



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE NUMBER 52 OF 1988

IN THE MATTER OF THE ESTATE OF THE LATE NJOROGE GIOKO (DECEASED)

MICHAEL KIRIKA NJOROGE.....APPLICANT/RESPONDENT

VERSUS

BENJAMIN KIMANI.....1ST INTENDED INTERESTED PARTY/APPLICANT

GEORGE HIUHU.....2ND INTENDED INTERESTED PARTY/APPLICANT

R U L I N G

1. On 29th October 2019 the Notice of Motion dated 28th October 2019 was placed before me under Certificate of Urgency. Brought under Section 1A, 1B, 3A of the Civil Procedure Act and Order 51 of the Civil Procedure Rules it sought orders;

1. Spent

2. Spent

3. Spent

4. Spent

5. Spent

6. THAT this Honourable Court be pleased to set aside its order dated 1st November 2018.

7. THAT the boundaries of Land Reference No. Githunguri/Gathangari 624 belonging to the Respondent, Githunguri/Gathangari/1033 belonging to the 1st intended Interested Party and Land Reference No. Githunguri/Gathangari/1034, belonging to the 2nd Intended Interested Party, prior to 1st October 2019, be restored with the assistance of the Officer Commanding Station, Githunguri Police Station.

8. THAT the costs of this application be in the cause.

2. The grounds for the application as set out on its face were;

1. THAT the respondent holds letters of administration for Land Reference No. Githunguri/Gathangari/624.

2. THAT Land Reference No. Githunguri/Gathangari/624 borders the 1st intended interested party's Land Reference No. Githunguri/Gathangari/1033.

3. THAT on 1st November 2018, this Honourable Court ordered the Kiambu District Surveyor to amend the perimeter boundary of the Land Parcel Number Githunguri/Gathangari/624.

4. THAT this order affected Land Reference No. Githunguri/Gathangari/1033.

5. THAT the 1st intended interested party was never served with the order or application to amend the boundary.

6. THAT the amendment of the boundary of the 1st intended interested party Land Reference No. Githunguri/Gathangari/103, affects the boundary of the 2nd intended interested party's Land Reference No. Githunguri/Gathangari/1034.

7. THAT the 2nd intended interested party was never served with the order or application to amend the boundary.

8. The Ministry of Lands issued its report in letters dated 27th February 2019 and 4th April 2019 to this Honourable Court explaining that the boundaries of Githunguri/Gathangari/624, Githunguri/Gathangari/1033 and 1034 could not be altered as the owner of Land Reference Githunguri/Gathangari/624, Wanjiku Njoroge, now deceased had in 1994 conceded to the altered boundaries.

9. THAT despite having had knowledge of the reports above, on or about 15th October 2019 the respondent trespassed on Land Reference No. Githunguri/Gathangari/1033 of the 1st intended interested party, damaged property thereon and moved the beacons without any authority.

10. THAT despite demand and notice of intention to sue, the respondent continues with such trespass.

11. THAT the respondent has not replied to the demand or provided the written authority under which he altered the boundaries.

12. THAT unless this matter is certified urgent and status quo prior to 1st October 2019 restored, the applicants who have suffered loss and damage will continue to suffer.

13. THAT this court lacked jurisdiction to issue the order affecting the boundaries of the three properties.

14. THAT succession matters are only limited to the estate of a deceased. The Court lacked jurisdiction to issue an order affecting the boundaries of properties that were not part of the estate, that is Land Reference No. Githunguri/Gathangari/1033 and Githunguri/Gathangari/1034.

15. THAT the order of 1st November 2018 was issued in breach of the Rules of Natural Justice. Though the 1st and 2nd intended interested parties' properties were affected, they were never given a hearing or served with the order of this Honourable Court.

3. The application is supported by the affidavit of Benjamin Kimani interested party on his behalf and on behalf of the 2nd interested party George Hiuhu. Reiterating the grounds for the application he deponed as follows;

3. THAT my deceased mother, Peninah Kabura Njane was the owner of Githunguri/Gathangari/1033. I mark "A" and exhibit hereto a copy of her title deed.

4. THAT I am the administrator of the estate of Peninah Kabura Njane. I mark "B" and exhibit hereto a copy of the petition for letters of administration.

5. THAT the 2nd intended interested party is the owner of Githunguri/Gathangari/1034. I mark "C" and exhibit hereto a copy of his title deed.

6. THAT the Land Reference Githunguri/Gathangari/1033 borders Githunguri/Gathangari/624. I mark "D" and exhibit hereto a copy of the diagram showing the ground situation.

