



**Attorney General & 2 others v Nzungula (Environment and Land Appeal E006 of 2025)
[2025] KEELC 5810 (KLR) (Environment and Land) (30 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5810 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL E006 OF 2025**

EK WABWOTO, J

JULY 30, 2025

BETWEEN

THE HONOURABLE ATTORNEY GENERAL 1ST APPELLANT

CHIEF NAKURUTO LOCATION 2ND APPELLANT

DISTRICT LAND ADJUDICATION OFFICER TAVETA 3RD APPELLANT

AND

MARTINA KALUMU NZUNGULA RESPONDENT

JUDGMENT

1. By a further amended plaint dated 4th May 2022 the Respondent in this appeal claimed against the Appellants various reliefs in respect to Land Parcel No. Taita Taveta/Cholla Njukini/5092.
2. According to the amended plaint, the land parcel belonged to the Respondent and that the Appellants had encroached on the same as it has a Chief's camp. It was averred in the said plaint that the Respondent actions are unlawful and without any justification.
3. The Appellants filed an amended defence denying the Respondent's claim and averred that the Respondent has never been the owner of the land parcel and further that the Respondent's suit was defective for want of consent from the Land Adjudication Officer prior to the institution of the case.
4. The case was heard before the trial court wherein the Learned Magistrate rendered a judgment in favour of the Respondent.
5. The Appellants aggrieved by the said judgment filed the instant appeal raising the following six grounds:-



- i. That the learned Magistrate erred in law by failing to appreciate that the suit was a boundary dispute between Plot 5090 and 5092.
 - ii. That the learned Judge lacked jurisdiction to hear a boundary dispute on account of Section 18(2) of the [Land Registration Act](#).
 - iii. That the learned Magistrate erred in fact by failing to appreciate the effect of the Registry Index Map in comparison to the claims of the Plaintiff.
 - iv. That the learned Magistrate erred in fact and law by failing to appreciate expert evidence of the District Land Surveyor as to the boundaries of the two parcels of land.
 - v. That the learned Magistrate erred in fact by only referring to the Plaintiff's survey report in the judgment.
 - vi. That the learned Magistrate erred in fact and law by failing to appreciate the existence of Land Adjudication appeals in relation to the suit properties Parcel Taveta Challa Njukini 5090 and Taveta Challa Njukini 5092.
6. The Appellants thus sought the following reliefs:-
- a. That this appeal be allowed.
 - b. That the Judgment of the court dated 27th February 2025 be set aside.
 - c. That the Honourable Court be pleased to refer the matter to the Land Registrar for hearing of the boundary dispute.
 - d. That in alternative to prayer (c) the court if the court finds the lower court has jurisdiction an Order that the Plaintiff did not prove their case.
 - e. That Honourable Court enters Judgment in favour of the Respondents.
 - f. A declaration that the Appellants have not encroached on the Plaintiff's suit property parcel Taveta Challa Njukini 5090.
 - g. A declaration that there is no overlap between the parcel Taveta Challa Njukini 5090 and Taveta Challa Njukini 5092.
7. The appeal was subsequently admitted for hearing and pursuant to the directions issued by the court, the same was canvassed by way of written submissions. The Appellants filed written submissions dated 8th July 2025 while the Respondent filed written submissions dated 9th July 2025.
8. The Appellant submitted on the following issues:-
- a. Jurisdiction of the trial court.
 - b. Whether the Learned Magistrate erred in his decision based on evidence on record including the report by the County Land Surveyor.
9. On jurisdiction it was argued that the aspect of jurisdiction is two fold, the plaint as filed offended provisions of the [Land Adjudication Act](#) that provided for express consent of the Land Adjudication Office to any person who so wished litigate before law courts on a suit of land that was undergoing adjudication.
10. The second aspect is whether the matter before the court was a boundary dispute between the Respondent and the Appellants and whether the court should have downed its tools.



11. It was submitted that Section 30 of the *Land Adjudication Act* makes it mandatory that a suit concerning land adjudication processes cannot be filed without the express consent of the Land Adjudication Office. Section 30 stipulates that; -

