

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC L APPEAL NO. E041 OF 2024**

**NJOKI KIMANI .....1<sup>ST</sup>**

**APPELLANT**

**KIMANI NJOKI .....2<sup>ND</sup>**

**APPELLANT**

**NDARUA NJOKI .....3<sup>RD</sup>**

**APPELLANT**

**MUNGAI NJOKI .....4<sup>TH</sup>**

**APPELLANT**

**VERSUS**

**JACOB**

**MWANTO**

**WANGORA.....RESPONDENT**

**(Being an Appeal against the Judgement and Decree of  
Honourable P. Achieng delivered on 22<sup>nd</sup> August 2024 in Ngong  
MCELC No. E015 of 2020)**

**JUDGEMENT**

**1. In her Judgement dated 22<sup>nd</sup> August 2024 in Ngong  
MCELC No. E015 of 2020, Hon. P. Achieng' (SPM) found**

that the Appellants had encroached on the Respondent's land and entered judgement in favour of the Respondent.

2. Aggrieved by the said decision, the Appellants filed a **Memorandum of Appeal** dated **20<sup>th</sup> September 2024** seeking that the judgement and decree be set aside, on the grounds that:

***1. The Learned Magistrate erred in law and in fact by failing to adhere to the mandatory provisions of Section 18 (2) of the Land Registration Act that a court shall not entertain any action or other proceedings relating to a boundary dispute of land unless the boundary has been determined.***

***2. The Learned Magistrate erred in law and in fact by failing to find that the boundary dispute before the Land Registrar, Ngong Land Registry relating to the suit subject matter was not resolved in accordance with the provisions of the law.***

***3. The Learned Magistrate erred in law and in fact by proceeding to make a determination in the matter despite her earlier ruling that***

*the matter can only be heard after the boundary has been determined which was not done.*

*4. The Learned Magistrate erred in law and in fact by issuing orders against Appellants without evidence that the boundary dispute had been resolved the and boundaries marked in accordance with the law.*

*5. The Learned Magistrate erred in law and in fact by usurping the statutory powers of the Land Registrar by proceeding to issue orders for marking of the boundary which can only be done by the Land Registrar, through the statutory power but not through a court order.*

*6. The Learned Magistrate erred in law and in fact by failing to apply the law to the evidence presented before the Honourable Court in regards to the determination of the boundary dispute.*

3. This Appeal was canvassed by way of written submissions.

### **Submissions of the Appellants**

4. On whether the boundary dispute was resolved in accordance with the law, it was submitted that when the suit was filed at the Lower Court, the Respondent indicated that he had filed a boundary dispute with the Land Registrar as per the requirements of the Land Registration Act and a Preliminary objection was raised, objecting the jurisdiction of the Court to determine the boundary dispute. The learned Trial Magistrate ruled that since the Appellants' dispute was not on boundary determination, the Lower Court had jurisdiction to determine the suit. The Learned Trial Magistrate then went on to state that the main suit would however await the determination of the Land Registrar. The Appellants contested the Land Registrar's report on grounds that the Land Registrar who produced the report was different from the one who generated it and could not answer questions put to him. It was also submitted that the report did not indicate the proper position of the boundaries, how the survey was carried out, no approved survey plan was filed and the process was not conducted as prescribed under **Rule 40 of the Land Registration (General) Regulations**. The Appellants stated that they were not

notified of the boundary dispute determination, the Appellants were not aware of the report and only found out from the Respondent's list of documents. It was also submitted that the report did not indicate how the boundary should be implemented and no beacons had been established citing **Section 22 of the Survey Act, Rule 38(1), 39, 41, 50, and 92 of the Land Registration (General) Regulations**. As such, no boundary dispute was filed by the Respondent and determined by the Land Registrar in the required format with reference to **Reuben Kioko Mutyaene vs Hellen Kiunga Miriti & 4 others; Ntalala Eric Mutura & another [2021] eKLR** and **Ndegwa & another v Gichuki [2024] KEELC 1308 (KLR)**.

5. It was submitted that the learned Trial Magistrate therefore made an error in her judgement in finding that the dispute had been determined while it had not. The order that the Land Registrar do rectify the boundary was also arrived in error because, the Land Registrar was not a party to the suit, and the learned Magistrate usurped powers arrogated to another entity in ordering the

rectification of the boundary. The Appeal should therefore be allowed as prayed.

