



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO. 37 OF 2017**

**(FORMERLY KERUGOYA ELC 277 OF 2014)**

**VICTORIA WANJIRU MURIGI** (*suing as the Administrator to the Estate of*

**JANE NJOKI MURIGI (Deceased)**.....**PLAINTIFF**

**VERSUS**

**EVANS MURINGU MUHIA**.....**DEFENDANT**

**JUDGMENT**

By a Plaint dated **24<sup>th</sup> September 2014**, the Plaintiff filed this suit against the Defendant seeking for the orders that;

***a) That the Defendant Evans Muringu Muhia, do remove the encroachment on land reference No. 4953/1507, Thika forthwith at his own cost in default thereof the Plaintiff be at liberty to remove such encroachment and recover the cost from the Defendant.***

***b) That Permanent injunction do issue restraining the Defendant whether by himself, his agents, persons claiming under him or under his authority from interfering with the quiet possession and ownership of L.R 4953/1507.***

***c) General Damages***

***d) Costs of this suit***

***e) Interest in (c) and (d) above***

***f) Such other relief that the Court may deem fit and just to grant.***

In her statement of claim, the Plaintiff averred that **Jane Njoki Murigi** (deceased) is the registered owner of the suit property. She averred that in **January 2010**, the Defendant called a surveyor to fix beacons on **L.R 4953/1508**, without her knowledge and thereafter put up a permanent building. That the Defendant's actions caused an encroachment on the suit property, by 3 meters to the detriment of the Estate of the registered owner. She averred that she approached the Defendant and pointed the encroachment to which he agreed to remove it no avail.

The plaintiff further averred that in **2011**, the Defendant convinced her to address a joint letter to the then Municipal Council of Thika Town Clerk informing him that one of his officers had done a faulty survey work, leading to the encroachment. It was her contention that she acquiesced to the request by the Defendant so as to find a solution, but that she was not in any way involved in instructing the surveyor to place beacons nor was she present when the survey was done. She averred that the Defendant had a duty to ensure that the beacons fixed on his land did not lead to encroachment on the suit property given that it was not a fresh subdivisions of the parcels of land as the lands were surveyed in **1990**.

Further, that Defendant admits that he has encroached on the suit property by 3 metres and promised to remove the said encroachment. That the Defendant has also proposed to compensate the Plaintiff, but that the compensation is not adequate given that the size of the land is **50 ft by 100ft** as such the encroachment has severely affected the market value. It was her contention that the Defendant has not taken any steps to remedy the situation.

Despite being served with the suit papers as enumerated by the process server in the Affidavit of service dated **28<sup>th</sup> September 2015**, the Defendant did not file a Memorandum of Appearance nor file any Defence. The matter proceeded by way of formal proof without his

participation.

## **PLAINTIFF'S CASE**

**PW 1 Victoria Wanjiru Murigi**, adopted her witness statement dated **24<sup>th</sup> September 2014**. She further produced the list of documents as Exhibit 1. It was her testimony that the Defendant is the owner of the adjacent plot to her mother. Further that the survey report was meant to establish the beacons in relation to the Defendants plots. She further testified that the indication is that their plot had been encroached on by the adjacent land. She produced a copy from the Municipal Council of Thika as **Exhibit 2**, the survey report as Exhibit 3, A copy of the letters of Administration as **Exhibit 4**. She further testified that the Defendant admits encroachment and that the letter from the Municipal Council is from him. She urged the Court to allow her claim.

After close of viva voce evidence, the Plaintiff filed written submissions which the Court has carefully read and considered and finds that the issue for determination is ***whether the Plaintiff is entitled to the orders sought***.

The Defendant failed to enter appearance and thereby defend the suit. Though the suit has not been defended, that does not mean that the Court will take the Plaintiff evidence as gospel truth. It is very clear that the Plaintiff's evidence remained unchallenged and uncontroverted. However, the Court will still have to consider it in totality and interrogate the veracity of the said evidence placed before it. It is trite that the Plaintiff is still required to prove her case on the required standard of balance of probabilities. See the case of **Shaneebal Limited...Vs...County Government of Machakos (2018)eKLR**, where the Court cited the case of **Karuru Munyororo.....Vs.....Joseph Ndumia Murage & Another, Nyeri HCCC No.95 of 1988**, where the Court held that:-

***“The Plaintiff proved on a balance of probability that she was entitled to the orders sought in the Plaintiff and in the absence of the Defendant's and or their Counsel to cross examine her on evidence, the Plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the Kind of evidence that a court of law should be able to act upon”***

Even with unchallenged evidence, the Court still has an obligation to interrogate the Plaintiff's evidence and determine whether the same is merited to enable the Court come up with logical conclusion as exparte evidence is not automatic prove of a case. The Plaintiff has to discharge the burden of proof. See the case of **Kenya Power & Lighting Company Limited... Vs...Nathan Karanja Gachoka & another [2016] eKLR**, the Court stated:-

***“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”***

Further in the case of **Gichinga Kibutha...Vs...Caroline Nduku (2018) eKLR**, the Court held that:-

***“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”***

The Plaintiff has sought for various orders as against the Defendant amongst them the Plaintiff has sought for an order that the Defendant removes the encroachment on the suit property . An order of permanent injunction and the plaintiff has also sought for General Damages. As already stated above, the evidence by the Plaintiff has not been controverted.

