Ngungu t/a Cornestone One Enterprises v Gichamba & 3 others (Environment and Land Appeal 113 of 2022) [2023] KEELC 20220 (KLR) (18 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20220 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL 113 OF 2022

BM EBOSO, J

SEPTEMBER 18, 2023

BETWEEN

JOSEPH NGIGI NGUNGU T/A CORNESTONE ONE ENTERPRISES ..... APPELLANT

AND

TERESIA NJERI GICHAMBA ..... 1ST RESPONDENT

MARY WANJIRU MBUGUA ..... 2ND RESPONDENT

DIRECTOR OF SURVEYS ..... 3RD RESPONDENT

THE HON. ATTORNEY GENERAL ..... 4TH RESPONDENT

(Being an Appeal against the Judgment of Hon J. A Agonda, Principal Magistrate, delivered on 10/11/2022 in Ruiru MCL & E Case No. E145 of 2021)

JUDGMENT

Background

1. This appeal challenges the Judgment of Hon J A Agonda, Principal Magistrate, rendered in Ruiru MCL & E Case No. E145 of 2021 on 10/11/2022. Before I dispose the issues that fall for determination in the appeal, I will briefly outline the background to the appeal.

2. The 1st and 2nd respondents instituted a suit in the trial court against the appellant (1st defendant) and three others vide a plaint dated 25/10/2021. They sought the following reliefs:

   (i) a permanent injunction restraining the appellant by himself, his servants, agents or otherwise, howsoever, from entering into or encroaching and interfering with their right of occupation, possession and or use of Title Numbers Ruiru/Ruiru East Block 2/36468 and Ruiru/Ruiru East Block 2/36469 [hereinafter referred to as "the suit properties"];

(ii) special damages of Ksh 316,360;

(iii) general damages for trespass;

(iv) aggravated, punitive and exemplary damages for unlawful conduct;

(v) costs of the suit; and

(vi) interest on (ii), (iii), (iv) and (v) at court rate from date of judgment until payment in full; and (vi) any other relief the honourable court may deem fit.

3. The case of the 1st and 2nd respondents was that, at all material times relevant to the suit, they were the respective registered owners of the suit properties, having bought them from the appellant in 2005 and 2009 through separate land sale agreements. The 1st and 2nd respondents contended that the agreements for sale were made based on proposed mutations and representations by the appellant that the mutation would be registered without alterations or amendments. They contended that the proposed mutation form was used by the appellant's surveyor to fix beacons identifying boundaries of the various parcels to allow purchasers to take possession pending processing of subdivision titles. They added that the proposed mutation form was later registered and used to process and issue title deeds relating to the subdivisions and consequently they took possession of the suit properties and made developments on them.

4. The 1st and 2nd respondents added that subsequent to their acquisition of the parcels, the appellant fraudulently, maliciously and illegally changed the mutation and curved out an extra subdivision parcel for his selfish interest and benefit at the expense of the 1st and 2nd respondents and other purchasers who were not party to the suit. As a result of the aforementioned conduct, the 1st and 2nd respondents held parcels that were far smaller in relation to the acreage indicated in their respective titles.

5. The 1st and 2nd respondents contended that on or about October2021, the appellant purported to install new beacons in the entire subdivision scheme to legitimize and curve out the extra parcel of land, thereby encroaching, trespassing on, destroying and dealing in the suit properties.

6. The 1st and 2nd respondent added that the appellant, by himself and through agents, also harassed and intimidated them through threats via phone. Despite warnings, the appellant ignored them. The 1st and 2nd respondents termed the appellant's actions as trespass. They contended that it was against the above background that they sought the above reliefs.

7. The appellant filed a defence dated 8/2/2022, in which he averred that the 1st and 2nd respondents "bought the suit properties as per the sizes described in the sale agreements since the subdivision had been done". He contended that he did not alter any mutation, adding that the 1st and 2nd respondents bought their respective parcels of land after the subdivision. The appellant further contended that he had never trespassed upon the suit properties and that he had never destroyed any of the 1st and 2nd respondents' properties erected on the suit properties. He urged the court to dismiss the 1st respondent's suit with costs.