7. THAT the Ministry of Lands issued its report in letters dated 27th February 2019 and 4th April 2019 explaining that the boundaries of Githunguri/Gathangari/624, Githunguri/Gathangari/1033 and Githunguri/Gathangari/1034 could not be altered as the owner of Land Reference Githunguri/Gathangari/624, Wanjiku Njoroge, now deceased had in 1994 consented to the altered boundaries. I mark "E" and exhibit hereto the letters.

8. THAT on 15th October 2019 I received a call from my sister, Hannah Wanyora Njane, informing me that the Respondent was trespassing on our land, damaged property thereon, and moved the beacons without any authority.

9. THAT I called the Assistant Chief, Nunga Kahara who informed me that she was called by the Respondent to provide security for him to lay his beacons.

10. THAT I went to our land and found the respondent in presence of the Assistant Chief and Administration Police Officers placing beacons on the land.

11. THAT during the exercise they damaged a line of our maize and napier grass. I mark "F" and exhibit hereto photos showing the line of maize damaged and the placed beacons.

12. THAT on 18th October 2019 I went to report the matter to the Director of Criminal Investigation Githunguri. When I was there, I was shown a bundle of documents including a court order made on 1st November 2018 by Honourable Justice A. K. Ndung'u.

13. THAT Land Reference Githunguri/Gathangari/1033 is not part of the Estate administered by the Respondent.

18. THAT the boundary for Githunguri/Gathangari/1033 has been in existence for over 50 years and no complain has ever risen.

19. THAT the deceased, Wanjiku Njoroge, in 1994 consented to the boundaries.

4. The letter from District Survey Office Kiambu dated 27th February 2019 ref. KD/KBU/2/26/VOL.18/2 was addressed to the Deputy Registrar Nakuru saying.

“RE: SUCCESSION CAUSE NO. 52 OF 1998 IN THE MATTER OF THE ESTATES OF THE LATE NJOROGE GIOKO”

The above subject matter refers.

The District Surveyor of Kiamba was ordered to establish the correct boundary for the purposes of amendment of our land records. The surveyor visited the site on 30th January, 2019 as per the summon letter dated 8th January, 2019.

The owners of Githunguri/Gathangari/624 and Githunguri/Gathangari/627 which was later sub divided into two resulting to Githunguri/Gathangari/1033 and 1034.

This is a brief history of the individual parcel:

a. The owner of Githunguri/Gathangari/1033 stated that the boundary has been in existence since 50 years ago and no complain has ever risen.

b. The owner of Githunguri/Gathangari/1034 stated that he bought the land and those were the boundaries that he was shown.

c. The owner of Githunguri/Gathangari/624 did subdivide the land in 1994 and after the subdivision the District Surveyor then recommended that the mutations be amended as per the ground situation. Njoroge Wanjiku did consent by signing the mutations indicating a sign of agreement.

Find the attached copies of mutations, summon letter, green cards, R.I.Ms and diagrams show the ground situations peruse.

J. D. Muchungu

District Surveyor

KIAMBU

Cc: 1. Michael Kirika Njoroge

2. Hanna Wanyora

3. Hiuhu Ng'ang'a”

A further letter dated 4th February 2019 ref. KD/KBU/26/VOL.18/34 said;

“RE: SUCCESSION CAUSE NO. 52 OF 1998 IN THE MATTER OF THE ESTATES OF THE LATE NJOROGE GIOKO”

Please refer to our previous report Ref. No. KD/KBU/2/26/VOL.18/2 dated 27th February, 2019 on the above subject matter.

We would like to clarify some issues regarding this exercise as per the court order. The District Surveyor was required to amend the perimeter boundary of the land parcel No. Githunguri/Gathangari/624.

Apart from what is contained in the previous report it should be noted that the ground and R. I. M. measurement differs completely. Therefore, we decided to measure the following existing boundaries as per ground for the following parcels of land namely Githunguri/Gathangari/624, Githunguri/Gathangari/1033 and Githunguri/Gathangari/1034 and this was our findings;

- The area for parcel No. Githunguri/Gathangari/624 is 8.13 Ha on the ground while the registered acreage is 8.88 Ha.
- The adjacent parcel No. Githunguri/Gathangari/1033 measures 1.48 Ha on the ground but the registered acreage is 1.00

- Ha.
- The next parcel No. Githunguri/Gathangari/1034 measures on the ground as 3.34 Ha while the one registered in our records is 2.64 Ha.

Attached find the diagrams illustrating the ground situation versus the registered area as per the R.I.M.

