



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ELC APPEAL NO. E035 OF 2022**

**SUSAN K. MUSIMBA.....**  
**APPELLANT**

**VERSUS**

**FREDRICK MWENDWA KITAKA.....1<sup>ST</sup>**  
**RESPONDENT**

**SERAH NDANU MWENDWA.....2<sup>ND</sup>**  
**RESPONDENT**

**THE COUNTY GOVERNMENT OF MACHAKOS**  
**DEPARTMENT OF LANDS & PHYSICAL PLANNING.....3<sup>RD</sup>**  
**RESPONDENT**

**JUDGMENT**

-  
**[Appeal from the ruling of Hon. C. N. Ondieki, PM,**  
**delivered on 21/09/2022 in Machakos CM's Court ELC Case**  
**No. E013 of 2022 (Susan K. Musimba Versus Fredrick**  
**Mwendwa Kitaka & Others) ]**

**Background**

1. The appeal before this court is challenging the decision rendered by the trial court, and to put the impugned ruling rendered on 21/09/2022 and the appeal in context, it is necessary to highlight the subject matter of the dispute that was before the trial court and now before this court.
2. The appellant filed the primary suit in the lower court against the respondent in a plaint dated 7/02/2022, where she claimed that she was the legal owner of a portion of unsurveyed land measuring **100 ft by 80 ft within Machakos/Kiandani /121 (“appellant's land”)**. She maintained that on purchase, beacons were pointed out to her, she developed it and put up a permanent perimeter wall around it. Nevertheless, the 1<sup>st</sup> and 2<sup>nd</sup> respondents, who are also purchasers of an adjacent land, trespassed into her land, demolished her perimeter wall, dug a deep terrace, put up a perimeter wall and reduced the size of the land. She sought a declaratory relief, permanent injunction and demolition of the 1<sup>st</sup> and 2<sup>nd</sup> respondents' structures, amongst others.
3. Contemporaneously with the suit, the appellant filed a motion dated 7/02/2022 and sought orders of a temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents, their agents and any other person acting under them from interfering with the appellant's land pending the hearing and determination of the main suit, the OCS Machakos police station be directed to supervise compliance of the court orders and costs of the motion be provided for.

4. The grounds presented in support of the motion were a reiteration of the averments contained in the plaint, and it is unnecessary to repeat them. Still, an additional ground was that she would suffer irreparable damages unless an order of the court restrains the respondents. The motion was also supported by an affidavit sworn by the appellant detailing her grievances. Of significance, she stated that there was an ongoing survey being undertaken by Land Plan Surveys & Consultants. She presented a proposed subdivision plan dated July 2016, signed by, amongst others, herself, whose portion is marked “A” and the 1<sup>st</sup> and 2<sup>nd</sup> respondents, whose portion is marked “D”, and Nicholas Wambua Mutua.
5. Accordingly, the 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the motion by filing a replying affidavit deposed on 2/03/2022, where the 1<sup>st</sup> respondent, with the authority of the 2<sup>nd</sup> respondent, stated:
- a) land parcel no. **Machakos Kiandani/121 (mother parcel)** forms part of the estate of **Wambua Mutie alias Tilus Wambua Mutie-deceased (“deceased”)**, with a rectified certificate of confirmation of grant issued therein on 10/11/2016;
  - b) upon purchase, he and the 2<sup>nd</sup> respondent, who is his wife, occupied 0.058 ha of the mother parcel and have been in occupation since 6/4/2007;
  - c) the appellant’s allegations were not true; rather, she had trespassed onto a 9-meter access road, and lastly,
  - d) By **Sections 18, 19 and 20** of the **Land Registration Act** the trial court lacked the requisite jurisdiction to handle the matter.