### **Submissions of the Respondent**

6. It was submitted that the Respondent was the legal owner of parcels Ngong/Ngong/97405 to 97422 which border parcel Ngong/Ngong/6106 occupied by the Appellants. On or about 25<sup>th</sup> October 2020 the Appellants embarked on extending the boundaries of parcel Title No. Ngong/Ngong/6106 and destroyed the boundary it shared with Plots No. 97415 to 97422.
7. The Respondent filed a complaint at Ongata Rongai Police Station, another complaint with the area chief, and finally lodged a boundary dispute with the Land Registrar dated 2<sup>nd</sup> November 2020. It was affirmed that the objection by the Appellant at the Lower Court was dismissed. Counsel further submitted that they withdrew their Appeal; **ELCA No.E013 of 2021** which had contested the dismissal.
8. It is further submitted that on 13<sup>th</sup> October 2021 and 16<sup>th</sup> March 2022, the Land Registrar and the Land Surveyor paid visits to the suit parcels in presence of the parties to this Appeal well as their representatives. A determination

of the boundary dispute was therefore made through a decision dated 16<sup>th</sup> March 2022 which confirmed that the Appellants had encroached onto the Respondent's land by 0.68 acres. This decision was delivered in the presence of all parties, and the Appellants amended their Plaint at the lower Court and annexed the report.

9. It is submitted that, the boundary dispute had been duly heard and determined and the Appellants had Sixty (60) days to Appeal against the decision. The Appellants cannot raise this issue in Appeal.

10. It is also submitted that, the Appeal is unmerited. The Respondent also sought for general damages under Order 42 rule 32, which he claims he sought at the Lower Court but the Learned Trial Magistrate did not award.

### **Analysis and Determination:**

11. The Appellants have lodged Six (6) grounds of Appeal, which can be compressed as follows;

- i. The Learned Magistrate erred in law and in fact by failing to find that the boundary dispute before the Land Registrar, Ngong Land***

**Registry relating to the suit subject matter was not resolved in accordance with the provisions of the law.**

**ii. The Learned Magistrate erred in law and in fact by proceeding to make a determination in the matter despite her earlier ruling that the matter can only be heard after the boundary has been determined which was not done.**

**iii. The Learned Magistrate erred in law and in fact by issuing orders against Appellants without evidence that the boundary dispute had been resolved the and boundaries marked in accordance with the law.**

12. This being a first Appeal, the court ought to re-evaluate, re-assess and re-analyze the evidence, then come to its own conclusion while bearing in mind that it did not hear or observe the witnesses.

See **Abok James Odera T/a A.J Odera & Associates Vs. John Patrick Machira T/a Machira & Co. Advocates (2013) KECA 208 (KLR)** which quoted **Kenya Ports Authority Vs. Kuston (Kenya) Limited (2009) 2 EA 212** where the Court of Appeal held;

***“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”***

13. Similarly in Richard **Wefwafwa Songoi Vs. Ben Munyifwa Songoi (2020) KECA 942 (KLR)** it was stated thus;

***“In Selle Vs. Associated Motor Boat Company Limited (1968) E.A 123 it was expressed thus;***

***“.....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....”***

14. The Appellants' case is that the Learned Trial Magistrate made a boundary determination which was outside her scope of jurisdiction arguing that the boundary dispute had not been determined as provided for under **Section 18 and 19 Land Registration Act**. They also claimed that they were not present during the boundary dispute hearing.
15. The Respondent contested this Appeal arguing that the learned Trial Magistrate arrived at her judgement judiciously and made reference to the report on the boundary dispute. presented to the Court.
16. The Respondent instituted this suit on grounds that he was the bona fide owner of land known as Ngong/Ngong/96381 which was combined in 2019 from parcels; Ngong/Ngong/3079 and 3080. Upon the combination, he subdivided the same to give rise to parcels Ngong/Ngong/97415 and 97422.
17. It was his claim that parcel Ngong/Ngong/6106 occupied by the Respondents shared a boundary with parcel Ngong/Ngong/97415-97422. However, sometime in 2020, they trespassed onto his parcels and erected an iron sheet fence onto the properties, claiming that their parcel

had not been properly surveyed. A boundary dispute was registered through the letter dated 2<sup>nd</sup> November 2020 which was received by the Ngong Land Registry and the parties were to await a site visit. The Ngong Lands Registry was shortly thereafter closed without the visit being undertaken and the Appellants' continued with their act of trespass.