“30(1) Except with the consent in writing of the adjudication officer, no person shall institute and no court shall entertain any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under Section 29(3) of this Act.”
12. While Section 29(3) states that an adjudication section can only be completed upon exhaustion of the entire dispute resolution mechanism under the act. The dispute mechanism is only complete after the conclusion of appeals at the Ministry level.
13. It was submitted that the Respondent’s claim was centered around alleged trespass by the national government on private land being Parcel 5092 at Challa Njukini. The Respondent claimed ownership of suit property 5090 together with a portion of 5092 to which she claims was irregularly transferred to 5092.
14. It was further submitted that the Respondent failed to demonstrate the existence of consent as well as conclusion of all appeals with regard to the said parcel 5092 as well as 5090 at Challa Njukini.
15. The land adjudication office heard the objections with regard to the plot number 5092 being objection 21, 86 and 172.
16. The process of adjudication has to be followed to its logical conclusion as that is being an appeal to the minister by the dissatisfied party. The court was supplied with certified copies of land dispute tribunal decision dated the 8th March 2006 and objector proceedings resulting in the decision of the 29th January 2018.
17. In the objection proceedings the final determination was to dismiss the Respondent’s objection on Plot 5092 being objection 21. The only avenue the Respondent had was to initiate an appeal. The Respondent did not appeal that decision but later filed the suit.
18. According to the Appellant, it was submitted that the suit was even more defective on account that even plot number 5090 to which the Respondent claims as hers is still under an appeal by Chrispus Leshamptaa. This was provided to the court through a letter dated 10th January 2019 as defence exhibit produced by land adjudication office.
19. It was also submitted that the Respondent did not produce any consent to file the suit despite being raised in the amended defense dated 2nd June 2022. This provision of law is not a mere technicality but a procedural process to which such disputes are heard. The absence of consent shows clear malice by the Respondent to mislead the court on the entire process that she had participated in resulting to a loss at the objection stage.
20. In respect to the boundary dispute it was argued that the Respondent couched her claim to 5092 as an extension of Plot 5090 to which she claimed to own. The claim is that the government has encroached unto 5090 and claimed its land approximately 3 hectares.
21. It was contended that the issue is then a matter of a boundary dispute between plot number 5090 and 5092. According to the *Land Registration Act* 2012 Section 18(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.



22. It was further submitted that the Respondent having lost objection 21 with regard to plot 5092 and failed to file an appeal at the Ministry she should be considered to have accepted the ownership of 5090 to belong to her and that 5092 was then public land.
23. It was the Appellants submissions that the matter before the lower court constituted a boundary dispute as defined under the Act. The process required by law is that the Land Registrar should be approached to carry out a determination, including instituting site visits, interviews and making a formal order. Only if a party is dissatisfied with the Land Registrar's decision may an appeal or review be lodged before court as provided in Section 19 of the Act.
24. Counsel for the Appellants argued that there is no evidence on record that the dispute was first referred to the Land Registrar, nor that the Land Registrar determined the boundaries in question. The lower court ought not to have determined the issue of the boundary at first instance. The court abrogated to itself a power that is inherently granted to the Land Registrar. The cases of *Wanjala Barasa & Another =Versus= Land Registrar, Bungoma & Another (2017) eKLR* and *Secretary, County Public Service Board & Another =Versus= Hulbhai Gedi Abdille (2017) KECA 643 (KLR)* were cited in support.
25. As to whether the Learned Magistrate reached his decision based on evidence, it was submitted that the Learned Magistrate never referred to nor analyzed the testimony of the Deputy Director of Land Survey Mr. Justice Korir and the survey report and thus undermining the integrity of the proceedings and the right to fair hearing as enshrined under Article 50 of *the Constitution* of Kenya.
26. The court was urged to allow the appeal and refer the matter to the Land Registrar.
27. The Respondent submitted on the following issues:-
 - i. Whether the Honourable Court had the requisite jurisdiction to hear and determine the case?
 - ii. Whether the Honourable trial Court erred in finding in favour of the Respondent?
 - iii. What are the orders as to costs.
28. It was submitted that from the pleadings filed before the lower court, the case did not revolve around the location of the boundary dispute between Plot No. 5090 and 5092 but was based entirely on the root of title of the Appellants in respect to the portion measuring 3 acres which was recorded as part of Plot No. 5092.
29. It was also submitted that the Respondent in paragraph 8C of the further amended plaint had pleaded several particulars of fraud and misrepresentation on the part of the Appellants which the trial court was called upon to interrogate.
30. As regards Section 30 of the *Land Adjudication Act*, it was submitted that the suit property per the Further Amended Plaint is a portion of land measuring approximately 3 acres which is recorded as part of land parcel Taita Taveta/Challa/Njukini/5092. A letter dated 2nd March 2022 and filed on the same day addressed to the trial court by the Land Adjudication and Settlement Officer confirmed that the suit property was not affected by any appeals to the Minister and was thus candidate for registration.
31. It was also submitted that the dispute mechanism provided for in the *Land Adjudication Act* Section 29(3) is only complete after the conclusion of appeals at the Minister.
32. It was argued that the said issue was an afterthought and ought to be disregarded.
33. As to whether the trial court erred in favour of the Respondent, it was submitted that the evidence on record confirmed that the Respondent was the owner of the land parcel. The root of title was traced by



evidence from the Respondent's grandmother one Mumbi Ikioli and the case of Jacob Wekesa Bokoko Balong =Versus= Kincho Olokio Adeya & Another (2020) KLR was cited in support.