8. The physical record of the trial court does not bear any pleadings by the Land Registrar, the Director of Survey and the Attorney General. The trio were the 2nd, 3rd and 4th defendants in the trial court. Trial was conducted before Hon J A Agonda.

9. During trial, the 1st and 2nd respondents testified as PW1 and PW2 respectively. Ruth Muchira, the District Surveyor at Ruiru testified as PW3. The appellant was the only defence witness and testified as DW1.

10. Upon conclusion of trial, the trial court rendered the impugned Judgment in which it made a finding to the effect that the 1st and 2nd respondents had proved their claim and were entitled to the reliefs sought in the plaint. Consequently, the trial court issued the following verbatim disposal orders:

    a. A permanent injunction be issued restraining the 1st defendant by himself, his servants, agents or otherwise howsoever from entering, encroaching and interfering with the plaintiffs' right of occupation, possession and or use of title numbers Ruiru/Ruiru East Block 2/36468 and Ruiru/Ruiru East Block 2/36469.

    b. The plaintiffs are awarded Kshs 316,360 as special damages.

    c. Aggravated, punitive and exemplary damages of Kshs 500,000 for both the plaintiffs. (sic)

    d. The County Land Registrar together with the County Surveyor do resurvey the Ruiru/Ruiru East Block 2/3110 for the purpose of establishing the correct boundaries and the plaintiffs be allocated their rightful plots as per mutation form Register Map Sheet no. 3.

    e. The plaintiffs are awarded the costs of the suit to be borne by the 1st defendant.

Appeal

11. Aggrieved with the Judgment and Decree of the trial court, the appellant brought this appeal, advancing the following twelve verbatim grounds of appeal:

    1. That the learned magistrate erred in law and fact by finding that the appellant had encroached on the 1st and 2nd respondents' plots.

    2. That the learned magistrate erred in law and fact by finding that the appellant had altered the boundaries for Ruiru/Ruiru East Block 2/36468 and Ruiru/Ruiru East Block 2/36469.

    3. That the learned magistrate erred in law and fact by finding that the appellant had caused damage on the 1st respondent's property.

    4. That the learned magistrate erred in law and fact by finding the appellant did not controvert that he visited and invaded the 1st respondent's property. (sic)

    5. That the learned magistrate erred in law and fact by finding that mere acts of filing complaints with the Police and Area chief confirmed there was trespass.

    6. That the learned magistrate erred in law failing to find that the claimed special damages were not specifically pleaded, particularized and proved. (sic)

    7. That the learned magistrate erred in law by finding that the 0020report filed by the District Surveyor was compliant with Section 19(2) of the *Land Registration Act*.

    8. That the learned magistrate erred in law and fact by finding that the 1st and 2nd respondents had filed a complaint at the Land Registrar's Office before filing the suit.

    9. That the learned magistrate erred in law by clothing herself with jurisdiction to entertain a boundary dispute.

    10. That the learned magistrate erred in law by ignoring the District Surveyor's recommendation on the Land Registrar's jurisdiction to determine boundary disputes.

    11. That the learned magistrate erred in law by failing to consider the testimonies of all parties.

12. That the learned magistrate erred in law by granting orders which were not pleaded nor sought by the 1st and 2nd respondents.

13. That the learned magistrate erred in law by granting orders for permanent injunction which had been expressly abandoned by the plaintiffs in their Written Submissions.

14. That the learned magistrate erred in law by granting aggravated, punitive and exemplary damages without any cause or justification.

15. That the learned magistrate erred in law and law by failing to consider the appellant's written submissions.

12. The appellant sought the following verbatim reliefs in the memorandum of appeal:

a. An order setting aside the Honourable Magistrate's Judgment and Decree dated 10th November 2022 and substitute it with an order dismissing the plaint dated 25th October 2021 with costs.

b. That the respondents do pay the costs of this appeal.

c. Any other relief the court deems fit.

