



Osinde v Nyamwaro & another (Enviromental and Land Originating Summons E002 of 2023) [2025] KEELC 6793 (KLR) (8 October 2025) (Ruling)

Neutral citation: [2025] KEELC 6793 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2023
DO OHUNGO, J
OCTOBER 8, 2025**

BETWEEN

KENNEDY ONKUNDI OSINDE PLAINTIFF

AND

WILSON NYAMWARO 1ST DEFENDANT

CHARLES MONDAS 2ND DEFENDANT

RULING

1. Proceedings in this matter commenced on 31st March 2023 when the Plaintiff filed Originating Summons dated 22nd March 2023. He averred in the Originating Summons that he was the proprietor of the parcel of land known as NyansiongoSettlement Scheme 3193 while the First Defendant was the proprietor of the parcel of land known as NyansiongoSettlement Scheme 3192. He sought the following orders:
 1. A declaration to be issued that both parcels of land exist on the map.
 2. An order be issued to ascertain the beacons for both parcels of land on the ground.
 3. The land registrar and the District Surveyor Nyamira County to be directed by the court to ascertain the beacons on the ground, establish them on the ground and present their findings to this honorable court.
 4. A declaration be issued that both the defendants have encroached the plaintiff's parcel of land.
 5. An order of restitution can be issued upon the findings of encroachment of defendants on the plaintiff's parcel of land.
 6. Restitution of and re-establishing of the boundaries.
 7. Costs of this suit be borne by the defendants jointly and severally.



2. The Originating Summons is supported by an affidavit sworn by the Plaintiff. He deposed that he, the First Defendant and Second Defendant are the registered proprietors of parcel numbers NyansiongoSettlement Scheme 3193, 3194 and 3192, respectively. He further deposed that on 2nd March 2023, the First Defendant trespassed into parcel number NyansiongoSettlement Scheme 3193 by fencing in such a way that he annexed a portion of NyansiongoSettlement Scheme 3193. The Plaintiff further deposed that he reported the matter to a surveyor who went and showed them where the boundaries ought to be, but the First Defendant refused to remove the fencing from NyansiongoSettlement Scheme 3193.

3. The First Defendant reacted to the Originating Summons by filing Notice of Preliminary Objection dated 13th April 2023, which is the subject of this ruling. The objection is pleaded as follows:

TAKE NOTICE that the 1st Defendant/Respondent herein shall, at the hearing thereof, raise a preliminary objection on the following grounds: -

1. That this Court lacks jurisdiction to hear the originating summons as it offends the express provisions of section 18 and 19 of the [Land Registration Act](#) No. 3 of 2012 for reasons that: -
 - a. The subject of the originating summons is a boundary issue which falls within the jurisdiction of the Land Registrar.
 - b. Further, it is an established principle of law that where there is an alternative remedy and especially where parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order would be granted by courts and the plaintiff/Applicant herein has not established the existence of any exceptional circumstances.

subPARA 2.

That the application is fatally defective, misconceived and mischievous or otherwise an abuse of the court process and therefore is unsustainable in the obtaining circumstances.

4. The objection was canvassed through written submissions. The First Defendant filed submissions dated 22nd May 2025. He submitted that the Court lacks jurisdiction to hear and determine a boundary dispute until the Land Registrar has dealt with the issue. He relied on Sections 18 and 19 of the [Land Registration Act](#) as well as the cases of *Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] KESC 8 (KLR), *Samuel Njoroge Gituku & 6 Others v Kenya Rural Roads Authority & 5 Others* [2017] eKLR, *Maricus Otieno Okwayo v George Owenge Aluoch* [2017] eKLR and *Willis Ocholla v Mary Ndege* [2016] eKLR.

5. Arguing that the [Land Registration Act](#) prohibits this Court from entertaining any proceedings relating to a dispute on boundaries of registered land unless the boundaries have been determined as provided in the said statute, the First Defendant contended that jurisdiction is everything and that without it, the Court can do nothing. The First Defendant further argued that Order 37 of the Civil Procedure Rules under which the Plaintiff had brought the Originating Summons does not allow commencement of a suit for re-establishment of boundaries through an Originating Summons. The First Defendant therefore urged the Court to uphold the objection and strike out the suit with costs.

