

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL NO. E040 OF 2024

JOSEPH ODERO OCHANDA.....

.....APPELLANT

VERSUS

PENINA OMOLO OMUNE.....

.....RESPONDENT

*(Being an Appeal from the ruling delivered by Hon.
Jacinta A. Orwa in Homabay MCELC E003 of 2024 on 31st
July 2024)*

JUDGEMENT

1. Through a Notice of Motion dated 15th May 2024, the Respondent sought the following orders;
 - 1) **That this Honourable Court be pleased to strike out this suit for want of jurisdiction pursuant to Section 18 (2) of the Land Registration Act and Regulation 40(6) of the Land Registration (General) Regulations; 2017.**
 - 2) **That in the result, judgement be entered in favour of the Defendant/Applicant as prayed for in the Defendant's Statement of Defence.**
 - 3) **That the Plaintiff/Respondent do bear the costs of this application.**
 - 4) **That this Honourable Court be pleased to issue such further orders as it may deem just.**
2. The Application was premised on the grounds on the face of it and the averments of the applicant in the supporting

affidavit. The applicant deponed that the Plaintiff initially instituted suit number MCELC/E049/2023 in which she sued one Dalmas Ochanda Oroka claiming that he had encroached on her land praying for orders that he be evicted from land parcel number LR No. Kanyada/Kanyango/Kalanya 55. That the Defendant filed a notice of preliminary objection on grounds that the said Dalmas Ochanda Oroka was demised and that the court lacked jurisdiction as it entailed a boundary dispute falling within the jurisdiction of the Land Registrar.

- 3.** Vide a ruling delivered on 11th January 2024, the Court dismissed the suit, and the Preliminary Objection subsequently succeeded. The Plaintiff then filed a complaint before the Land Registrar stating that she did not know where her boundary lines were and she wished the Land Registry to invoke its powers and fix the boundaries. On 18th September 2023, Land Registrar informed the parties involved that, along with the Land Surveyor, they would visit the site on 18th September 2023 for the purpose of demarcating the boundaries as invited by the Plaintiff. He annexed and marked as DOO-1 a copy of the Land Registrar's letter dated 17th August 2023.
- 4.** The deponent averred that on 18th September 2023, the Defendant together with the Plaintiff and other members attended to the Land Registrar's site visit to demarcate the land boundaries. The Land Registrar having observed that the Defendant and all other neighboring persons had no objection to the demarcation of the boundaries, proceeded

to mark all the boundary features in relation to all the parcels of land adjacent to the parcel of land known as Kanyada/Kalango/55. Upon conclusion of the physical visit and survey of the boundaries, the Homabay County Land Registrar and the Land Surveyor prepared a report with recommendations that the map be amended to reflect that the part extending towards suit property belongs to the Defendant. He annexed and marked as DOO-2 a copy of the Land Surveyor's letter to the Land Registrar dated 5th October 2023 and as DOO-3 a copy of the Land Registrar's Report dated 22nd December 2023. Thereafter, the Plaintiff filed the instant suit in which she has clearly demonstrated her dissatisfaction with the Land Registrar's decision finding that the disputed parcel of land falls within the boundaries of the Defendant's parcel of land.

- 5.** The deponent averred that the Plaintiff's claim for the parcel of land occupied and developed by the Defendant is unjustified as the Land Registrar has already made a determination over the boundary dispute pursuant to Regulation 40(5) of the Land Registration (General) Regulations; 2017. Further, that this matter being a boundary dispute which has been determined by the Land Registrar, it is therefore clear that this Court lacks jurisdiction to entertain this matter by dint of Section 18 (2) of the Land Registration Act No. 3 of 2012 and Regulation 40(6) of the Land Registration (General) Regulations, 2017.
- 6.** He deponed that it is in the best interest of justice that this suit be struck out in its entirety for having been determined

by the Land Registrar, and subsequently filed in a suit with no jurisdiction.