Appellant's Submissions

13. The appeal was canvassed through written submissions dated 6/2/2023, filed by M/s Wachira Maina & Company Advocates. Counsel for the appellant identified the following as the four issues that fell for determination in the appeal: (i) Whether the learned magistrate erred in finding that the appellant had trespassed on the 1st and 2nd respondents' properties; (ii) Whether the learned magistrate erred in law and in fact by awarding special, aggravated, punitive and exemplary damages to the 1st and 2nd respondents; (iii) Whether the learned magistrate erred in law by delving into and assuming jurisdiction of a boundary dispute; and (iv) Whether the learned magistrate erred in law by granting orders neither pleaded nor sought in the plaint.

14. On whether the learned magistrate erred in finding that the appellant had trespassed on the 1st and 2nd respondents' properties, counsel for the appellant faulted the learned magistrate for solely relying on the evidence of the 1st respondent who testified that the appellant had brought people on her property and demolished her ablution block and wall. Counsel further submitted that the appellant did not call any independent witnesses to corroborate her trespass allegations against the appellant. Counsel further submitted that the 1st respondent merely stated that her witnesses were threatened and the court concurred with her despite the fact that there was no proof of the allegation.

15. Counsel contended that the learned magistrate misinterpreted the report by the surveyor by holding that the surveyor had indicated that there was an interference of the boundaries yet the report indicated that the ground measurements did not tally with the measurements on the mutation purely for the reason that the mutation was prepared with an apparent error on part of the licensed surveyor. Counsel argued that it was unfair and improper for the learned magistrate to blame the appellant for a mistake committed by a professional he had engaged.

16. Counsel submitted that the learned magistrate completely ignored the evidence of the 2nd respondent in cross-examination, which was to the effect that it was the 1st respondent who had trespassed onto

her property and built a fence on it. Counsel further contended that while under cross-examination, the 2nd respondent stated as follows:

> " When the 1st plaintiff was constructing her fence, she had encroached onto my land."

17. Counsel added that the above statement confirmed the 1st respondent did not in any way attribute any form of encroachment or trespass to the appellant whatsoever. Counsel contended that the 2nd respondent did not claim any damages for trespass and if any were to be claimed, it would have been against the 1st respondent who had encroached into her land, and not the appellant. Counsel faulted the learned magistrate for disregarding the 2nd respondent's evidence and choosing to apportion blame to the appellant without any basis and further awarding damages that were not sought. Counsel contended that the trial court's finding to the effect that there was trespass on the 1st and 2nd respondents' properties was flawed, and was not based on any evidence placed before it and as such, this court should set aside the finding as it was unsustainable in law.

18. On whether the learned magistrate erred in law and in fact by awarding special, aggravated, punitive and exemplary damages to the 1st and 2nd respondents, counsel submitted that special damages must be pleaded, particularized and proved. Counsel argued that even though the 1st respondent produced assorted receipts during trial, she confirmed in her evidence that the alleged loss was not particularized.

19. Counsel further submitted that in any case, the appellant would not be liable to pay the claimed special damages since he was not the one who caused the alleged damage. Counsel relied on the case of Equity Bank Limited & 2 Others v Perpetua Muthoni Nduma [2019]eKLR.

20. Counsel for the appellant further argued that the learned magistrate erroneously awarded the 1st and 2nd respondents damages for aggravated, punitive and exemplary damages in the absence of proof that the appellant had trespassed on their properties, adding that they had not proved that they deserved the awarded damages. Counsel relied on the decision in Joseph Maina Mwaura v Limited (2019) eKLR to buttress this point.

21. On whether the learned magistrate erred in law by delving into and assuming jurisdiction over a boundary dispute, counsel submitted that the learned magistrate made a finding to the effect that the respondents had not rushed to court since they had filed a claim before the Land Registrar. Counsel contended that by the aforementioned finding, the learned magistrate erroneously presumed that there was a boundary dispute already determined by the Land Registrar and she went ahead to issue reliefs based on a non-existent report. Counsel faulted the learned magistrate for assuming that there was compliance with Sections 18 (2) and 19 (2) of the *Land Registration Act* and purporting to assume jurisdiction over a dispute reserved for the Land Registrar.