While the survey office was able to take measurements of the three parcels, it was not possible to shift the boundaries of the parcels as per the R.I.M. or as per the existence on the ground. The Land Registrar was required to be present during the exercise as per the Registration Land Act 2012 section 16(1) to suggest any necessary decision.

It is also our request that the other parties of parcel No. Githunguri/Gathangari/1033 and 1034 are enjoined in the suit to enable the Land Surveyor and the Land Registrar to effectively carry out the exercise regarding the boundaries.

I hope this report will assist the honourable court.

Thank you.

J. D. Muchungu

District Surveyor

KIAMBU.”

(emphasis mine)

5. In opposing the application, the respondent Michael Kirika Njoroge, swore an affidavit on 8th November 2019. He deponed as follows:-

5. On or about January, 1994 my late mother, Wanjiku Njoroge wanted to subdivide the property subject matter herein. Upon assessing the application for subdivision, the then Kiambu District Surveyor noted that the dimension details on the mutation forms were not accurate and true presentation of the actual ground dimensions. He recommended the Registry Index Map (RIM) to be amended to reflect the actual ground. My mother appended the thumb print to consent to the said changes (annexed hereto and marked exhibit “MK-1” is a true copy of the said mutation form).

6. Survey of Kenya returned the application for mutation vide a letter dated 21st December, 2010 advising the Kiambu District surveyor that the boundaries on record do not enclose the entire parcel number Githunguri/Gathangari/624 and need to be amended appropriately (Annexed hereto and marked exhibit “MK2” is a true copy of the said letter dated 21st December, 2010).

7. I moved this Honourable Court for orders, among others, to move the Kiambu District Surveyor to amend the perimeter boundary for land parcel number Githunguri/Gathangari/624. The court did issue orders to that effect on 1st November, 2018 (Annexed hereto and marked exhibit “MK – 3” is a true copy of the court order).

8. I served the Kiambu District Surveyor with the orders on 8th November, 2018. I was advised to make an official payment for the surveyor works to implement the court order. On 24th January 2019 I paid a sum of Kenya Shillings Twenty Eight Thousand Five Hundred (Kshs. 28,500/=) (Annexed hereto and marked exhibit “MK-4” is a true copy of the official receipt serial number 582874 evidencing the said payment).

9. Via a letter dated 8th January, 2019 the Kiambu District Surveyor through the area chief, Gathangari Location invited Michael Kirika, Hanna Wanyora, sister to the Interested party and Hiuhu Ng’ang’a the 2nd interested party to be present for the purposes of establishing the ground dimensions versus the map situation (Annexed hereto and marked exhibit “MK – 5” is a true copy of the District Surveyor’s letter dated 8th January 2019).

10. On 30th January, 2019 the Kiambu District Surveyor and his assistants visited the property and conducted a survey exercise. The measurements were done and a report made by the Kiambu District Surveyor. The report had a satellite photograph, a map sketch and a written summary of the exercise. (Annexed hereto and marked exhibit “MK-6” is a true copy of the satellite photographic image, a map sketch and the said report).

11. The primary findings of the report (Annexed hereto and marked exhibit “MK-7” is a true copy of the satellite photographic image, a map sketch and the said report) were as follows;

- a) The area for parcel number Githunguri/Gathangari/624 is 8.13 Ha on the ground while the registered acreage is 8.88 Ha (deficit of 0.75 Ha).
- b) The adjacent parcel number Githunguri/Gathangari/1033 measures 1.48 Ha on the ground but the registered acreage is 1.00 Ha (excess of 0.48 Ha) and

c) The next parcel No. Githunguri/Gathangari/1034 measured on the ground as 3.34 Ha but registered as 2.64 Ha (excess of 0.70 Ha).

12. The above findings are supported by respective official copies of the Land Registry Entries (green cards) for the respective properties (Annexed hereto and marked exhibit "MK – 8 is a true copy of the green card).

13. On 20th September, 2019 the Kiambu District Surveyor, through the Officer Commanding Station (OCS) Githunguri wrote a letter inviting the parties to be present on the land parcel numbers Githunguri/Gathangari/624, 1033 and 1034 on 15th October 2019 for the purposes of placing beacons in accordance with the findings of the survey done on 30th January 2019 (Annexed hereto and marked exhibit "MK-9" is a true copy of the said letter).

14. The interested parties via the sworn affidavit of Benjamin Kimani alleges that the registered owner of land parcel numbers Githunguri/Gathangari/624 did consent to the inconsistency on the boundary on the ground and the map. They also allege that the Ministry of Lands confirming the same. It is a shame that the allegations cannot be supported by any material evidence.