7. The trial court considered the application and responses thereto and dismissed the application for lack of merit. The trial court was of the view that issues touching on determination of ownership to land is a preserve of the court.
8. Being dissatisfied with the ruling of the trial court, the appellant instituted the present appeal vide a Memorandum of Appeal dated 27th August 2024 premised on the following grounds;

1) That the learned trial Magistrate erred in law and fact in finding on the one hand that the matter herein is a boundary dispute that had already been determined by the Land Registrar but on the other hand, finding that the court has jurisdiction to entertain this suit after such a determination contrary to section 18 (2) of the Land Registration Act and Regulation 40 (6) of the Land Registration (General) Regulations.

2) That the Learned Trial Magistrate erred in law and in fact in failing to appreciate that the Land Registrar and the Surveyor had determined the boundary dispute between the parties and as such, their decision could only be challenged through an appeal as per the dictates of Regulation 40 (6) of the Land Registration (General) Regulations and not a fresh suit as done in this case.

- 3) That the learned trial Magistrate erred in law and fact in finding that she had the jurisdiction to determine the case, despite appreciating that the suit was premised on the Respondent's dissatisfaction with the findings of the Land Registrar's in the ascertainment of a boundary dispute contrary to the dictates of Regulation 40 (6) of the Land Registration (General) Regulations.**
 - 4) That the Learned Trial Magistrate erred in law and in fact in failing to appreciate that the Respondent being dissatisfied with the findings of the Surveyor and Land Registrar, Homabay County, ought to have lodged an appeal against the said decision.**
 - 5) That the Learned Trial magistrate erred in law and in fact in failing to appreciate that the Respondent's case in the trial court was premature and in violation of the sub judice rule for having been filed before the implementation of the decision and recommendation of the Land Registrar.**
 - 6) That the Learned Trial Magistrate erred in law and in fact in failing to fully analyze and evaluate the evidence on record thus arriving at an erroneous conclusion.**
- 9.** The Respondent filed a Grounds of opposition dated 28th March 2025 in response to the appeal. The appeal is opposed on the following grounds;

- 1) The entire appeal lacks merit and is a waste of courts judicial time.**
- 2) The approved surveyors report filed in court and tabled among the lists of documents to be relied upon by the respondent in the trial court clearly show that the defendant/appellant had indeed encroached onto the plaintiff's land being land parcel no. KANYADA/ KANYANGO /KALANYA /55 as per the report dated the 11th day of June 2024.**
- 3) The distinct lands of the Appellant and defendant were clearly defined by their respective titles (deed) with the Appellant having title number KANYADA/ KANYANGO /KALANYA /4310 , whilst the respondent having KANYADA/ KANYANGO /KALANYA /55.**
- 4) The pleadings presented before the court clearly pleaded encroachment of the respondents land by the appellant whom actually had even constructed a house on her land.**
- 5) There are fixed and defined boundaries between the appellant and the Respondent, and as such the issue that the appellant wants to canvass that the matter at hand is a boundary dispute is farfetched and a waste of courts time.**
- 6) The applicant is on a fishing expedition, which should be estopped in the bud.**
- 7) The application is an abuse of the Honorable court process.**

8) The Applicant has come to come to court with tainted and unclean hands.

9) The appellant wants to raise issues which can only be determined after a full trial.

10) The said application is vexatious and meant to embarrass the court and the respondent.

10. The appeal was canvassed by way of written submissions. The Appellant filed submissions dated 14th April 2025 through the firm of **Messrs. Arwa & Change Advocates**. The Respondent filed a Grounds of opposition dated 28th June 2025 and submissions of the same date through the firm of **Ongoso Ayoma & Co. Advocates**.

Appellants' Submissions

11. Counsel submitted that the trial court lacked jurisdiction to hear and determine the dispute therein. He urged that it is a truism that jurisdiction is everything, and it is what gives a court or a tribunal the power, authority, and legitimacy to entertain any matter before it. He referred the court to the definition of what amounts to jurisdiction as held by the Court of Appeal in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd. (1989)**.