34. The court was urged to dismiss the appeal with costs.
35. This is a first appeal from the decision of the court of first instance, namely, the Subordinate Court. By virtue of being a first appeal, this honourable court is vested with the requisite jurisdiction to review, re-evaluate and re-analyse the findings of the court of first instance and thereafter to arrive at independent conclusions, considering the pleadings filed, evidence on record and the applicable laws. See the provisions of Section 78 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya
36. Nevertheless, it is imperative to underscore that even though this court is clothed with jurisdiction to review, re-evaluate and re-analyse the findings and observations of the trial court, this court is, however, called upon to exercise necessary caution and circumspection. In addition, the court is called upon to defer to the findings of the trial court unless the findings of the trial court are informed by extraneous factors or, better still, are perverse to the evidence on record.
37. The scope and jurisdictional remit of this court whilst entertaining a first appeal has been elaborated upon and underscored in various decisions. In the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, the Court of Appeal for Eastern Africa elaborated on the applicable principle and stated thus;

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. 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 allowance in this respect...”.

38. Likewise, the extent and scope of the Jurisdictional remit of the first appellate court was also elaborated upon in the case of *Abok James Odera T/A A.J Odera & Associates versus John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, where the Court of Appeal held thus;

“We also wish to be guided by the reasoning of this court in the case of *Mwana Sokoni versus Kenya Business Limited* (1985) KLR 931 page 934,934 thus: -

“Although this court on appeal will not lightly differ from the Judge at first instance on a finding of fact, it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the house of Lords in *Sottos Shipping versus Sauviet Sohoid*, the Times, March 16,1983.

“It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate court they should be over mindful of the advantages enjoyed of the trial Judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and equally impotent what was not said”.

Again, in *Peters versus Sunday Post Limited* (1958) EA424, a decision of the Court of Appeal for Eastern Africa, Sir Kenneth O' Conner, P said at page 429:

“It is a strong thing for an appellate court to differ from the finding on a question of fact of the Judge who tried the case and who has had the advantage of seeing and hearing and the witnesses.”



39. Without endeavouring to exhaust the case law that elaborate on the scope and extent of jurisdiction of the first appellate court, it is apposite to take cognizance of the holding of the Court of Appeal in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, where the Court held as hereunder;

“As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in *Peters vs- Sunday Post Ltd* [1958] EA 424. In its own words: -

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide ...”

40. This court having considered the entire record of appeal together with the written submissions filed by the parties is of the considered view that the following are salient issues for considering herein:-

- i. Whether the trial court had jurisdiction to hear and determine the suit.
- ii. Whether the trial court failed to consider and analyze the Appellant’s evidence that was tendered during trial.
- iii. Whether the trial court erred in law and fact in arriving at its decision.

41. In respect to the issue of jurisdiction it was pleaded by the Appellants at paragraph 13 of their Amended Defence dated 2nd June 2022 where it was pleaded as follows:-

“The Defendant aver that the suit herein is fatally defective for want of consent of the Land Adjudication Officer to institute the suit as required under Section 30 of the *Land Adjudication Act* Cap. 284 Laws of Kenya and the Defendant’s hereby issue notice that they will raise and argue a preliminary objection to that effect at the hearing of this matter”

42. The Respondent while submitting on this issue argued that the same was not considered by the trial court and it is an afterthought since the Appellants appeared to have abandoned the said issues and hence should not have raised the same at this forum.

43. Regarding the issue of jurisdiction, it is imperative to recall and reiterate that a court of law can only entertain and adjudicate upon a matter where same is seized of the requisite jurisdiction. On the contrary, where a court of law is divested of jurisdiction, then it behoves the court to down its tools at the very earliest.

44. It is also important to note that the question of jurisdiction can even be taken and raised by the court itself. However, where the question of jurisdiction is raised by the court, then it behoves the court to afford the parties an opportunity to speak to the jurisdictional question. See the holding of the Court of Appeal in the case of *Kenya Ports Authority =Versus= Modern Holding (EA) Limited* (2018) eKLR.

45. From the analysis of the evidence on record, proceedings before the trial court and the entire record of appeal, it is worth noting that the testimony of the Respondent who testified as PW1 was to the effect that the area had been declared an adjudication section and an appeal had even been filed before the land adjudication committee. The Appellants submissions that were filed by the trial court appearing at pages 43 to 46 shows that the Appellants never submitted on the said issue as to whether the court



has jurisdiction to hear and determine the suit. Equally the Respondents submissions appearing at pages 23 to 31 also shows that the Respondent never submitted on the said issue. The judgment of the Learned Magistrate also never addressed the said issue.