6. The 3<sup>rd</sup> respondent also opposed the motion by the affidavit sworn on 16/03/2022 by **Peter Nzuki Matheka**, its Sub-County Physical Planner of Machakos Sub-County, who maintained it was a stranger to the allegations made; nevertheless, it maintained that the appellant never followed due process necessary for approving the construction of buildings, including the perimeter wall. On this basis, the 3<sup>rd</sup> respondent issued a stoppage order in the form of PPA 7.
7. On being served with these documents in reply, the appellant filed a brief further affidavit of an undisclosed date, which specifically at **paragraphs 5-7** stated as follows in verbatim: -

***“5. THAT the alleged 9 meter access road did not exist at the time I purchased my portion of land but it is the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents who influenced a surveyor to create the access road thereby encroaching into my portion of land.***

***6. THAT the proposed sub-division plan of the parcel of land Number MACHAKOS/KIANDANI/121 is disputed by myself since it has reduced the size of my portion of land and. Refer to annexure SKM5 in my supporting affidavit.***

**7. THAT whilst the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents states that they occupy a 0.058 Ha parcel they have not exhibited proof that what they purchased measured 0.058 Ha.”**

8. On hearing the parties by way of written submissions, the impugned ruling found the court lacked jurisdiction as the dispute fell within the jurisdiction of the land registrar. It struck out the motion and suit and stated that the parties were at liberty to pursue the available mechanisms with the Land Registrar, Machakos County.

**Appeal to this court and the hearing**

9. Dissatisfied, the appellant, in exercise of her right to appeal, invoked this court’s jurisdiction by filing a memorandum of appeal dated 19/10/2022 and filed on the instant date, questioning the ruling on six grounds that faulted the learned trial magistrate. Nonetheless, in submissions dated 8/03/2025, filed by her law firm on record, **M/s. Fred K Musyimi & Associates Advocates**, which framed two issues for determination, it arose that the grounds of appeal were collapsed into a singular ground; **whether the learned trial magistrate erred in law and fact in finding he lacked jurisdiction.**

10. In consequence of the appeal, the appellant urged this court to allow the appeal, the impugned ruling be set aside, the

main suit be set down for hearing before a court differently constituted, costs of the appeal be granted to her and any further relief that this honourable court deems fit to grant the appellant.

11. As directed by the court, the appeal was canvassed by the above-referenced appellant's submissions and also by the written submissions that were received from the law firm of **Ms. B. M. Kituku & Co. Advocates** for the respondent, dated 27/05/2025, and this court is grateful to counsel for their illuminating submissions.

### **Issues for Determination, Analysis, and Determination**

12. This being a first appeal, this court's duty is enshrined under **Order 42 Rule 32** of the **Civil Procedure Rules** and its role is to re-appraise the evidence and draw inferences of fact to arrive at its own independent decision. This duty has been stated in several decisions of the court, including **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] KECA 208 (KLR)**, where it was held that:

***“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse 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.”***

13. This court has gone through the memorandum of appeal, the record of appeal, the rival submissions, the provisions of the law relied upon, and the authorities cited therein. In this court's humble view, this appeal will be determined by answering the consolidated ground of appeal, which is **whether the learned trial magistrate erred in law and fact in finding he lacked jurisdiction.**

14. Regarding this issue, from undisputed facts, the appellant and the 1<sup>st</sup> and 2<sup>nd</sup> respondents occupy adjoining parcels of land that are unsurveyed and were all derived from the mother parcel. It is also undisputed that the parties have not disputed each other's ownership of their respective parcels of land. It is also undisputed that the mother parcel belongs to the deceased. It is also undisputed that Nicholas Mutua Wambua, who is the deceased's legal representative, has put in motion a subdivision plan to divide the mother parcel into several portions. It is also undisputed that he intends to give several purchasers/beneficiaries their respective shares of their unsurveyed land, which fall within the mother parcel. It appears the mother parcel is surveyed land. At this point, it is uncertain if the boundaries of this mother parcel are fixed or approximate, as a copy of the title document was not provided to the trial court.