22. Counsel submitted that the learned magistrate complicated the matter by issuing drastic orders that had the potential of affecting other parties who were not parties to the suit, given that the original property had been subdivided into 15 plots which were purchased and developed by third parties.

23. On whether the learned magistrate erred in law by granting orders that were neither pleaded nor sought in the plaint, counsel argued that a party is bound by their pleadings which include the reliefs sought. Counsel further submitted that a court cannot frame issues and later prescribe reliefs that are not expressly sought by a party in their pleadings. Counsel faulted the learned magistrate for granting an order for permanent injunction yet the said relief had been expressly abandoned by the 1st and 2nd respondents through their written submissions. Counsel argued that the order issued by the learned magistrate for re-survey of land reference number Ruiru/Ruiru East Block 2/3110 was irregular because there was no prayer made in the plaint seeking the relief. On the relief of permanent

injunction, counsel submitted that the relief having been expressly abandoned, it should not have been granted by the court.

24. In conclusion, counsel submitted that the impugned Judgment was reached based on fundamental flaws coupled with misinterpretation of facts. Counsel further contended that the learned magistrate deliberately ignored and overlooked the appellant's testimony and evidence and therefore the Judgment in its entirety was flawed and should be set aside and the plaint filed in the lower court dismissed. Counsel prayed that the appeal be allowed.

Respondents' Submissions

25. The 1st and 2nd respondents filed written submissions dated 7/3/2023, through M/s Muthoni Nyuguto & Co. Advocates. Counsel for the 1st and 2nd respondents elected to submit on the following five issues:

    (i) Whether the learned trial magistrate erred in law and fact by making findings that the appellant altered boundaries of the 1st and 2nd respondents' properties;

    (ii) Whether the learned trial magistrate erred in law and fact by making findings that the appellant encroached, trespassed on, caused damage to, visited or invaded the 1st and 2nd respondents' properties;

    (iii) Whether the learned trial magistrate erred in law and fact by making the award in the Judgment;

    (iv) Whether the learned trial magistrate erred in law and in fact by assuming or clothing herself with jurisdiction unlawfully; and (v) Whether the learned trial magistrate erred in law and fact by failing to grant a fair hearing, consider testimonies and submissions.

26. On whether the learned trial magistrate erred in law and fact by making findings that the appellant was fraudulent and that he altered boundaries of the 1st and 2nd respondents' properties, counsel submitted that the trial court relied on the respondents' evidence, the appellant's admissions, and the evidence of the expert witness in arriving at her decision. Counsel further submitted that the appellant, through his own admission, stated that he entered into agreements and sold to the 1st and 2nd respondents two plots and one plot respectively, each measuring "40 by 60 plots". Counsel contended that the 1st respondent's evidence was that the appellant had encroached on her property with a group of youths and demolished her ablution block and had erected beacons on the property, with the aim of hiving off the extra plot he had sold to a third party.

27. Counsel submitted that the 1st respondent's oral testimony was consistent with her written statement that buttressed the unlawful conduct of the appellant; of demolishing her perimeter fence and ablution block; destroying and ferrying away the building materials; and altering the beacons. Counsel submitted that the 1st respondent produced copies of Police Occurrence Book extract relating to the report she made to the Police. Counsel contended that the 2nd respondent corroborated the 1st respondent's evidence and further testified that the acreage on her property reduced after the alterations by the appellant. Counsel added that the 1st and 2nd respondents' evidence was further corroborated by their expert witness, Ruiru District Land Surveyor, whose report indicated the ground measurements of the suit properties did not tally with the acreage in the title deeds. Counsel argued that the trial court noted the appellant's mere denials to the allegations made by the surveyor and the failure by the appellant to adduce any evidence in rebuttal. Counsel stated that the appellant's argument that the discrepancies between the ground acreage and the registered acreage was not an indication of an alteration could not hold because the variance itself was sufficient proof of "a prima facie case for alteration of the boundaries by the appellant".