15. The boundary of both Githunguri/Gathangari/624 and 1033 were in existence since 1966 when of parcel no. Githunguri/Gathangari/627 was subdivided to 1033 and 1034. Njoroge Gioko, the registered owner of No. Githunguri/Gathangari 624 raised boundary issue with the owner of parcel no. 1033, one Mr. Eliud Njane. The matter was handled by local elders without much success.

16. On 15th October 2019, at around 11.30 a.m. to 1.00 p.m. the Kiambu District Surveyor together with his assisting officials and security from Kambaa Administration Police Post marked and erected permanent boundary beacons. The area assistant chief was in attendance together with local community elders.

18. on 2th October 2019, through my advocate, I wrote a letter to both interested parties herein giving them a 30-day notice to vacate all areas comprising land parcel number Githunguri/Gathangari/624 through the office of the area chief (Annexed hereto and marked exhibit "MK-10" is a true copy of the said letter).

19. Instead vacating the respective portions, they have unlawfully occupied for about fifty years, the Interested Parties served me with a letter on 26th October 2019 accusing me of trespassing into their properties.

Annexed to the affidavit are mutation forms for Githunguri/Gathangari/624 letter dated 21st October 2010 ref. SK/5/17/vol. 36/282, Survey of Kenya to District Surveyor Kiambu;

"The District Surveyor

P.O. Box 651

KIAMBU

RE: RETURN OF MUTATION (GITHUNGURI/GATHANGARI/624

Forwarded herewith find the above mentioned mutation.

The parcel subdivided i.e. 624 does not correspond with our records i.e. the perimeter boundary is different hence a portion of the said plot is left out.

The affected portion is adjacent to parcel No. 1033.

R. E. Mukhwana

FOR: DIRECTOR OF SURVEYS

Encls"

The Order dated 1st November 2018 from *Ndung'u J* which states

"IT IS HEREBY ORDERED: -

1. THAT MICHAEL KIRIKA NJOROGE do substitute WANJIKU NJOROGE (now deceased) as the administrator of the estate of the late NJOROGE GIOKO.
2. THAT the Kiambu District Surveyor is hereby ordered to amend the perimeter boundary of the land parcel number Githunguri/Gathangari/624 to enclose the entire parcel to correspond with the Kiambu Lands Registry records.

GIVEN under my hand and the seal of this Court this 1st day of November, 2018.

A. K. NDUNG'U

ISSUED at Nakuru this 1st day of November 2018

DEPUTY REGISTRAR”

There is a Letter from the District Survey Office of 8th January 2019 KD/KBU/2/26/VOL 17/6 inviting the parties herein to witness the *“establishing of the ground situation versus the map situation.”*

The letter District Surveyor letter of 4th April, 2019 and map for 1033, 1034 and 624 letter ref KD/KBU/2/26 Vol. 19/87 dated 20th September 2019, to OCS Githunguri Police Station to provide security during the implementation of the court order dated 1st November 2018. The letter is copied to DCIO, OCPD, Area Assistant Chief, Gathangari, the applicant and the owner of 1033 and the Notice to vacate addressed to applicants dated 25th October 2019 Ref. D1/AA002/18 from Atunga & Associates Advocates.

6. When the matter came for inter-partes hearing on 12th November 2019, Mr. Mapesa for the interested parties/applicants informed the court that the respondent had not complied with orders of 29th October 2019, not to trespass. He had also not responded to the application within seven (7) days of service as ordered and had served the Replying Affidavit that same morning. Mr. Mapesa's prayer was that the respondent be denied audience, and the offending Replying Affidavit be purged out of the proceedings. Mr. Atunga for the respondent urged the court not take that draconian position and to allow the affidavit as having been served on time. He explained that this being a land matter the delay had been caused by their need to obtain the requisite documents to argue their case.

7. Mr. Mapesa urged the court to deem the application as unopposed and grant the orders sought.

8. However, after due consideration of the issues at hand I overruled the objections, deemed the Replying Affidavit as duly filed and awarded costs to the interested party/applicants.

9. Counsel consented to proceed by way of written submissions and highlights.

10. On 19th December 2019 the matter came up for compliance. Again Mr. Mapesa pointed out that there was persistent disobedience of this court's orders of 29th October 2019 and they had been compelled to file a Notice of Preliminary Objection, Supplementary Affidavit together with their submissions. The Notice of Preliminary Objection was filed on 16th December 2019 on the grounds;

“1. The Respondent, Michael Kirika Njoroge, having willfully disobeyed the order of this Honourable Court dated 29th October 2019 has no right of audience before this Honourable Court. He must first purge the contempt.