15. This act by Nicholas Mutua Wambua is provided for in **Section 22 (2)** of the **Land Registration Act** which permits the proprietor of a parcel of land to make an application for the division of that parcel into two or more parcels. This process involves the proprietor, the relevant survey office and the land registrar as stated under **Section 16** of the **Land Registration Act**, as follows: -

***“(1)The office or authority responsible for the survey of land may rectify the line or position of any boundary shown on the cadastral map based on an approved subdivision plan, approved combination plan or any other approved plan necessitating the alteration of the boundary, in the prescribed form, and in accordance with any law relating to subdivision of land that is for the time being in force.***

***(2)whenever the boundary of a parcel is altered on the cadastral map, the parcel number shall be cancelled and the parcel shall be given a new number.***

***(3)The office or authority responsible for the survey of land may prepare new editions of the cadastral map or any part thereof, and may omit from the new map any matter that it considers obsolete.***

***(4)Any rectification to the cadastral map in accordance with this section shall be notified to***

***the Registrar by the submission of the rectified cadastral map and all the approvals that necessitated the amendments.”***

16. Accordingly, it follows if any party is aggrieved by these processes, then under **Section 79** of the **Land Registration Act**, she can lodge a dispute with the land registrar and if dissatisfied, then she can approach the court under **Section 79(3A)** thereof which states that any person aggrieved by the decision of the registrar under this section may apply to the court for any necessary orders. Alternatively, a party can seek a review of the decision of the registrar under **Section 86** thereof. The court of appeal decision of **Estate Sonrisa Ltd & another v Samuel Kamau Macharia & 2 others [2020] KECA 734 (KLR)** that was relied upon by the learned trial magistrate weighed in on this issue by stating:-

***“...the Registrar had, first to conduct the proceedings to determine the extent of the parties’ respective parcels, and cause to be defined by survey, the precise position of the boundaries in question. By sections 79(3A), 80, 86 and 91(9) of the Land Registration Act that decision may be challenged in court.”***

17. Having outlined the relevant provisions of law and prevailing jurisprudence that applied to the matter before the trial court, this court finds the trial court applied the wrong provisions of

law, as **Sections 18** and **19** of the **Land Registration Act** deals with boundary disputes of registered land and not unsurveyed land which both the appellant and the 1<sup>st</sup> and 2<sup>nd</sup> respondents held. It follows that the submissions by counsels on these irrelevant provisos cannot suffice. This notwithstanding, bearing in mind the applicable law and jurisprudence that were earlier highlighted, this court arrives at the same conclusion as the learned trial magistrate that he did not have jurisdiction to entertain the dispute.

18. It is settled law that reliefs flow from pleadings, and even if the appellant sought declaratory reliefs and permanent injunction amongst others, just as the learned trial magistrate and the respondent's counsel, this court finds the dispute is all about the boundaries of 2 adjoining unsurveyed parcels of land that appear to be within the surveyed mother parcel. Thus, the dispute can adequately be determined by the relevant land registrar as envisaged by **Section 79** of the **Land Registration Act**. It is worth pointing out that errors in surveys between a proprietor and a person acquiring from him are only indemnifiable within 6 months from the date of registration of the instrument under which the proprietor acquired the land. **See Section 79 of the Land Registration Act.**

19. Ultimately, and for the reasons and findings stated above, this court finds and holds that this appeal is devoid of merit. It

is hereby dismissed, and this court upholds the orders issued on 21/09/2022. Since it is trite law that costs follow the event, and being the appeal was unsuccessful, this court awards costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

Orders accordingly.

**Delivered and Dated at Machakos this 14<sup>th</sup> day of October, 2025.**

**HON. A. Y. KOROSS  
JUDGE  
14.10.2025**

**Judgment delivered virtually through Microsoft Teams  
Video Conferencing Platform**

In the presence of;

Josephine Court Assistant.

M/s Mutunga holding brief for Mr. Musyimi for Appellant.

Mr. Kituku for 1<sup>st</sup> and 2<sup>nd</sup> respondents.