28. Counsel contended that the court should not allow the appellant to escape liability because Section 22 of the *Land Registration Act* assigned responsibility to proprietors of land. Counsel added that the surveyor acted as an agent of the appellant.

29. On whether the trial magistrate erred in law and fact by making findings that the appellant encroached, trespassed on, caused damage to, visited or invaded the 1st and 2nd respondents' properties, counsel submitted that ample evidence was placed before the trial magistrate, demonstrating the threat to dispossess and undermine the respondent's right to property. Counsel contended that the 1st respondent's evidence was corroborated by photographic evidence which was neither challenged nor controverted during the hearing. Counsel submitted that the 2nd respondent further corroborated the 1st respondent's evidence.

30. Counsel argued that the appellant's assertion that the respondents ought to have called independent witnesses to identify him as being the trespasser was a misapprehension of the law because the threshold of proof in civil litigation did not require any independent corroborative evidence. Counsel contended that the evidentiary threshold for civil cases was one on a balance of probabilities which the respondents had met.

31. On whether the learned trial magistrate erred in law and fact by making the award in the Judgment. Counsel submitted that the 1st respondent specifically claimed special damages of Kshs 316,260 by stating the total figure of costs incurred to erect the developments on the suit property destroyed by the appellant, and provided a bundle of receipts to support the same as prayed in the plaint. Counsel submitted that there was no contradiction in the court's award on special damages as it only related to the 1st respondent who pleaded, particularized and produced receipts in support of the special damages award. Counsel faulted the appellant for relying on a "typographical error" referring to the 2nd respondent in plural as 'plaintiffs', contending that this was an error which did not change the substance of the award. Counsel argued that the appellant should have applied to the trial court to review the judgment in accordance with the principle of the "slip rule" which permitted a court to correct errors that were apparent on the face of the Judgment. Counsel relied on the decision in the case of Fredrick Otieno Outa v Jared Odoyo Okello & 3 Others [2017]eKLR to buttress his argument.

32. Counsel submitted that although the order for resurvey of Ruiru/Ruiru East Block 2/3110, was not prayed for in the plaint, the same was justified as being an appropriate relief that the trial court deemed fit in light of the unique circumstances of the case. Counsel further submitted that the trial court resolved the controversy by ordering the resurvey of the mother title (Ruiru/Ruiru East Block 2/3110), including the suit properties to avoid a plethora of subsequent litigation over the suit property by other owners.

33. Counsel further argued that the unscrupulous conduct of the appellant justified the award of exemplary and punitive damages of Ksh 500,000. Counsel relied on the decisions in the cases of The Nairobi Star Publication Limited v Elizabeth Atieno Oyoo[2018]eKLR and Abdulhamid Ebrahim Ahmed v Municipal Council of Mombasa [2004]eKLR .

34. On whether the learned trial magistrate erred in law and fact by assuming or clothing herself with jurisdiction unlawfully, counsel submitted that the honourable magistrate was within her jurisdiction in hearing the matter and granting the disposal orders since the dispute did not fall under the ambit of Sections 18 and 19 of the *Land Registration Act*, 2012. Counsel further contended that the appellant erroneously believed that the dispute was one of the nature of uncertain or undisputed boundary. Counsel further argued that the filing of a defense and proceeding to the full trial meant that the appellant had submitted to the jurisdiction of the trial court and hence the appellant should not be allowed to raise the issue of jurisdiction at this late stage. No such preliminary objection was raised

prior or during trial. Counsel contended that the trial magistrate's decision did not in any way usurp the Land Registrar's role, neither did she cloth herself with illegal jurisdiction because the boundary dispute had already been referred to the Land Registrar prior to the hearing. Counsel relied on the decision in Muraguri v Kamara Rukenya [1983]eKLR.

35. On whether the learned trial magistrate erred in law and fact by failing to grant a fair hearing, consider testimonies and submissions by any party, counsel submitted that the same were mere sweeping statements made by the appellant and were not supported by any evidence.

