### Submissions

8. The appeal was canvassed through written submissions dated 4/10/2022, filed by M/s Kimani Kahete & Co Advocates. Counsel for the appellant faulted the trial court for holding that the surveyor ought to have involved the Land Registrar in the survey process and that there was no public participation. Counsel argued that the trial court's finding to the effect that the Land Registrar was not involved was contrary to the surveyor's report and contrary to the evidence tendered before the trial court. Counsel argued that the surveyor's report and the evidence tendered before the trial court indicated that the surveyor carried out the exercise with instructions from the Land Registrar. Counsel added that the fact that neighbouring parcels were "measured and the area chief had been informed" indicated that there was public participation.
9. Counsel made reference to section 18(2) of the [Land Registration Act](#) and contended that the appellant had properly followed the due process in approaching the court for redress. Counsel submitted that what was before the trial court was a long standing boundary conflict between neighbours, which required adjudication and resolution. It was the view of counsel that the trial court ought to have allowed the appellant's plea. Counsel urged the court to allow the appeal.
10. The respondent filed written submissions dated 11/11/2022, through M/s A. K. Macharia & Company Advocates. Counsel for the respondent made reference to the framework in sections 18 and 19 of the [Land Registration Act](#) and submitted that the boundary dispute in this appeal was presented to the trial court prematurely because the Land Registrar was not involved in the dispute at any stage. Counsel argued that no evidence was tendered to suggest that the Land Registrar was involved in the dispute. Counsel pointed at the observation of the trial court at page 7 of the impugned Judgment [page 40 of the Record of Appeal] and submitted that instead of the appellant moving the Land Registrar to hear and determine the boundary dispute and cause the relevant entries to be made in the relevant land register, he instructed a surveyor directly. Counsel argued that for the court to have jurisdiction to deal with the dispute, it ought to have been clear that the parties had appeared before the Land Registrar and that upon hearing the parties, the Land Registrar had determined and fixed the boundaries and made a note to that effect in the land register.
11. Counsel for the respondent further submitted that the appellant's case could not succeed because, firstly, the appellant had subdivided parcel number Ruiru/Ruiru East Block 2/88 and sold the subdivisions, hence he [the appellant] had no locus standi to initiate the suit. It was the position of counsel for the respondent that none of the proprietors of the subdivisions had complained about any



encroachment. Counsel added that the road alleged to have been encroached was public land which was vested in the National Land Commission by dint of the provisions of section 156 of the [Land Act](#) and the said Commission had not complained about any encroachment. Counsel added that during trial, the appellant conceded that when he purchased parcel number Ruiru/Ruiru East Block 2/88, the beacons were in the same position as they were during trial, hence he had no basis for complaining after 15 years of occupation of the land. Counsel urged the court to dismiss the appeal.

### **Analysis and Determination**

12. I have considered the record of the trial court, the grounds of appeal, the record of appeal, and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence on the key issues that fall for determination in this appeal. Parties did not agree on a common set of issues to be determined in this appeal.
13. Taking into account the grounds of appeal and the parties' respective submissions, the following are the three key issues that fall for determination in this appeal: (i) Whether the trial court erred in finding that it did not have jurisdiction to entertain the boundary dispute; (ii) Whether the trial court erred in dismissing the appellant's suit on the ground that the appellant had not proved his case on the balance of probabilities; (iii) What order should be made in relation to costs of the suit. I will dispose the three issues sequentially in the above order. Before I do that, I will briefly outline the principle that guides this court when exercising jurisdiction as an appellate court.
14. 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.”
15. 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.”
16. The first issue falling for determination in this appeal is whether the trial court erred in finding that it did not have jurisdiction to entertain the boundary dispute. The claim giving rise to the impugned Judgment was filed in the trial court in September 2019. At that time, the [Land Registration Act](#) was in force. Sections 18 and 19 of the [Land Registration Act](#) 2012 contain an elaborate framework on how land boundary disputes are supposed to be ventilated and adjudicated. The two sections provide as follows:
  - 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.
- 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.”