18. He therefore sought injunctive reliefs against the trespassers and an order that once the boundary dispute was resolved the Respondent restored his original boundary. He also sought for Special and General damages.

19. The Appellants filed a Preliminary Objection on grounds that the Lower Court did not have jurisdiction to determine the issue since it was a boundary dispute.

20. In the Ruling delivered on 18<sup>th</sup> March 2021, the learned Trial Magistrate held that the Respondent was not inviting Court to determine the boundary dispute, but to issue injunctive reliefs restraining the Appellants from interfering with the disputed portion of land awaiting resolution of the dispute by the Land Registrar. This was necessitated upon by the fact that the Ngong Land

Registry had been closed before a site visit was conducted. The learned Trial Magistrate held that she had jurisdiction, although the main suit would await the outcome of the boundary determination by the Land Registrar.

21. From the Record of Appeal, there is a report dated 16<sup>th</sup> March 2022, which shows that the dispute was heard. The Land Registrar, the Land Surveyor, the Respondent (who was the Plaintiff at the Lower Court), the Appellants (who were the Defendants then), their witnesses, together with their advocates, as well security officers. It states that both the Respondent and the 1<sup>st</sup> Appellant testified and findings were arrived at as follows:

***“... Upon taking measurements of the disputed (barbed wire fence) as the boundary, it was found that number 96381 measures 3.16 acres against the registered acreage of 4 acres. Land parcel number 6106 measured 1.089ha that is 2.689 acres against the registered 2 acres. Meaning he (sic) has encroached on the Plaintiff by 0.68 acres...”***

22. In her judgement, the Learned Trial Magistrate made reference to the report noting that no Appeal had been lodged against it, which concluded that the Appellants had encroached on to the Respondent's parcel of land.
23. The Appellants contested this finding arguing that the learned Trial Magistrate made a boundary determination, and also argued that the said report did not adhere to the laid out legal guidelines.
24. This Court has taken cognisance as summarised above, that the 1<sup>st</sup> and 2<sup>nd</sup> Appellants were present during the hearing of the dispute and went ahead to testify. Their claim that they were not aware of the decision is false. It is also on record that the decision of the Land Registrar were not appealed against. If the Appellants were dissatisfied, they had a right of Appeal which they did not pursue. This Court can therefore only determine a question of boundaries brought as an Appeal as stipulated under **Section 18(2) Land Registration Act.**
25. In the judgement, the Learned Trial Magistrate on determining whether the Appellants had encroached onto the Respondent's land held:

***“... The answer to the above can only be found in the evidence of the Land Registrar since he visited the boundary in dispute and prepared a report... Therefore there is proof of encroachment on the Plaintiff’s parcel of land by the 1<sup>st</sup> Defendant...”***

26. I find that, the learned Trial Magistrate did not err either in fact or in law in relying on the report Land Registrar to make a finding on whether the Appellants had trespassed and/or encroached onto the Respondent’s parcel.

27. The Court takes cognisance that the Respondent in his submissions prayed for general damages arguing that the Learned Trial Magistrate erred in not granting the same. This Court cannot determine an issue as raised in submissions. Courts have made pronouncements on the fact that submissions are not pleadings but marketing tools which cannot be used in place of pleadings. In **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] KECA 642 (KLR)** the Court of Appeal held: ***“...Submissions are generally parties’ ‘marketing language’...”***

28. I find no merit in this appeal and the same is dismissed with costs to the Respondent. In essence, the Judgement delivered on 22<sup>nd</sup> August 2024 in **CMC ELC No. E015 of 2020** is upheld.

**Dated, Signed and Delivered virtually at Kajiado this 27<sup>th</sup> day of November 2025.**

**L. KOMINGOI**

**JUDGE.**

**IN THE PRESENCE OF:**

Mr. Chege for the Appellants.

N/A for the Respondent.

Court Assistant - Peter.