12. Counsel cited Section 18(2) of the Land Registration Act 2012 and submitted that prior to the filing of this suit, the Respondent made a complaint to the Land Registrar, Homabay County seeking the intervention of the Land Registrar in settling of the dispute where she claimed that she did not know where her boundary lines were and wished

that the Land Registrar invoked its powers and have them fixed. On the 18th September 2023, the Homabay Land Registrar, in the company of the County Surveyor with a team of surveyors, the Area Chief, as well as both the Appellant and the Respondent visited the site in order to determine the dispute and demarcate the boundaries. That upon the conclusion of the physical visit, the Homabay County Land Registrar and the County Land Surveyor prepared a report dated 22nd December 2023 with recommendations that the map be amended to reflect that the part extending towards the land known as parcel no. 55 belongs to the Appellant as had been marked on the ground. Before the Land Registrar's report could be implemented, the Respondent invoked the original jurisdiction of the Magistrate Court, and instituted a suit before it, where she admitted that she had filed a complaint before the Land Registrar, and a determination was made through the report dated 22nd December 2023.

- 13.** At this point, the Appellant filed the Application dated 15th May 2024 seeking the trial court to strike out the suit for want of jurisdiction pursuant to Section 18(2) of the Land Registration Act and Regulation 40(6) of the Land Registration (General) Regulations, 2017. The Appellant argued that the trial court lacked the original jurisdiction to hear and determine a dispute arising out of a litigant's dissatisfaction with the decision of a Land Registrar in the demarcation and fixing of boundaries. While determining this Application, the learned Magistrate observed that the

boundary dispute between the two parcels of land had been determined by the Land Registrar in accordance with Section 18 and 19 of the Land Registration Act.

14. Counsel urged this Court to determine whether the Learned Magistrate erred in law and fact in finding that she had the original jurisdiction to determine this dispute, despite finding on one hand that the issue in question arose out of a boundary dispute which the Land Registrar had adjudicated over, and the Respondent was dissatisfied with his findings. He cited Regulation 40(5) of the Land Registration (General) Regulations and urged that the import of Section 18(2) of the Land Registration Act and Regulation 40(6) of the Land Registration (General) Regulations is that the jurisdiction to be exercised by a trial court in relation to a party's dissatisfaction with the findings of the Land Registrar is appellate and not original jurisdiction. That the proceedings before the trial court invoked the original jurisdiction of the Magistrate Court as opposed to the Appellate jurisdiction. He cited the case of **Kairu v Mutunga (Environment and Land Appeal E018 of 2022) [2023] KEELC 21723 (KLR)** in this regard.

15. Counsel submitted that in light of the holding of the Court in *Kairu v Mutunga*, he urged the Court to find that the jurisdiction of the ELC cannot be invoked in the first instance as done by the Respondent. Further, that this position was affirmed by the Court in the above cited case of **Okondo & 10 others v Kioko & 2 others; Saidimo (Interested Party)**.

- 16.** Counsel pointed out that in her ruling, the learned magistrate relied on the case of David **Juma Agunda vs. Charles Juma [2021] KEELC 4071 (KLR)** and observed that the facts of this case were similar to the case at hand. It is on this ground alone that the learned magistrate proceeded to dismiss the Appellant's Application with costs. Counsel posited that the Learned Magistrate disjunctively applied the reasoning of Justice A. Omollo. He cited paragraph 40 of the said judgment and urged this court to find that the learned magistrate erred in finding that she had the jurisdiction to determine the suit, whereas the decision relied upon clearly demonstrated that a Court of law lacks the jurisdiction to determine such disputes and a suit will be considered pre-maturely filed before the implementation of the finding of the Land Registrar.
- 17.** Counsel submitted that in its final disposition, the Court in **Okondo & 10 others v Kioko & 2 others; Saidimo (Interested Party) (supra)**, the Court directed that; The decision of the Land Registrar contained in the report dated 11/9/2023 be implemented in full unless reversed on appeal. While placing reliance on this decision, the learned Magistrate ought to have exercised her powers at the interlocutory stage and direct the parties to ensure the implementation of the Land Registrar's report dated 22nd December 2023 before the Respondent could invoke its original jurisdiction.

