



**Pete v Kidiga (Environment and Land Appeal E057 of 2024)  
[2025] KEELC 4910 (KLR) (30 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4910 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E057 OF 2024**

**E ASATI, J  
JUNE 30, 2025**

**BETWEEN**

**PETER OTIENO PETE ..... APPELLANT**

**AND**

**GEORGE AOL KIDIGA ..... RESPONDENT**

*(Being an appeal from the decision of the District Land Registrar (NICHOLAS A. OBIERO) dated 20th June 2024)*

**JUDGMENT**

1. Vide the Memorandum of Appeal dated 30<sup>th</sup> July, 2024, the Appellant appealed against the decision of District Land Registrar (Nicholas Obiero) dated 20<sup>th</sup> June, 2024.
2. The grounds of appeal are that;
  1. The District Land Registrar erred in law and especially with regards to his authority accorded by sections 14 and 18 of the *Land Act* by flagrantly failing to conduct an independent inquiry into the dispute in order to establish the truth from the testimonies and evidence of Appellant witnesses summons and present to establish a conclusive finding.
  2. The Land Registrar erred in law and in fact in using Preliminary Index Diagram as the primary source of evidence contrary to the provisions of the *Land Registration Act*, 2012, to the effect that the map is not an authority on boundaries.
  3. That the Land Registrar erred in law and in fact in failing to employ the dictates of the Fair Administration of Actions Act which compel an Administrator (Land Registrar) to accord affected persons with an opportunity to be heard and to cross-examine persons who gave adverse evidence or information against them.



4. The Land Registrar erred in law and in fact by not appreciating that he lacked the requisite jurisdiction to make a determination of the matter, it being a land claim and not a boundary dispute.
5. The said Land Registrar did not adjudicate the dispute impartially and was influenced by extraneous matters hence the erroneous decision.
3. The Appellant sought for orders that;
  - a. The appeal be allowed.
  - b. The Registrar's decision dated 20<sup>th</sup> June, 2024 and all consequential orders be set aside.
  - c. That another Land Registrar other than Nicholas A. Obiero be ordered to visit the disputed area in compliance with sections 14 and 87 of the [Land Registration Act](#).
  - d. The costs of the appeal be awarded to the Appellant.
4. A brief history of the appeal is that the Respondent initiated a land boundary dispute between himself and the Appellant herein which dispute was handled by the Land Registrar, Kisumu in respect of land parcel numbers Kisumu/Nyalunya/3405 & 7235, 7237, 7238 and 3070.
5. The record shows that subsequently the Land Registrar prepared a report dated 20<sup>th</sup> June, 2024 where the Land Registrar made a determination as follows;
  - i. The Appellant had encroached into the present Respondent's land parcels Kisumu/Nyalunya/3405 & 7235 fenced part of them and is currently constructing inside.
  - ii. The entire fencing and construction fell inside the Respondent's land.
  - iii. The Appellant herein may stop the illegal construction and remove the structures and fences that he has erected on the Respondent's land. In default, the Applicant (Respondent herein) should then move to court to seek for eviction and demolition orders as this office lacks the jurisdiction to issue such orders.
  - iv. Parties have the right to appeal this determination under section 86 of the [Land Registration Act](#) within 30 days from the date hereunder, 20<sup>th</sup> June, 2024.
6. The Appellant herein was aggrieved by the decision and preferred the present appeal.

### **Submissions**

7. The appeal was heard by way of both written and oral submissions.
8. It was submitted on behalf of the Appellant that the Land Registrar did not follow the procedure under the law. That the Land Registrar acted illegally, irregularly and that there was evidence of procedural impropriety which resulted in prejudice to the Appellant's interests and infringed on his rights, leading to miscarried of justice and a grossly unfair outcome.
9. That the Land Registrar did not allow witnesses to testify. That the Land Registrar ignored the Appellant's plea for him to conduct a hearing. That the decision of the Land Registrar had the effect of alienating to the Respondent a portion of land that was not even under the dispute.
10. That the Land Registrar used Preliminary Index Diagram as the primary source of data and survey. That under Section 18 of [Land Registration Act](#), Preliminary Index Diagram shows only the approximate area and location of parcels (and not the boundaries) and therefore should not be used



without getting views from persons who have lived long in the area and therefore are acquainted with the precise positions of the relative boundaries. That the map serves more as an index for the parcels within an area and not an accurate map base from which to extract survey measurements for use on property boundaries.