2. The Respondent's Replying Affidavit dated 8th November 2019 and filed on 12th November 2019 ought to be consequently struck out in limine.

3. The Respondent, having willfully disobeyed the Order dated 29th October 2019 has usurped the Authority of this Court under Article 160 of the Constitution and the rule of law and should lose his right to be heard.”

11. To this, Mr. Atunga submitted that they had been serve only with the supplementary affidavit and written submission, two (2) days before and they were not in a position to respond and prepare for highlights, to which Mr. Mapesa responded that that they had not complied with the order on submissions, because of the respondent's persistent disobedience of the court order of 29th October 2019. He persisted with his submission that respondent be denied audience.

12. I considered these rival submissions very carefully. I was not persuaded that what was alleged to be happening in Githunguri could affect the counsel's ability to prepare his submissions on his own application and serve them in good time. I had already dealt with the issue of the affidavit and did not wish to go back there. I found that this time the interested parties had caused an adjournment without good reason, and had to pay costs. Both Counsel agreed to new timelines for submissions.

13. Mr. Atunga filed submissions on the Notice of Preliminary Objection on 28th January 2020, together with submissions on the main application. The Interested Parties were filed on 16th December 2019 by Kilonzo & Company Advocates.

14. I have read the submissions and perused the authorities cited.

15. The genesis of this matter is set out in the rival affidavits I have set out herein above, and was triggered by the actions of the respondent in this cause which is with regard to the Estate of Njoroge Gioko who died on 13th September 1988. The grant issued to Wanjiku Njoroge was confirmed on 16th February 1994. One of the assets was Githunguri/Gathangari/624. She later died.

16. On 7th August 2018 the respondent filed Chamber Summons seeking orders;

1. The Application be heard ex-parte.

2. This Honourable court be pleased to substitute WANJIKU NJOROGI (now deceased) as the administrator of the estate of the late NJOROGI GIOKO with MICHAEL KIRIKA NJOROGI.

3. This Honourable Court be pleased to issue orders to allow the Kiambu District Surveyor to amend the perimeter boundary of land parcel number Githunguri/Gathangari/624 to enclose the entire parcel to correspond with the Kiambu Lands Registry records.

On the grounds

a) Wanjiku Njoroge, the sole administrator of the Estate of the late Njoroge Gioko passed away on 26th March, 2008.

b) Land Parcel Number Githunguri/Gathangari/624 forms part of the Estate of the late Njoroge Gioko as listed in the schedule of properties in the Certificate of Grant.

c) The Survey of Kenya has identified an inconsistency in the perimeter boundary and the maps at the Survey of Kenya registry in the aforementioned parcel of land in (b) above. The inconsistency has caused part of the land parcel to be left out of the Estate.

d) To cure the inconsistency, the district surveyor ought to be moved by an order of this honourable court to correctly amend the said inconsistency and capture the entire parcel of land under the Estate of the Late Njoroge Gioko.

17. When the matter came before Chitembwe J on 5th October 2018, this is what the record shows;

“5/10/2018

Before Hon. Chitembwe J

C/A Betty/Edna

Mr. Atunga for the petitioner

It is our application dated 21st July 2018. We seek substitution of the deceased petitioner. The person coming in is the deceased's son. There is also an issue on the boundary. The surveyors have confirmed the position.

COURT

The application dated 25th July 2018 allowed.

C. CHITEMBWE J

5/10/2018”

18. On 11th October 2018, it was placed before *Ndung'u J*, he was of the view that the record of 5th October 2018 was incomplete and directed that the application be re-listed for hearing. It was placed before him on 1st November 2018. The record shows

Before A. K Ndung'u Judge

CA Betty/Edna

Atunga for applicant

Atunga: I was before Justice Chitembwe. We were to confirm that orders issued were complete.

Court:

The application dated 25/7/18 was allowed. Orders be extracted.

Submissions

19. For the interested parties/applicants Mr. Mapesa framed issues for determination;

1. Whether the Respondent should be given audience despite the clear contempt of the court order dated 29th October 2019?

2. Whether the order dated 1st November 2018 was obtained without jurisdiction and through material disclosure.

3. Whether the interested parties/applicants not being parties to this cause deserve the orders sought.

20. Relying on Fred Matiang'i the Cabinet Secretary Ministry of Interior and Coordination of National Government vs Miguna Miguna & 4 Others [2018] eKLR it was argued that the respondent could not have audience because of the blatant disobedience of this court's orders of 29th October 2019. He relied on the passage;

21. On the 2nd issue he argued that the order of 1st November 2018 was obtained through material non-disclosure of the crucial fact that it would affect the property rights of the interested parties who are not beneficiaries of the estate herein.