- 18.** Counsel urged the court to find that the magistrate's court lacks jurisdiction to entertain the suit before it and allow the appeal with costs

Respondents' Submissions

- 19.** Learned counsel for the respondent submitted that the appeal lacks merit. Further, that a land matter is not a boundary dispute when the issue involves questions of ownership, possession, tenure, use, sale, or transfer of land that are not related to the physical location of the property line between two or more parcels. Cases where land boundaries are already fixed by the Land Registrar or relevant office are generally not considered boundary disputes that a court would lack jurisdiction over and as such the trial court rightfully dismissed the notice of motion dated 15th May 2024. The boundaries of the lands in question were already legally determined and registered by the Land Registrar or a similar authority, land parcel with land parcels no. KANYADA/KANYANGO/KALANYA/55 belonged to the respondent whilst land parcel no. KANYADA/ KANYANGO /KALANYA / 4310 belonged to the appellants/ respondent father who had a title to that effect being land parcel no. KANYADA/KANYANGO/KALANYA/4310 and the dispute/ pleadings filed before the court were all about the precise location of the boundaries between the appellant/ defendant and the respondent/plaintiff and as such in all aspects it may not be a boundary dispute which the appellant wants to confer the same upon the said court through the back door.

- 20.** The core issue at hand is generally a conflict about who legally owns the land, who has the right to possess or use it, and or the nature of that tenure and thus this cannot be said to be a boundary dispute as is being mischievously canvassed by the appellant.
- 21.** Counsel submitted that the issue at hand is whether the entire pleadings as filed offends the provisions of section 18 (2) of the Land Registration Act and regulations; 40 (6) of the Land Registration (general) regulations 2017; Whether the trial court lacked jurisdiction to entertain the said suit; Whether the issues at hand revolved around boundary issues; Whether the suit should be struck out at the first instant for failing to confirm with sections 18 (2) and 19 of the Lands Registration Act; Whether the court was right in dismissing the said application dated the 15th day of May 2024.
- 22.** Counsel urged that in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, Sir Charles Newbold defined a Preliminary objection. He also cited the case of **Bashir Haji Abdullahi v Adan Mohammed Noor & 3 Others [2004] eKLR** on the same among a number of other authorities.
- 23.** Counsel urged that it is clear that a preliminary objection arises on a point of law only. The Appellants stated that the suit offended Section 18(2) of the Land Registration Act. They also included the grounds the suit was an abuse of the court process, vexatious and mischievous. From the above definitions and the description of a preliminary objection as

given in the cited cases law, the second limb of the preliminary objection cannot pass as one. It calls for an assessment and proof of facts. The only limb that remains is the first one and this Court proceeds to consider it. Counsel submitted that the defendants pleaded that the court lacked jurisdiction on the ground that the issues raised in the suit lay within the mandate of the Land Registrar. Counsel urged that there are two parts of the provision in relation to the ouster of the Court's jurisdiction. First, the Court shall not have jurisdiction on a matter of boundary dispute between parties where land is registered if no (boundary) has been determined by the relevant office. Second, the Court shall have jurisdiction over a boundary dispute between parties where one has been determined as per the Section. Thus, to determine whether the limb of the Preliminary Objection had merit, he urged the court to look at the pleadings and prayers therein in comparison with the Provision of law relied on.