11. That only the evidence of land owners who have lived on an area for long helps. That the Land Registrar by using the Preliminary Index Diagram as the base map exacerbated an already a violated situation and this made the Land Registrar to push the boundary further and deep into the Appellant's land to an area which was not even in dispute.
12. Counsel relied on the case of Samuel Wangan -vs- Attorney General & 2 Others (2009)eKLR to support the submissions.
13. Counsel submitted further that Land Regulation 40(6) – allows any party aggrieved by the decision of the Registrar to within 30 days of the date of notification of the Land Registrar's determination appeal the decision.
14. Counsel submitted that the Appellant was never notified of the decision and only became aware of it in pleadings filed in ELC Case No.100 of 2024. That it therefore follows that the date of notification is the date the Appellant became aware of the decision.
15. On jurisdiction of the Land Registrar, Counsel submitted that Regulation 40(4) stipulates that in determining a boundary dispute, the Registrar shall be guided by the recommendations by the office responsible for survey of land. That the recommendations of the Surveyor as contained in the Surveyor's report is that the issue in dispute is a land claim and therefore the Land Registrar lacked jurisdiction on issues of land claim as it is only the Environment and Land Court that possesses the jurisdiction over land claims and/or ownership claims.

### **Submissions for the Respondent**

16. On behalf of the Respondent, written submissions dated 3<sup>rd</sup> February, 2025 were filed by the firm of Okal Odero & Company Advocate. Counsel submitted that the jurisdiction of this court has been improperly invoked and that the court lacks the jurisdiction to hear and determine the appeal Relying on the provisions Regulation 40(6) of the Land Registration (General) Regulations 2017, Counsel submitted that the parties were notified of the decision of the Land Registrar on 20<sup>th</sup> June, 2024.
17. That the failure of the Appellant to lodge the appeal within 30 days from the date of notification renders the appeal a nullity. That the appeal being a nullity, the honourable court lacks jurisdiction. That the Appellant did not seek leave to appeal out of time.
18. Counsel relied on the case of In re estate of Edward Rayori Ochar (Deceased) Succession Appeal E007 of 2022 [2023] KEHC (KLR) (14 November, 2023) Ruling Neutral Citation: [2023] KEHC 25405 (KLR) where it was held, inter alia, that an appeal filed out of time without leave of the court is incompetent and the Court cannot lawfully exercise jurisdiction on such appeal.
19. Counsel submitted that the appeal before court is incompetent and the same ought to be dismissed.
20. Counsel submitted further that though the court directed the Appellant to file Record of Appeal none was filed hence the decision appealed from is not before court. That what is before court is only the Memorandum of Appeal dated 30<sup>th</sup> July, 2024. That for that reason the appeal is incompetent.
21. Counsel submitted further that the court is seized with jurisdiction if there are competent parties before it. That the Appellant has selectively appealed against the Respondent yet the Respondent



did not make any decision. That the failure to appeal against the decision maker against whom the Appellant seeks the orders renders the appeal incompetent.

22. That to proceed to hear the appeal and make orders against the person who made the decision without according him a hearing will be in contravention of article 50 of *the Constitution* as no party should be condemned unheard. Counsel relied on the case of Karugia & Amos -vs- Kabuya & Others Civil Appeal No.80 of 1982 for this submission.
23. Counsel urged the court to find that the appeal is a nullity and incompetent and that the court lacks jurisdiction and dismiss the appeal with costs.

### **Issues for determination**

24. The issues that arise herein for determination herein are;
  - a. whether or not the appeal was filed out of time and heard without Record of Appeal being filed therefore incompetent.
  - b. whether or not the court has jurisdiction to hear the appeal.
  - c. whether the appeal has merit.
  - d. Costs of the appeal.

### **Analysis and determination**

25. This being a first appeal the court has a duty to reconsider the whole evidence produced before the trial court, re-evaluate it and arrive at its own independent conclusion. While doing so, the court keeps in mind the fact that the trial court had the advantage, which this court does not have, of seeing and hearing the parties and their witnesses first hand. In the case of Gitobu Imanyara & 2 others –vs- Attorney General [2016] e KLR the court held that the principles upon which a first appellate court proceeds are well settled and stated that:-

"Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect".