22. That the order was obtained in circumstances that depict, absence of jurisdiction on the part of the court as it affected boundaries to land and the right to property, hence encroaching into the jurisdiction of the ELC and that in any event, issues of boundaries were within the jurisdiction of the Land Registrar vide section 16 and 17 of the Land Registration Act.

23. That the respondent obtained the ex-parte order which had far reaching effects without disclosing to the judge all material evidence. He referred to WEA Records Limited Vs Visions Channel 4 Limited & 4 Others (1983) 2 ALL ER 589 at 593 Sir Donaldson MR, for this proposition. That this ex-parte order was up for discharge on this ground, Gotv Kenya Limited vs Royal Media Services Limited & 2 Others [2015] eKLR for the proposition that the respondent in making the ex-parte application was under an obligation to disclose, to the fullest possible, all material facts otherwise, *"he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained. That is perfectly plain and requires no authority to justify it"*

24. It was also argued that the **Land Registration Act** applied to the circumstances of this application. For this proposition he cited the case of George Kamau Macharia vs Dexka Limited [2019] eKLR where with respect to **Section 18(2) of the Land Registration Act** which states:

"The court shall not entertain any action or proceedings relating to a dispute as to have boundaries of registered land unless the boundaries have been determined in accordance with this section."

25. In George Kamau Macharia the said;

"15. From the above provisions of the law, it is manifestly clear that the above section gives the mandate to the Land Registrar to resolve boundary disputes of land with general boundaries. Registry Index Map (RIM) only indicates approximate boundaries and the approximate situation on the ground. Even if this Court was to hear and determine this matter it will still require the input of the Land Registrar. The framers of section 18(2) of the Land Registration Act placed this matter before the Land Registrar who has the technical advice and resources of the District Surveyor to determine and ascertain the boundaries. 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 let that department proceed to meet its legal obligations. 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 Court. It is the view of this Court that the dispute is prematurely before the Court."

26. On whether this court as a Succession Court had the jurisdiction to make the orders it was argued that it did not, vide Article **162 (2) (b) of the Constitution of Kenya 2010** and Re Estate of Late Joseph Tirop Kiptarus [2019] eKLR where the court said;

"17. Whereas it may be difficult for the succession cause to be reasonably concluded where the acreage of the land is not clear and boundaries are not established, the question of ownership, land use, boundaries, and trespass fall within the docket of the ELC as well set out under Article 162 (2) which requires that the specialized court should deal with inter alia the use and occupation of land, and title to land. This being the core prayer in the application, I am in agreement with the respondent that the application falls outside the jurisdiction of this court. Consequently, this application fails and is dismissed with costs."

27. On the third issue, it was argued that the orders sought were deserved. that the applicants had occupied the land as it is by consent of the deceased; that the respondent could not have better title than the deceased, that the alteration of the boundaries was made vide an order obtained contrary to Natural Justice, that they have no beneficial interest in the deceased's estate, their proprietary rights to the land, 1033 and 1034 arose in the lifetime of the deceased who consented to the mutation, that in any event they had occupied the parcels of land as they are for over fifty (50) years.

28. Mr. Atunga for the respondent on the Notice of Preliminary Objection framed two (2) issues.

i) Whether the respondent is in contempt of the court order.

ii) If he should be given audience

29. It was submitted on this issued that by the time of the order issued on 29th October 2019, the respondent had effected the order of 1st November 2018 on 15th October 2019 and the District Land Surveyor had done the survey works and erected new beacons.

That the order of 29th October 2019 was served on 30th October 2019, that the interested party/applicants had sought an order to act retrospectively yet the actions that had been done by the respondent were lawful at all material times. That what the respondent did after receiving the order of 30th October 2019 was to stop all the activities on the said parcel of land pending the hearing and determination of the application inter-partes. He urged the court to find that there was no disobedience of any court order and not to deny the respondent audience as he had a right to be heard as per **Article 50 of the Constitution of Kenya 2010**.