36. In conclusion, counsel for the 1st and 2nd respondents prayed that the appeal be dismissed and that the appellant bears costs of the appeal.

Analysis and Determination

37. I have read and considered the original record of the trial court together with the record filed in this appeal; the parties' respective submissions; the relevant legal frameworks; and the jurisprudence relevant to the issues that arise for determination in this appeal. This appeal challenges the trial court's findings and disposal orders.

38. The appellant itemized twelve grounds of appeal in his memorandum of appeal dated 29/11/2022. In his subsequent written submissions dated 6/2/2023, his advocate condensed the twelve grounds of appeal into the following four issues which he invited the court to determine: (i) Whether the learned magistrate erred in finding that the appellant had trespassed on the 1st and 2nd respondents' properties; (ii) Whether the learned magistrate erred in law and in fact by awarding special, aggravated, punitive, and exemplary damages to the 1st and 2nd respondents; (iii) Whether the learned magistrate erred in law by delving into and assuming jurisdiction over a boundary dispute; and (iv) Whether the learned magistrate erred in law by granting orders neither pleaded nor sought in the plaint. The issues identified by counsel for the appellant flow from some of the grounds that were itemized in the memorandum of appeal. I will accordingly dispose this appeal on the basis of the above four issues. The four issues will be analysed and disposed sequentially in the above order. Before I do that, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.

39. 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 Keshar 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 analyse, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions."

40. 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."

41. The first identified issue is whether the learned trial magistrate erred in finding that the appellant had trespassed on the 1st and 2nd respondents' properties. It does emerge from the record of the trial court that the dominant issue before the trial court was the question of the precise boundaries of the parcels

of land which the appellant had sold to the 1st and 2nd respondents. The question as to whether or not there was trespass on the said parcels could only be answered effectually after a determination of the boundaries relating to the affected parcels of land in accordance with the framework in Sections 18 and 19 of the *Land Registration Act*.

42. Sections 18 and 19 of the *Land Registration Act* contain the following framework which should have guided the 1st and 2nd respondents in their endeavour to obtain a redress:

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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 theboundaries 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.

43. It is clear from the pleadings and from the evidence that was placed before the trial court that there was bitter contestation over the boundaries of the relevant parcels of land. There is, however, no evidence on record to suggest that the contested boundaries had been determined or fixed in accordance with the provisions of Section 18 and 19 of the *Land Registration Act*. The disputed boundaries were general boundaries. In the circumstances, the trial court's finding on the question of trespass was made prematurely and without proper evidence relating to the precise boundaries of the relevant parcels. In light of the fact that the boundaries had not been fixed as by law required and there existed a boundary dispute, a conclusive finding on the question of trespass could only be made after compliance with the

provisions of Sections 18 and 19 of the *Land Registration Act*. It is therefore the finding of this court that the trial court made an error by prematurely pronouncing itself on the question of trespass in the absence of a determination by the Land Registrar of the precise boundaries of the affected parcels of land.

44. The second question is whether the trial court erred in awarding special, aggravated, punitive and exemplary damages to the 1st and 2nd respondents. I have made a finding to the effect that the finding on the question of trespass was made prematurely and without proper evidence. To the extent that the award of damages was anchored on the trial court's return of a finding of trespass by the appellant, the award of damages cannot stand.

45. Secondly, the law relating to special damages required the claimants to specifically plead and prove the special damages claim. Kenya's Court of Appeal emphasized this binding principle in Richard Okuku Oloo v South Nyanza Sugar Co Ltd [2013] eKLR in the following:

> " We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.
>
> In the Jivanji case (supra), a decision of this court differently constituted, it was held that the degree of certainty and particularity depends on the nature of the acts complained of. The following passage which partly quotes Coast Bus Service Limited v Murunga & Others Nairobi CA No. 192 of 1992 (ur) appears in the Jivanji case:
>
> > "It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of Kampala City Council vs Nakaye [1972] EA 446, Ouma v Nairobi City Council [1976] KLR 297 and the latest decision of this Court on this point which appears to be Eldama Ravine Distributors Limited and another v Chebon Civil appeal number 22 of 1991 (UR). In the latest case, Cockar JA who dealt with the issue of special damages said in his judgment:
> >
> > > "It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In Ouma v Nairobi City Council [1976] KR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages. Chesoni J quoted in support the following passage form Bowen LJ's judgment at 532-533 in Ratcliffe v Evans [1892] QB 524, an English leading case of pleading and proof of damage.
> > >
> > > The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