It has been submitted by the Plaintiff that **Section 18** of the **Land Registration Act**, prohibits this Court from entertaining matters relating to boundaries, unless the boundaries have been determined. Further the plaintiff has rightfully submitted that by dint of **Section 19** of the same **Land Registration Act**, the duty to fix the said boundaries has been vested upon the Land Registrar. Further the Plaintiff has submitted that she engaged a registered land surveyor to determine the boundaries of the subject matter in question and to this effect, she produced a surveyor's report.

It is also the Plaintiff's submission that the input of the **Land Registrar** is required when determining issues relating to fixed boundaries and in this case the input of the Land Registrar as required was shown via the map produced as evidence. The said map indicates the approximate boundaries and situation on ground as per investigation and conclusion made by the surveyor who worked in tandem with the Land Registrar.

**Section 18(2), the Land Registration Act, 2012 (LRA)**, 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”.***

There is no doubt that this Court does not have jurisdiction to entertain, disputes relating to boundaries of registered land, unless the boundaries have been determined and fixed by the Land Registrar. That means that the Court must first determine whether the boundaries have been fixed, so that it can then determine whether or not it has jurisdiction to deal with the matter or not. Jurisdiction is everything and without it, a Court of Law has no option but to down its tools. Under **Section 19 of Land Registration Act, 2012** which provides that the duty to fix boundaries to registered land is vested in the Land Registrar. It provides as follows:

***“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.”*

It is evident that for the Court to have jurisdiction to deal with the instant suit, it must be clear that the parties appeared before the **Land Registrar** and the Land Registrar after hearing both parties determined and fixed the boundaries and made a note in the register. It is the Plaintiff's contention that she engaged the service of a registered land surveyor to determine the boundaries. To this effect she produced a surveyor's report. The Plaintiff has also produced in evidence a letter jointly signed by the Defendant and herself indicating that there is an encroachment. However, the provisions of law are very clear that it is the Land Registrar and not the Land surveyor is vested with powers to determine and fix the said boundaries. Though it is not in doubt that the Land surveyor is crucial in the determination of this question, it is also not in doubt that the office of the Land Surveyor and the office of the Land Registrar are two very distinct and separate offices. The submissions by the Plaintiff that the input of the Land Registrar as required was shown as presented via the map produced is not correct. It is this Court's considered view that it is the input of the Land Registrar that is required for the determination of the boundaries. In fact it is the input of the Land Surveyor that is required to be able to guide the Land Registrar. It is also not in doubt that as per Section **19(2) of the Land Registration Act**, the Land Registrar is required to make a note that the boundaries have been fixed. As already held above, though the evidence of the Plaintiff is uncontroverted, it was still her duty to prove her case to the required standard of balance of probabilities. There is no such evidence of the said **note** by the Land Registrar and thus there is no evidence that the Land Registrar has already fixed the boundaries.

The submissions by the Plaintiff that this Court allowed the parties and Land Registrar via District Surveyor to deal with the matter of boundaries is baseless as this Court does not have such power and there is no such provision in law that empowers the Court to do so.

In the case **Paul Muraya Kaguri ...Vs... Simon Mbaria Muchunu [2015] eKLR** the Court held that;

*“It is now trite law that where a statute establishes a dispute resolution mechanism, that mechanism must be followed. Where a party fails to follow the established dispute mechanism, they cannot be heard to say her rights were denied.*

The Land Registration Act vide **Sections 18 and 19** have established how disputes relating to boundaries ought to be fixed and determined and how this Court will then have jurisdiction to deal with the matter. The Plaintiff has failed to prove that the said dispute resolution mechanism was followed and therefore the Court finds and holds that it does not have jurisdiction to deal with the said matter.

The Plaintiff has testified that the Defendant encroached upon her suit property. To this effect the Plaintiff has produced in evidence a letter dated **8<sup>th</sup> January 2015**, from **Geodata Land Surveyors** indicating that the Defendant's property being **L.R 4953/1508**, has encroached onto the Plaintiff's property being **L.R 4953/1507**, with **4.8 metres**. However, the Plaintiff in both her testimony and her pleadings indicate that the encroachment is **3 metres**. The evidence by the surveyor seems to suggest that the encroachment is **4.8 metres**. This would be the reason why then it is necessary that the Land Registrar is required to fix the boundaries, so that the Court does not embark on a determination that may prejudice the parties.

From the above analysis of evidence and the law, it is evident that the Land Registrar being the office given the mandate to resolve the boundary disputes should first be allowed to fix the same before the Court can find that there is an encroachment and grant the orders sought. See the case of **George Kamau Macharia v Dexka Limited [2019] eKLR** where the Court held that;

*“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.”*

The Upshot of the foregoing is that the Court finds and holds that it does not have jurisdiction to hear and determine the matter herein and it must therefore down its tools. Consequently the Court finds that the Plaintiff has not proved her case on the required balance of probabilities and therefore the Plaintiff's claim vide the Plaint dated **24<sup>th</sup> September 2014** is **not merited** and the same is **dismissed** entirely with no order as to costs.

It is so ordered.

**Dated, signed and Delivered at Thika this 30<sup>th</sup> day of July 2020.**

**L. GACHERU**

**30/7/2020**

**JUDGE**

**Court Assistant - Lucy**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With consents of:-**

**Daniel Henry & Co. Advocates for the Plaintiff**

**N/A for the Defendant**

**L. GACHERU**

**30/7/2020**

**JUDGE**