17. The Court of Appeal interpreted the above framework in *Azzuri Limited v Pink Properties Limited* [2018] eKLR and asserted that the framework contemplates two categories of boundary areas: (i) general boundary area; and (ii) fixed boundary area. The Court of Appeal observed that where a boundary dispute arises in relation to lands that fall within a general boundary area, the dispute must first be referred to the Land Registrar for hearing and resolution. While disputes relating to lands with fixed boundaries may be investigated and possibly resolved simply through a surveyor. The Court of Appeal rendered itself thus:

“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.”

18. My interpretation of the above framework is that, before a land owner takes a boundary dispute to court, he is expected to establish whether the boundary in dispute has been determined and fixed by the Land Registrar and a relevant note has been made in the relevant land registers. Indeed, part of the pleadings and evidence to be presented to the court at the time of initiating the suit is an averment relating to the status of the boundary in dispute, together with evidence relating to the Land Registrar’s notes in the affected land registers. The law provides for the procedure to be followed when the Land Registrar is fixing boundaries. He is expected to issue notices inviting all the affected land owners to



attend the hearing and present evidence. Upon hearing the parties, the Land Registrar is expected to determine and fix the boundaries. He is expected to thereafter make entries in the affected land registers.

19. There was no evidence presented to the trial court to suggest that the Land Registrar carried out any boundary determination hearing as contemplated in the above framework. There was no evidence presented to the trial court relating to any entry that the land Registrar made in the Land registers relating to the affected land. Put differently, there was no evidence to suggest that the boundary in dispute had been determined and fixed by the Land Registrar in tandem with the above legal framework. The result is that the trial court had no jurisdiction to entertain the boundary dispute. Section 18(2) of the [Land Registration Act](#) 2012 expressly barred the trial court against entertaining the dispute. That is my finding on the first issue.
20. The second issue is whether the trial court erred in dismissing the appellant's suit on the ground that the appellant had not proved his case on the balance probabilities. While I entirely agree with the trial court on its finding in relation to its jurisdiction, there appears to be a serious error in the way the trial court disposed the dispute after making the above finding. Our courts have umpteen times emphasized that whenever a court establishes that it does not have jurisdiction, it ought to down its tools without making any further step in the matter. Indeed, Nyarangi JA emphasized this point in [Owners of Motor Vessel Lillian "S" v Caltex Oil \(Kenya\) Ltd](#) [1989] eKLR in the following words:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
21. Despite the trial court establishing in the impugned Judgment that it had no jurisdiction to adjudicate the dispute, it went beyond that finding, considered the merits of the dispute, and determined the suit on merits. The trial court then issued an order dismissing the appellant's suit for lack of merit.
22. What the trial court should have done upon establishing that it did not have jurisdiction to adjudicate the dispute was to strike out the suit and direct the appellant to ventilate his claim in the proper forum. Considering and determining the merits of the claim after establishing that it had no jurisdiction was an error on part of the trial court. Consequently, my finding on the second issue is that the trial court erred in considering and ultimately dismissing the appellant's claim on merits instead of simply striking it for want of jurisdiction.
23. On costs, this appeal has partially failed and partially succeeded. The error occasioning the partial success was committed by the trial magistrate. In the circumstances, parties will bear their respective costs of the appeal. The appellant will however, bear costs of the suit in the trial court.

### **Disposal Orders**

24. In the end, this appeal is disposed in the following terms:
  - a. The disposal order dismissing the suit by Simon Muchiri for lack of merit in Ruiru SPMC Environment and Land Case No 120 of 2019 is set aside and is substituted with an order striking out the said suit for lack of jurisdiction and awarding the defendant in the said suit costs of the suit.
  - b. Parties shall bear their respective costs of this appeal.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 6TH DAY OF MARCH  
2023**

**B M EBOSO**

**JUDGE**

Pauline Wahu Karanja [Respondent] present in person

Ms Macharia now present for the respondent

Court Assistant: Ms Osodo