46. It is clear from the plaint which the 1st and 2nd respondents filed in the trial court that they did not bother to plead particulars of the special damages. Indeed, no special damages were pleaded in the main body of the plaint. It was only made as a prayer/ relief in the last paragraph of the plaint. Further, the trial court awarded special damages to both plaintiffs yet only the 1st plaintiff had prayed for special damages without particularizing them.

47. The reason why a claimant is required to specifically plead, particularize and prove every limb of the claim for special damages is to afford the defendant the opportunity to respond to the claim through pleadings and controverting evidence. The law does not permit condemnation of a defendant to pay special damages without giving him a proper opportunity to respond to the claim. Regrettably, the 1st and 2nd respondents ran afoul of this principle.

48. Lastly, the trial court's pronouncement on aggravated, punitive and exemplary damages was preceded by the following finding:

> " In this case the plaintiff have not adduced any evidence as to the state or the value of the parcel of land before and after trespass. This makes it difficult to assess the general damages. In the circumstances, I declined to award under this head." [sic]

49. It is strange that against the background of the above finding to the effect that the 1st and 2nd respondents had failed to tender evidence to facilitate an award of general damages, the trial magistrate proceeded to make an award of Kshs 500,000 as aggravated, punitive and exemplary damages. The circumstances under which an award of aggravated/ punitive/ exemplary damages are awardable are clear. In Abdulhamid Ebrahim Ahmed v Municipal Counsel of Mombasa[2004]eKLR the Court of Appeal observed as follows:

> " Exemplary damages on the other hand are damages that are punitive. They are awarded to punish the defendant and vindicate the strength of the law. They are awarded in actions of tort and only three categories of cases. The first category relates to oppressive, arbitrary or unconstitutional actions of servants of government. The other two categories are where the defendant's conduct is calculated to earn him profit and the third one is where exemplary damages are expressly authorized by statute.[emphasis ours]"

50. In Butt v. Khan [1981] KLR 349 the Court of Appeal rendered itself as follows:

> " An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

51. It is clear from the record of the trial court her was no proper evidence basis to warrant the award of aggravated, punitive and exemplary damages. The award was made without a proper basis. The totality of the above finding is that the trial magistrate erred in awarding special, aggravated, punitive and exemplary damages to the 1st and 2nd respondents.

52. The third issue is whether the trial court erred in delving into and assuming jurisdiction over a boundary dispute. I observed earlier than the dominant issue before the trial court was a question relating to the precise boundaries of the parcels of land. Put different, the dispute before the trial court was dominantly a land boundary dispute.

53. Section 18 of the *Land Registration Act* prohibits trial courts against entertaining boundary disputes unless the boundaries have been determined and fixed in accordance with the provisions of the said Section and Section 19 of the Act. I have reproduced the relevant framework in one of the preceding paragraphs.

54. The record of the trial court does not contain evidence of any entry made in the relevant land register indicating that the boundaries of the affected parcels had been fixed. Indeed, none of the parties to the suit tendered the relevant land registers as part of their evidence. Similarly, there was no evidence before the trial court indicating that the Land Registrar had been invited to determine the boundaries in accordance with the provisions of Sections 18 and 19 of the *Land Registration Act*. It is, in the circumstances, clear that the trial court exercised jurisdiction prematurely. At that point, the trial court had no jurisdiction to entertain the boundary dispute. The trial court should have downed it tools and directed the claimant to exhaust the redress mechanism provided under Sections 18 and 19 of the *Land Registration Act*.

55. The Court of Appeal spoke to the question of jurisdiction of the courts in boundary disputes in Azzuri Limited v Pink Properties Limited [2018] eKLR in the following words:

> " 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."