30. With regard to the main application Mr. Atunga framed three (3) issues;

i) **Whether the orders issued on 1st November 2018 were properly obtained and binding?**

ii) **Whether the respondent had the legal right to have the perimeter boundary for LR Githunguri/Gathangari/624 reviewed by the Kiambu District Land Surveyor to correspond with the records at Kiambu District Lands Registry.**

iii) **Whether the interested party/applicants have the locus standi to obtain inhibitory orders against the respondent from fully executing the orders of 1st November 2018 vide the court order of 30th October 2019.**

31. On the 1st issue it was argued that at all material times there was no boundary dispute or any dispute to ownership/occupation of the land parcels subject matter herein, and that what the respondent sought was an administrative action on the part of the surveyor and not a dispute resolution endeavor, hence the provisions of **Section 13 of the Environment and Land Court Act** and **Section 18(2) of the Land Registration Act** would not be applicable. That this court is clothed with unlimited jurisdiction in civil and criminal matters vide **Article 165 (3) of the Constitution of Kenya 2010**.

That the error sought to be cured was discovered by the surveyor and Land Registrar. There was no dispute.

32. On the 2nd issue it was argued that there was no dispute that the respondent was the registered proprietor of LR Githunguri/Gathangari /624 with the rights set out under **Section 24 of the Land Registration Act –**

“Absolute ownership of [the] land together with all the rights and privileges belonging to or appurtenant thereto”

He relied on **Elijah Makori Nyang’wara vs Stephen Mungai Njuguna & Another [2013] eKLR, ELC 609 (B) of 2012 formerly HCC 47/2020**.

33. On the third issue it was argued that the interested party/applicants had not demonstrated any ownership/legal rights over LR Githunguri/Gathangari 624, hence they could not be heard to seek orders restraining the respondent from

“accessing, using or appropriating” all that consists of LR *Githunguri/Gathangari 624*.

To that end, it was argued they lacked *locus standi* “... *The right to appear or to be heard, in court or other proceedings...*”

See **Alfred Njau & 5 Others v City Council of Nairobi [1983] eKLR Civil Appeal No. 74 of 1982** cited.

Analysis and Determination

34. I have carefully considered all the affidavit evidence, the contents of the annexures, the submissions by counsel and the authorities cited vis a vis the orders of this court (*Ndung’u J*) of 1st November 2018. It is obviously evident that when the respondent filed his application of 25th July 2019 and obtained the ex-parte orders that issued on 1st November 2018 he did so, without disclosing what he has disclosed so far in this application.

35. So the questions that beg for answers are whether, the respondent was guilty of material non-disclosure, whether the orders obtained ex-parte ought to stand, and whether, with the information before this court now, this court had the jurisdiction to issue the orders sought.

36. From the outset the respondent approached the court only, as correctly submitted by counsel, on the issue of remedying the boundaries of LR Githunguri/Gathangari 624 to which he is the registered proprietor.

37. It is evident that in order to do so, the surveyor had to “encroach” onto the neighboring parcels of land that belong to the interested parties/applicants, promptly pulling them into this matter. The respondent cannot therefore be heard to argue that they have no *locus standi* to appear before this court. If, in the remedying of the boundaries of LR Githunguri/Gathangari /624 their parcels of land, as registered had not been touched, we would not be here.

38. It is noteworthy that the respondent conceded that the boundaries had existed like that for fifty (50) years plus.

39. The map of the survey of Kenya, Kiambu District Surveyor of 4th April 2019 demonstrates how serious this is, in that it sets out the differences in size of the three parcels on the ground thus;

	? 624	1033	1034
Ground	8.13 Ha	1.65 Ha	3.37 Ha
Registered Map	8.88. Ha	1.00 Ha	2.64 Ha

Any changes on the ground to match with the registered area would without any questions result in the interference with the right of the

interested party/applicant as protected just like the respondent by **Section 24 of the Land Registration Act**.

40. It is also noteworthy that the order as issued on 1st November 2018 did not allow the respondent to interfere with the boundaries of any other parcel of land. In fact it appears from the application that what was to happen was within the deceased's estate. He never mentioned the persons mentioned in the letter of 8th January 2019, or that he would require police assistance to do so, or that some people would be required to 'vacate' the land in question. He clearly held back information from the court, as all the parties involved had a right to be heard. In fact the District Surveyor Kiambu made that very clear in his letter of 4th April 2019.

“While the survey office was able to take measurements of the three parcels, it was not possible to shift the boundaries of the parcels as per the R.I.M. or as per the existence on the ground. **The Land Registrar was required to be present during the exercise as per the Registration Land Act 2012 section 16(1) to suggest any necessary decision.**”

It is also our request that the other parties of the parcels Githunguri/Gathangari 1033 and 1034 are enjoined in the suit to enable the Land Surveyor and the Land Registrar to effectively carry out the exercise regarding the boundaries. I hope this report will assist the Honourable Court.”