(Also see *Selle & another vs Associated Motor Boat Company Ltd & Another* (1968) IEA 123 and *Peter M. Kariuki vs attorney General* [2014]eKLR)

26. The first issue for determination is whether or not the appeal was filed out of time
27. The decision appealed against is contained in the Records of Appeal dated 10<sup>th</sup> September, 2024 filed on 13<sup>th</sup> September, 2024 contrary to submissions of the Respondent, there is a record of appeal filed.
28. The decision is dated 20<sup>th</sup> June, 2024. The timelines for filing appeal from the decision of Land Registrar are provided for in Regulations 40(4) of the Land Registration (General) Regulations 2017 which provides that;

Any party aggrieved by the decision of the Registrar made under paragraph (5) may, within thirty days of the date of notification appeal the decision to the court."

29. Regulation 40(5) requires the Land Registrar after making a determination of the dispute to inform the parties accordingly.



30. The Appellant's case is that he was not informed or notified of the determination of the Land Registrar and only became aware of the same through the pleadings of case No. ELC No.100 of 2024.
31. The position of the Respondent is that the parties were informed and/or notified of the decision of the Land Registrar on 20<sup>th</sup> June, 2024.
32. Perusal of the proceedings before the Land Registrar dated 20<sup>th</sup> June, 2024 shows that the ground visit was on 18<sup>th</sup> June, 2024 when the parties attended and their statements recorded. There is nothing on the decision or proceedings to show that the parties were informed of the decision on 20<sup>th</sup> June, 2024.
33. Since the law requires that the parties be informed of the decision or determination of the Land Registrar accordingly, it was crucial that evidence be availed that the parties were indeed informed.
34. In the absence of evidence of notification of the Appellant of the decision of the Land Registrar, the burden rests with the Respondent who claims that the parties were notified to prove the notification as provided in section 109 of the *Evidence Act*. The Respondent has not discharged this burden by producing evidence of notification.
35. I find that the appeal was filed within time from the date the Appellant became aware of the decision appealed against.
36. The next issue for determination is whether the court has jurisdiction to entertain the appeal.
37. The jurisdiction of this court is drawn from article 162(2) (b) of *the Constitution* of Kenya to handle disputes relating to the Environment and the use and occupation of, and title to land and section 13 of the *Environment and Land Court Act*.
38. The Respondent's contention is that the appeal having been filed out of time is a nullity and the court lacks jurisdiction to handle it. Having found that the appeal was filed within time from the date of notification, the issue of jurisdiction does not arise.
39. The next issue for determination is whether or not the appeal has merit.
40. The grievance of the Appellant against the decision of the Land Registrar is firstly, that the Land Registrar failed to hear witnesses before making his decision.
41. Perusal of the proceedings before the Land Registrar do not show that any of the parties presented witnesses and were denied opportunity to be heard. The record shows that both the Appellant and the Respondent were heard before the Land Registrar proceeded to make his determination.
42. The second grievance is that the Land Registrar relied on the Preliminary Index Diagram and Registry Index Map (RIM) maps instead of evidence of the land owners and witnesses. The proceedings however show that the Land Registrar relied on the evidence of both parties, the boundary features on the ground and the maps. The Surveyor's report confirmed this.
43. The Appellant claims that the Surveyor recommended that the dispute was a land claim and not a boundary dispute and therefore outside the jurisdiction of the Land Registrar. However, perusal of both the Surveyors report dated 20<sup>th</sup> June, 2024 and the determination by the Land Registrar, reveal that the substantive findings were that the Appellant had trespassed onto the Respondent's parcels of land.



44. The Land Surveyor's recommendation was that;

The proprietor of Kisumu/Nyalunya/3405 and 7235 one George Aol Kidiga to seek court redress in order to obtain an eviction and/or demolition order.”

45. The Land Registrar similarly made a determination partly that the Appellant herein had encroached onto the land parcel number Kisumu/Nyalunya/3405 and 7235 and ordered the Appellant to stop the illegal construction and remove the structure and fences he had erected failing which the Respondent herein could move to court to seek for eviction and demolition orders.

46. While the appellant's grievances are against the Land Registrar, the Land Registrar was not made a party in the appeal.

### **Conclusion**

47. The court has made a determination that although the appeal was filed in time and record of appeal containing the decision of the Land Registrar and other documents filed, the appellant has not been able to prove his grievances and/or grounds of appeal raised.

48. The court finds that the appeal lacks merit and hereby dismiss it.

Costs to the Respondent.

Orders accordingly.

**JUDGMENT DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 30<sup>TH</sup> DAY OF JUNE, 2025 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI**

**JUDGE.**

In the presence of:

Maureen: Court Assistant.

Okello for the Appellant.

Gichaba for the Respondent.