6. The Second Defendant filed submissions dated 23rd June 2025. He submitted that the suit concerns a boundary dispute in respect of registered land whose boundaries and beacons have never been established and fixed by the Land Registrar and that the Court lacks jurisdiction in view of the provisions of Section 18 of the [Land Registration Act](#). He called to his aid the doctrine of exhaustion of administrative remedies and further submitted that where a clear statutory procedure is available for redress of a grievance, that procedure should be strictly followed. He relied inter alia on the cases



- of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) [2023] KESC 17 (KLR), Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] eKLR, Kinyuni v Nyambura & another (Civil Appeal 163 of 2017) [2022] KECA 923 (KLR) (19 August 2022) (Judgment), and Mwangi Muraguri v Kamara Rukenya [1983] eKLR.
7. The Second Defendant went on to submit that the Land Registrar's report which is on record did not amount to fixing of boundaries of the parcels in dispute. That in the circumstances, the proceedings herein offend Section 18 (2) of the [Land Registration Act](#) and should therefore be struck out with costs.
 8. The Plaintiff did not file any submissions despite being given opportunity to do so.
 9. I have considered the Preliminary Objection and the submissions. The issues that arise for determination are whether this case is a boundary dispute and whether the Court has jurisdiction to hear and determine the case.
 10. The law on preliminary objections was succinctly summed up in Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696 by Law JA as follows:

“So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
 11. It follows therefore that for a preliminary objection to be valid, it must raise a pure point of law which is argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. If it is upheld, a valid preliminary objection should result in summarily terminating the suit or application against which it is raised.
 12. The nature of the Plaintiff's case and the reliefs sought have been summarised at paragraphs 1 and 2 of this ruling. Although no grounds were listed on the face of the Originating Summons, a reading of paragraph 5 of the affidavit in support of the Originating Summons makes it clear that the genesis of the Plaintiff's case is his allegation that the First Defendant trespassed into parcel number Nyansiongo Settlement Scheme 3193 “by fencing directly from the beacon at road directly to the beacon in the middle of my land without taking into consideration the truncation beacon which is at the interval of 14 meter mark thereby annexing my land into his land at a distance of about 97 meters.”
 13. At paragraph 6 of the affidavit, the Plaintiff deposed that he reported the matter to “the surveyor who came and showed us where the boundaries ought to be but the [First Defendant] has refused and or neglected to remove the boundary from [Nyansiongo Settlement Scheme 3193].” Further, at paragraph 8 of the affidavit, the Plaintiff deposed that he had requested the Defendants to rectify the boundaries, but they had neglected or refused to do so.
 14. Turning to the prayers in the Originating Summons, prayer number 2 seeks an order to ascertain the beacons on the ground while prayer number 3 seeks an order directing the Land Registrar and the District Surveyor Nyamira County to ascertain as well as establish the beacons on the ground. Equally significant is prayer number 6 which seeks an order for restitution of and re-establishment of the boundaries.



15. In line with the guidelines in *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (supra), the foregoing constitutes the pleadings and facts against which the Preliminary Objection herein must be determined. In view of the pleadings and facts availed by the Plaintiff, I have no doubt in my mind that what is before the Court is a boundary dispute and that the parcels involved are registered land.
16. The last issue for determination is whether the Court has jurisdiction to hear and determine the case. Jurisdiction is an issue that pervades all litigation. It is the entry point in any matter that a Court of law is called upon to determine and is the very life and soul of any judicial proceedings. Without jurisdiction, the proceedings come to a certain end and the Court cannot take any further step. See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR.
17. The Supreme Court restated the centrality of jurisdiction in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR thus:
- “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. ...”
18. The jurisdiction of this Court in disputes relating to the boundaries of registered land has been circumscribed under Section 18 (2) of the *Land Registration Act* as follows:
- (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.
 - (2) 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.
 - (3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:
- Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the *Survey Act*, (Cap. 299).
19. The question that arises is whether the boundaries between the two parcels have been determined in accordance with Sections 18 and 19 of the *Land Registration Act*. If the answer is in the affirmative, then this Court has jurisdiction. If negative, then the Court lacks jurisdiction. The Court of Appeal underscored the issue in *Kinyuni v Nyambura & another* (supra) where it held:
- “To us, the Court was clear in its orders that the Registrar was to determine the boundaries of the two disputed parcels of land based on applicable laws and nothing more. It is after the determination by the Land Registrar that parties are now mandated to move to court and maybe challenge the said report of otherwise deal accordingly. In the Court of Appeal Case of *Estate Sonrisa Ltd & another v Samuel Kamau Macharia & 2 others* [2020] eKLR, the court stated thus,
- “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.”