The record speaks for itself, that though these letters were addressed to the Deputy Registrar, the respondent never brought them to the attention of the court and proceeded to effect the order of 1st November 2018, without having the court address its mind to these emerging issues. A clear boundary dispute was in place and by his own admission efforts to resolve it through the elders had failed.

The input of the Land Registrar was missing all along and even when the order was effected the Land Registrar was absent. Nowhere in the respondent's documents does he mention that the Land Registrar was ever present or visited that land.

The failure by the respondent to bring these to the attention of the court in my view amounted to material non-disclosure of crucial facts. By 15th October 2019 when the surveyor went to the ground a lot of new issues had arisen clearly had not been envisaged by the order of 1st November 2018. This is a clear boundary dispute.

41. The respondent argues that this was not a boundary dispute but an administrative action by the Surveyor. Well, administrative actions must be compliant with the Constitutional and statutory requirements. The Constitution states at **article 47 (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair**. Would this action described by the respondent as an administrative action pass this test? In this case the surveyor was clear on the legal requirements in their minds that the other affected parties needed to be parties to the “suit.” It is the respondent who failed to move the court appropriately by failing to disclose the import of the orders sought.

42. This matter fell squarely within the premises of **Section 18(2) of Land Registration Act**. Until the Land Registrar has “fixed” the boundary, as provided for by **Section 18(3)**, the court has no jurisdiction to entertain any dispute. Here we have a very clear boundary dispute.

43. True the High Court has unlimited jurisdiction in criminal and civil matters, but this is limited with regard to Land and Environment matters by the **Constitution Article at 162 (2) (b). Section 13(2) of the ELC Act** states; *that the ELC court shall have power to hear and determine disputes inter alia relating to “boundaries”*.

44. I do not have to belabor the point that the impact of the orders issued on 1st November 2018 resulted in acts beyond the jurisdiction of this court in a succession dispute. Githunguri/Gathangari/1033 and 1034 are not part of the estate, and the respondent cannot be heard to deal with them using an order relating to the deceased's estate. If the respondent could effect the order without interfering with the boundaries of other person's property, he would be perfectly in order.

45. Do the applicants deserve the orders sought? I would say in the light of the foregoing they deserve to the extent that the boundaries of the three (3) parcels of land are restored to the status quo ante 15th October 2019. This would pave way for the respondent to follow the laid down procedures for the remedying of boundaries where more than one parcel of land is involved, and there is a dispute.

46. Finally, on the issue of contempt, the applicant's argument is that the respondent was trespassing on their land, despite a court order not to. The respondent was clear that the order was served on 30th October 2019 and he immediately stopped whatever activities he was doing as at that time to await the determination of the application. Hence there was no evidence of any trespass post the orders. What the applicants appear to have been pushing was for their prayer number 4 to be allowed without hearing the respondent. I think that would not have been fair as the best thing is always to make room for a matter to be heard on its merits.

i. In the end, I find that the respondent's act of remedying the estate of the deceased herein was a bid to settle a long had boundary dispute without the involvement of the other disputants. That the order of 1st November 2018 was obtained on the back of material non-disclosure.

ii. That its effect was to result in actions which this court had no jurisdiction to enforce in a succession cause.

iii. That the effect of correcting the boundaries of LR Githunguri/Gathangari/ 624 resulted in a boundary dispute with Githunguri/Gathangari/1033 and 1034 conferring to the interested parties/applicants the locus to bring this application because order of 1st November 2018 affected their land rights without them being heard.

iv. The boundary dispute touches on the proprietary rights of each of the registered owners of the three parcels of land protected by

Section 24 of the Land Registration Act. This is beyond the import of the order of 1st November 2018 issued in this cause.

v. That order is set aside.

vi. The respondent has recourse under the Land Registration Act.

vii. The Notice of Preliminary Objection is dismissed.

viii. The application of 28th October 2018 is allowed in terms of prayer 7.

ix. That District Surveyor who amended the boundaries of Land Reference No. Githunguri/Gathangari/624 belonging to the Respondent, Githunguri/Gathangari/1033 belonging to the 1st intended Interested Party and Land Reference No. Githunguri/Gathangari/1034, belonging to the 2nd Intended Interested Party, to restore the same as they were prior to 15th October 2019.

x. Costs to the interested parties/applicants.

Delivered, Dated and Signed at Nakuru this 7th day of May, 2020.

Mumbua T. Matheka

Judge

In the presence of:- VIA ZOOM

Edna Court Assistant

Atunga & Associates Company Advocates N/A

Mapesa for applicant