



**In re Estate of Makokha Cheloti Lukhubi alias Makokha Chelot (Deceased) (Environment & Land Miscellaneous Case E001 of 2023) [2023] KEELC 21577 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21577 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND MISCELLANEOUS CASE E001 OF 2023  
EC CHERONO, J  
NOVEMBER 9, 2023  
IN THE MATTER OF THE ESTATE OF MAKOKHA CHELOTI  
LUKHUBI ALIAS MAKHOKA CHELOTI(DECEASED)**

**BETWEEN**

**VITALIS WAKHULEKA SIMIYU ..... APPLICANT**

**AND**

**LAND REGISTRAR BUNGOMA ..... 1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF SURVEY NAIROBI ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL KAKAMEGA ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Applicant, vide a Notice of Motion dated 17<sup>th</sup> July, 2023 and filed in court on 20<sup>th</sup> July 2023 seeks orders the following orders;
  - a. (Spent)
  - b. That pending the hearing and determination of this application, the Hon. Court be pleased to issue an order directing the 1<sup>st</sup> respondent land Registrar Bungoma to produce and give evidence to this Hon. Court on the current status of Land parcel NO. West Bukusu/South Mateka/31 for inter parte hearing
  - c. That pending the hearing and determination of this application this Honourable court do issue an order directing the 2<sup>nd</sup> respondent the director of Survey Nairobi to produce all the adjudication original Aerial Image document to ascertaining land parcel No. West Bukusu/ South Mateka/31 for inter-parte hearing.



- d. That the Hon. Court be pleased to issue orders in favour of the applicant and in strength of the evident that shall be adduced in court by the respondents for further transmission/action pertaining land parcel no. West Bukusu/South Mateka/31. And if need be this Hon. Court to visit land for the purpose of advising the way forward and further interpretation of the laws of the lands Act.
- e. That costs of this application be provided for by the 1<sup>st</sup> respondent.
2. The application is supported with an affidavit sworn by the Applicant herein on 17<sup>th</sup> July, 2023. The supporting affidavit is further supported by several annexures thereto which include a copy of a certificate of confirmation of grant, various receipts from the lands office, introduction letter by a Chief, letter dated 24<sup>th</sup> November, 2023 by the Land Registrar-Bungoma County, copies of 2 certificates of official search and an aerial view map.
3. The 3<sup>rd</sup> Respondent entered appearance upon service while the 1<sup>st</sup> and 2<sup>nd</sup> Respondent failed to enter appearance or file response thereto
4. The matter came up on 28<sup>th</sup> September, 2023 when directions were taken in the absence of the respondents who were duly notified and a date for ruling was reserved.
5. The applicant's case is that he was one of the beneficiaries of the estate of Makokha Cheloti whose free estate is land Parcel No. W.Bukusu/S. Mateka/31 and which was shared amongst the beneficiaries as shown in a Certificate of a confirmed grant of letters of administration. He averred that the Land Registrar Bungoma County has been frustrating their efforts to transmit the property despite presenting the certificate of grant forcing them to file the current application. The applicant further states that their prayer before the court is to have the 2<sup>nd</sup> Respondent ascertain the acreage of the property to confirm that the same tallies with the records held by the 1<sup>st</sup> Respondent.
6. I have considered the application, the supporting affidavit and the annexure's therein. Although the pleadings as drawn by the Applicant are not clear, I note that this is a matter that involves property of a deceased person where succession has been concluded and the beneficiaries are now seeking to enforce/execute the certificate of grant. From the present application, there are no substantive orders worth being granted since the Applicant's case is dependent on the respondent's case and as earlier noted, the respondents did not file any documentation.
7. Again, looking at the orders sought by the applicant and a copy of a letter by the Land Registrar-Bungoma County and the area Chief of Kabula Location, I note that the Applicant's wish is to identify the extent of Land Parcel No. W.Bukusu/S. Mateka/31 which in my view is a question of boundaries. Therefore, the Court's mind is drawn to the question of whether the Court is seized with jurisdiction to handle the issues it is called upon to determine. Since a Court must always satisfy itself of the jurisdiction in a matter, I will do so suo moto.
8. Jurisdiction is defined in *Halsbury's Laws of England* (4<sup>th</sup> Ed.) Vol. 9 as
- “the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.”
- Black's Law Dictionary*, 9<sup>th</sup> Edition, defines jurisdiction as the Court's power to entertain, hear and determine a dispute before it.
9. It is a well settled principle in law that jurisdiction is so central in judicial proceedings such that a Court acting without jurisdiction is acting in vain and all it engages in is nullity. Nyarangi, JA, in *Owners of*



Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] KLR 1 expressed himself as follows on the issue of jurisdiction: -

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...

10. On the source of a Court's jurisdiction, the Supreme Court of Kenya in Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & others (2012) eKLR stated as follows: -

A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution.

11. The jurisdiction of this court to hear and determine disputes relating to the environment, use and occupation of and title to land lies with Article 162 of the Constitution of Kenya, 2010 and Section 13 of the Environment and Land Court Act.

12. Article 162 provides as follows: -

162. System of courts

The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).

Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

- i. employment and labour relations; and
- ii. the environment and the use and occupation of, and title to, land.

Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

13. Under the Registered Land Act Cap 300 (repealed), Section 21(4) deprived this Court the power to entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided under the laws. Section 18(2) of the Land Registration Act, 2012, similarly prohibits this Court from entertaining any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in that section. It 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”.

14. Section 18(2) of the Land Registration Act provides in mandatory terms that the dispute should be submitted to the Land Registrar.

15. Under Section 19 of the Land Registration Act, 2012, the duty to fix boundaries to registered land is vested in the Land Registrar. It provides that:



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”.
16. It is manifestly clear that the entity which has the statutory mandate to avail an accurate plan of defined boundaries is the Land Registrar. This is also the entity which has the requisite expertise to undertake the aforementioned task.
17. In the Court of Appeal Case of *Estate Sonrisa Ltd & another v Samuel Kamau Macharia & 2 others* [2020] eKLR , the court stated as follows in relation to the application of Section 18 of the Land Registration Act:

“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.

.....

Under that Act, the Registrar carries out his functions without any restrictions and may rely on any other relevant document and existing records in order to resolve any dispute between landowners. Because a title deed is only prima facie evidence of the matters shown therein, the Registrar’s investigations, of necessity must encompass all entries in the register, rely on any other relevant document and existing records, conduct proceedings in accordance with section 14(1) and cause a survey to be carried out and determine the dispute .....

It is only after determining the dispute can parties move to court to challenge it (emphasize added).

18. The aforementioned case law clearly indicates that the dispute relating to boundaries ought to be resolved by the Land Registrar in the first instance. Any party aggrieved by the decision of the Registrar may challenge in court pursuant to the provisions of Sections 79 (3A), 80, 86 and 91 (9) of the Land Registration Act.
19. I note from the application and the affidavit in support thereof that the Applicant is alleging that the land registrar has been frustrating the beneficiaries. However, the Applicant has not attached any correspondences between him and the office of the Registrar depicting the alleged frustrations. The court has not been made aware of the outcome of the site visit held on 13<sup>th</sup> December,2020 as can be



seen from a letter by the Land Registrar calling for purposes of ascertaining and fixing boundaries. Even looking at the “orders” as sought without a substantive prayer, the application is misconceived and incompetent as any of the relief sought can only be granted if there is pending a substantive prayer in the main suit/case. This being a Miscellaneous Application, the orders sought are untenable.

20. It is trite law that where the law has given a legal obligation to a department of Government, it is important for the Court to allow that department proceed to perform its legal obligation/mandate. In this case, the office of the Land Registrar is mandated to deal with the general boundary dispute first before the same is escalated to the Courts. It is my view that the dispute herein is premature.
21. In the end, the application dated 17<sup>th</sup> July, 2023 is hereby struck out with no orders as to costs.
22. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**HON.E.C CHERONO**

**ELC JUDGE**

**In the presence of;**

1. Applicant-present
2. Respondent/Advocate-absent
3. Okwaro C/A.