It is clear that the dispute relating to boundaries ought to be resolved by the Land Registrar in the first instance. The decision thereof can then be challenged in court pursuant to the provisions of Sections 79 (3A), 80, 86 and 91 (9) of the *Land Registration Act*. We find that the report adopted was in line with the law and the court had no reason to interrogate the said report. Ideally, the appellant has avenues to deal with the report, as under section 86 of the *Land Registration Act*, any party aggrieved by or with the decision, or by the exercise of any power by the Registrar, can apply for review of the Registrar's decision by way of a case stated for the court's opinion.

20. The import of Section 18 (2) of the *Land Registration Act* is that there is a presumption that cadastral maps and other filed plans indicate only the approximate boundaries and the approximate situation the parcels. That presumption is only to be rebutted in regard to a specific parcel, through filing a copy of the register with an entry stating that its boundaries have been fixed. The filing must be done from the onset, together with the Plaint, Originating Summons or whatever other pleading is used to commence the proceedings. A subsequent filing is not helpful, since the Court must be satisfied as to jurisdiction right from the onset of the proceedings.
21. The manner of determining or fixing boundaries is provided by Section 19 of the *Land Registration Act* as follows:
 - (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.
22. The Plaintiff did not avail copies of registers in respect of the parcels in contention. He only annexed a copy of the title deed in respect of Nyansiongo Settlement Scheme/3193, a perusal of which does not



reveal any indication that the boundaries have been fixed. The presumption that the boundaries are unfixed was not rebutted from the onset.

23. I am alive to the fact that on 23rd May 2024, at the Plaintiff's request, the Court (Mugo Kamau, J.) ordered the Land Registrar and the County Surveyor to file a report in Court. Subsequently, the two officers signed and filed a joint report dated 14th October 2024. The report, to which is annexed a field diagram, reads as follows:

“The undersigned visited the suit properties on 25th June 2024 as ordered by this honorable court.

There is a slight discrepancy between the position of the common boundary of Nyansiongo SS/3193 AND 3194 as represented on the mutation and as is on the ground. Whereas the mutation indicated that the said boundaries run from way points 413 to 417 through way point 414; however, on the ground the boundary (which is marked by a wall constructed by the owner of Nyansiongo SS/3194) runs almost on a straight line from way point 413 to 417 through way point 416. The ownership of the portion of land represented by the highlighted part on the annexed Field Diagram is therefore disputed.”

24. Beyond filing the report in Court, there is nothing on record to show that any entry has been made in the registers of the respective parcels stating that the boundaries have been fixed. The field diagram that is annexed to the report is not a plan verified by the Director of Survey, as is contemplated by Section 19 (3) of the *Land Registration Act*. In the absence of a plan verified by the Director of Survey and an entry in the register, there is real risk of a different field diagram being generated at some future point. I believe that in providing for a specific way of fixing boundaries and recording the fact of fixing in the register, the legislature wanted to have certainty and verifiability in boundaries. I find that that the boundaries have not been fixed and that consequently, the Court lacks jurisdiction to hear and determine the case.
25. In view of foregoing discourse, I find merit in Notice of Preliminary Objection dated 13th April 2023 and I uphold it. I strike out the suit with costs to the Defendants.

DATED, SIGNED, AND DELIVERED AT NYAMIRA, THIS 8TH DAY OF OCTOBER 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

No appearance by the Plaintiff

Mr Okok for the First Defendant

Mr Atisi for the Second Defendant

Court Assistant: B Kerubo