46. A perusal of the Memorandum of Appeal raised the following grounds in respect to the appeal:-
1. That the Learned Magistrate erred in law by failing to appreciate that the suit was a boundary dispute between Plot 5090 and 5092.
 2. That the Learned Magistrate lacked jurisdiction to hear a boundary dispute on account of Section 18(2) of the Land Adjudication Act.
47. From the perusal of the Amended Defence filed by the Appellants and a perusal of grounds 1 and 2 of the appeal, it still appears that the Appellant is still keen to pursue the issue of jurisdiction at this stage.
48. As earlier stated a court must be satisfied that it has the requisite jurisdiction to hear and determine a matter before and the issue of jurisdiction once pleaded must be determined by the court. It does not matter whether or not the same is abandoned by a party since jurisdiction is everything and the same can even be raised by the court on its own motion.
49. From the submissions filed by both parties in respect to this appeal, the parties have submitted extensively on the same and hence this court is bound to consider it.
50. In the further amended plaint dated 4th May 2022 the Respondent's cause of action against the Appellant was on encroachment of Plot No. 5092 by the Chief's camp. The Respondent also pleaded and particularized particulars of fraud and misrepresentation on the part of the Appellants. In her submissions before this court she submitted that the issue was not about a boundary dispute and further no consent was required to file the suit under Section 30 of the Land Adjudication Act since there was no pending appeal before the minutes after the same had been withdrawn.
51. From the perusal of the said pleadings and evidence tendered it is clear that the Respondent's cause of action before the trial court was not only on encroachment but also on the root of title. It was also evident that the Respondent had adduced evidence confirming that there was no pending appeal that would have required the consent of the Land Adjudication Officer prior to the filing of this suit. The land was not under adjudication. In view of the foregoing it is the finding of this court that the suit was properly before the trial court which had jurisdiction to hear and determine it.

Issue No. (i) Whether the trial court failed to consider and analyze the Appellant's evidence that was tendered during trial

52. This issue was raised on grounds 3 to 6 of the Memorandum of Appeal.
53. The Respondent argued that the trial court properly analyzed and considered the evidence on record before rendering its decision.
54. From a perusal of the judgment delivered by the trial court it can be observed that the trial Magistrate considered the evidence of DW2 Korir Justice. In the said judgment the Learned Magistrate held as follows:-

“DW2 KORIR JUSTICE was not present during land adjudication. He relied on mapsheets which did not reflect the findings and the decision to the land adjudication officer Mr. Khaemba in objection No. 20 and the sketch map drawn by Mr. Khaemba (P.Ex2). DW2 and DW3 stated in cross-examination that they did not have the verdict and the proceedings of Khaemba. I find that DW2 was misled by the mapsheets and reached at the wrong



conclusion in his report dated 18.11.2024 as he did not consider the decision and the map drawn by Mr. Khaemba in objection in objection No. 20. Had DW2 seen the decision and map by Mr. Khaemba (P/Ex2), he could have found that the boundary between the Plaintiff's land and public land is the cattle track and that the chief's office Nakruto is built on the Plaintiff's land.

DW2 stated that after his findings and report dated 30.11.2020 he and the land registrar gave the Plaintiff a chance to engage another surveyor. If she was dissatisfied with their findings. The Plaintiff engaged PW3 (MATHEW MJOMBA IRINA) a private surveyor who visited the land on 10.2.2021 and found that the boundary between the Plaintiff's land and public land is the cattle track and that the chief's camp is built on the Plaintiff's land. There is encroachment of about 36 acres into the Plaintiff's land.

DW2 supported the Plaintiff's case when he admitted in cross-examination that the boundaries of an adjudication area are general boundaries identifiable by physical features. The physical features do not appear in mapsheets and mapsheets are just approximation of the boundaries. The boundaries could best be identified by the land adjudication officers and the land owners who were present during the land adjudication exercise. DW2 was not one of those officers."

55. In view of the foregoing, it is the finding of this court that indeed the Learned Magistrate considered all the evidence on record including the testimony and documentary evidence that was presented by the Appellants' witnesses before rendering his decision.
56. In view of the foregoing it is the finding of this court that the appeal is not merited and the same is hereby dismissed. Each party to bear own costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 30TH DAY OF JULY 2025.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Koech h/b for Mr. Penda for the Appellants.

Mr. Mutinda for the Respondent.

Court Assistant: Mary Ngoira.