56. The Court of Appeal emphasized this position in Estate of Sonrisa Ltd and another v Samuel Kamau Macharia & 2 Others [2020] eKLR in the following words:

> " We ourselves find nothing untoward with the first sentence of that order. The ascertainment and fixing of boundary in dispute involve three parties, the owners of the affected parcels, the surveyor and the Registrar. Reference to the *Land Act* must have been a mistake. 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."

57. It does therefore emerge that the trial court exercised jurisdiction in the dispute prematurely. The court's jurisdiction had not crystallized. That is my finding on the third issue.

58. The last issue is whether the trial court erred in granting orders that were neither pleaded nor sought in the plaint. The appellant challenged the trial court's decision to issue an order directing the resurvey of Ruiru/Ruiru East Block 2/3110 for the purpose of establishing the correct boundaries. This particular relief was neither pleaded nor sought in the plaint. Secondly, there was evidence before the trial court indicating that 15 subdivisions parcelled out of Ruiru/Ruiru East Block 2/3110 had been sold and transferred to purchasers. Except the 1st and 2nd respondents, all the other purchasers were not parties to the suit. They are to be confronted with the order directing a resurvey without their participation in the suit. Put differently, they have been condemned unheard and the resurvey order has been issued without being sought by any of the parties to the suit. Without saying much, our laws do not permit that.

59. The importance and the centrality of pleadings in Kenya's legal system cannot be gainsaid. Pleadings define and delimit the issues in respect of which parties are required to respond to through response

pleadings and evidence. They define the issues which the court is invited to determine as between the parties before it. Put differently, a party's pleadings inform the opposing party what the party's case is; what should be expected during trial; and what should be expected in the final determination of the case. Pleadings put the opposing party on notice of the case that he is facing [See the Court of Appeal decision in Dakianga Distributors (K) Ltd v Kenya Seed Company Ltd].

60. In the suit giving rise to this appeal, the trial court granted the drastic order directing a resurvey of parcel number 3110 without being invited through pleadings to do so. The order for resurvey has the effect of annulling thirteen other [subdivision] titles whose holders were not parties to the suit. Those title holders have been condemned unheard. Clearly, this was an error on part of the trial court. That is not all.

61. At paragraphs 53, 54 and 55 of the written submissions of the 4th and 5th respondents, the duo expressly submitted that given that there was need to resolve the issue of boundaries and acreage, the plea for an injunction was untenable. They urged the court not to grant them that relief. What did the trial court do? It granted them the injunction which they had told the court not to grant them because it was untenable in the circumstances of the case. If not for any other reason, this appeal would succeed on the basis of this glaring irregularity.

62. For the above reason, it is the finding of this court that the trial court erred in granting orders that were not sought by the plaintiff.

63. The result is that this appeal succeeds. Given that the trial court did not have jurisdiction to entertain the dominant issue in the suit, I will set aside the findings and disposal orders of the trial court. I will however not issue an order dismissing the plaintiff's suit. I will instead issue an order striking out the suit on the ground of want of jurisdiction. This will allow the parties the opportunity to exhaust redress mechanisms relating to determination of boundaries as provided under Sections 18 and 19 of the *Land Registration Act*.

64. Taking into account the appellant's evidence to the effect that his agent [the surveyor] was the author of the problem giving rise to the dispute, and given the fact that the trial court failed to appreciate that it lacked jurisdiction to entertain the dispute, parties will bear their respective costs of this appeal and costs in the trial court.

Disposal Orders

65. In the end, this appeal succeeds and is disposed in the following terms:

    a. The Judgment of the trial court in Ruiru SPMC Environment & Land Case No E145 of 2021 rendered on 10/11/2022 is hereby set aside and is substituted with an order striking out the suit with no award order as to Costs.

    b. Parties shall bear their respective costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 18TH DAY OF SEPTEMBER 2023

B M EBOSO

JUDGE

In the Presence of: -

Mr Karwanda for the Appellant

Court Assistant: Hinga