- 24.** Counsel submitted that the boundaries regarding to the two parcels had already been fixed in accordance with Sections 18 of the Act hence these is not an issue that no longer can be addressed before the Registrar anymore. Further that the Court finds that boundaries were fixed as per the RIM which gave rise to the issuance of the titles. For that reason, the suit does not contravene the provisions of Section (18) (2) of the Land Registration Act. Consequently, the Notice of Motion dated 15th May 2024, and the resultant appeal against the ruling should be dismissed with costs as

the same is not merited at the first instance. Counsel reiterated that the trial court had jurisdiction to determine the matter as donated by section 13(2) of the ELC Act. He urged that Section 18(2), of Land Registration Act, is couched in mandatory terms and that the trial court had all the right to entertain the said suit.

25. Counsel urged that the entire appeal lacks merit and should be dismissed at the first instance and that the matter be set down for hearing at the trial court to determine the issues at hand since the appeal in itself is not arguable.

Analysis and Determination

26. The role of the Appellate Court was stated by the Court of Appeal in the judicial decision of **Gitobu Imanyara & 2 others vs Attorney General [2016] eKLR**. It was held as follows;

“An appeal to this Court from a trial by the High 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 allowances in this respect.”

27. In **Abok James Odera T/A A.J Odera & Associates Vs John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR** the Court held as follows;

“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyze 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.”

28. The issue that arises for determination is; **Whether the trial court erred in finding that the trial court had jurisdiction to entertain the dispute**

29. Jurisdiction has been discussed extensively over the years. In the celebrated case of **Owners of Motor Vessel “Lilian S” v Caltex Oil (Kenya) Limited (1989) 1 KLR** the Court held thus:-

“Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given”.

30. In the case of **Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & Others (2012) eKLR** it was held:

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. the court must operate within the constitutional limits. It cannot expand jurisdiction craft or innovation."

31. In the trial court, the Plaintiff instituted the suit vide a Plaint dated 21st January 2024 seeking the following orders;

- a) An order that the defendant do remove or demolish or pull down permanent house structure that is trespassing or encroaching on the Plaintiffs' parcel of land known as Kanyada/Kalanya/Kanyango 55 within 14 days of the making of the order herein and failure to do so the plaintiff be at liberty to do the same at the defendants' costs.**
- b) An order of permanent injunction to restrain the defendant whether by himself, his servants, agents, employees or any other person acting under the defendants' mandate or authority or direction from trespassing or erecting or encroaching or entering or constructing or erecting or developing or in any of all the parcel of land known as Kanyada/Kalanya/Kanyango 55.**
- c) The OCS Rodi Police Station do ensure compliance with the orders of the court.**

d) Costs of this suit and interest thereon as from the date of filing the suit until payment in full.

e) Any other relief the Honourable Court deems just and expedient to grant.

32. The defendant then filed the application to strike out the suit for want of jurisdiction. It then emerged that there was evidence on record that the Land Registrar had visited the suit land and the boundary dispute determined in December 2023.

33. A cursory reading of the prayers reveals that the Plaintiff seeks the orders premised on the allegation that the Defendant is trespassing onto his land and not on the issue of a boundary dispute. It follows that the cause of action is clearly trespass and encroachment. It means that the boundaries of the of the adjacent suit parcels of land were not the ones to be determined.

34. The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** found and held as follows in respect to the essence of pleadings in an election petition:-

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and

they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings...”

35. Additionally, I note that the use of the report by the land registrar was for the purposes of determining if there was encroachment or not, and to what extent it was, and not for determining a boundary dispute. The upshot of the foregoing is that the Appeal is without merit and the same is dismissed with costs to the Respondent.

36. Orders accordingly.

Judgment **dated, signed and delivered virtually via the Teams Platform this 26TH day of November 2025.**

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HON. DR. IUR NYAGAKA
JUDGE

From 10:06 PM in the presence of,

Mr. Ongoso Advocate for the Respondent

Mr. Nyamwaro Advocate for the Appellant

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