

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VIHIGA

ELCLA NO. E006 OF 2025

KENNEDY MUSERA INZIANI.....APPELLANT

VERSUS

BOAZ JOHN ANUBI.....RESPONDENT

(Being an appeal from the Ruling of Hon. J. Agonda- Principal Magistrate in Miscellaneous Application No. 25 of 2021 delivered on 23/01/2025)

JUDGEMENT

Background

A brief background to the appeal herein is that the appellant was the Respondent in VIHIGA SPMC MISC APPL NO. 25 of 2021 which had been commenced vide the Notice of Motion application dated 22nd December 2021, (herein referred to as the application). Vide the application, the applicant (who is the Respondent herein) sought for orders that: -

- a) the Honourable court be pleaded to issue an order directing the Officer Commanding Station and Vihiga Police Station and/or any other Police Officer within the Republic of Kenya to provide security to the County Lands Surveyor Vihiga County to restore beacons and boundary demarcation between land parcel NO. SOUTH MARAGOLI/CHAGENDA/1130 and 1131.
- b) the honourable court be pleased to issue an order directing the Officer Commanding Station Vihiga police station and/or within the Republic of

Kenya to provide security to the applicant and/or his employees and/or servants in removing the pit latrine erected on the public road leading to land Parcel No. NO. SOUTH MARAGOLI/CHAGENDA/1130

c) The costs of the Motion be awarded to the applicant.

The Notice of Motion was Supported by the averments in the Supporting Affidavit sworn by the applicant (Respondent herein) on 22nd December 2021.

The record shows that the appellant opposed the application vide the Replying Affidavit sworn on 4th January 2022.

The record shows that the application was heard by way of oral evidence after which the trial court, vide its Ruling delivered on 23rd January 2025, found that the application had merit and allowed it with further orders that the County Land Registrar to file report in court and after filing of the report each party was at liberty to apply and each party was ordered to bear own costs of the suit.

The appeal

Aggrieved by the ruling the appellant filed the present appeal vide the Memorandum of Appeal dated 19th February 2025 on the grounds that:-

- i) the learned trial Magistrate erred in law and in fact in failing to find that the suit as filed offended the provisions of section 18(2) of the Land Registration Act and that having no jurisdiction she could not order demolition of the structures in issue.
- ii) the learned trial Magistrate erred in law and in fact in making orders that were unlawful as they were contrary to section 18(2) of the Land Registration Act.

- iii) the learned trial Magistrate erred in law and in fact in relying on a report that was made after filing of the suit or application contrary to section 18(2) of the Land Registration Act in ordering the demolition of the appellants structures.
- iv) The learned trial Magistrate erred in law in making substantive orders in a Miscellaneous application and arriving at a contradicting decision hence occasioning a miscarriage of justice.
- v) The decision of the trial Magistrate was made contrary to the evidence on record.

The appellant therefore sought that the appeal be allowed with costs.

Vide directions given on 11/6/2025 the appeal was disposed of by way of written submissions.

Submissions for the Appellant

Written submissions dated 2nd September 2025 were filed by J. E. Namenge & Co Advocates on behalf of the appellant.

Counsel submitted that the trial court having found that no evidence was presented before it that the Land Registrar had fixed the boundary between the parcels of land and having acknowledged the provisions of section 18(2) of the Land Registration Act, it ought to have determined that it had no jurisdiction to determine the matter. Counsel referred the court to the case of the Owners of the Motor Vessels Lilian vs Caltex Oil (k) Ltd (1989) KLR and submitted that the orders made in the ruling were so made without jurisdiction.

Counsel submitted further that there was no basis for the proceedings on 7/11/2024 as there were no pleadings before the court for the proceedings. That there was no

substantive suit upon which the orders made on 23/1/2025 could be made. That the Land Registrar does not require directions of the court to fix boundaries.

Submissions for the Respondent

Written submissions dated 30th September 2025 were filed by D.C Chitwah & Co. Advocates on behalf of the Respondent. Counsel submitted that appellate courts should not interfere with lower court decisions without caution. That judicial restraint and respect for the lower court findings are fundamental principles that guide an appellate review include presumption of correctness, standard of review, judicial economy, respect for the trial process, legal stability, procedural irregularities. That appellate courts will not interfere with the findings of fact by a trial court unless it is shown that the trial court misapprehended the evidence, acted on wrong principles or reached a conclusion that was plainly wrong.

Counsel relied on the case of Attorney General vs Bala (2023) KECA 117(KLR) and submitted that section 66 of the Civil procedure Act only allows appeals from decrees and orders but not from incidental findings.

Counsel submitted that there is a report by the County Surveyor dated 15th December 2021 on the exercise carried out and observations on the ground. That it is the office that directed the Respondent to move to court for orders. That the appellant acknowledged in paragraph 5 of his Replying Affidavit that indeed the surveyor visited the disputed parcels and carried out survey.

That the lower court addressed itself to section 18(2) of the Land Registration Act and correctly found that already the Land Registrar had determined the dispute and filed a report in court. That the orders of the trial court were very specific as they were directed at the OCS to provide security to the Land Registrar and Surveyor to

fix the boundary and remove the pit latrine already determine to be on the road of access.

Counsel submitted that the appeal lacks merit and urged the court to dismiss it with costs to the respondent.

Issues for determination

The grounds of appeal raised and the submissions filed revolve around the issue of jurisdiction; whether the trial court had the jurisdiction to entertain the matter before it and make the orders it made.

Analysis and determination

This being a first appeal, this court is enjoined to reexamine the evidence placed before the trial court to arrive at independent conclusion and findings. See cases of Selle & Another vs Associated Motor Boat Company Limited and Others [1968] EA 123 and Gitobu Imanyara & 2 others –vs- Attorney General [2016] e KLR.

It was common ground between the parties as it is the law that jurisdiction to handle boundary disputes is vested in the Land Registrar by the provisions of sections 18 and 19 of the Land Registration Act. It is clear from the proceedings of the trial court that the trial court found as much. It is also the law under s. 18(2) of the same Act that courts are divested of jurisdiction in such disputes until the boundary dispute is heard and the boundary fixed by the Land Registrar.

It was not denied before the trial court and even in the appeal herein that the dispute between the parties was a boundary dispute. The summons from the Ministry of Lands dated 23rd August 2020 and attached to the application as annexure “BA1” was headed “Boundary confirmation of parcel S. MARAGOLI/CHAGENDA/1129, 1130, 1131 and 1132.”

Although subsequent summons indicated that he exercises was for opening of road of access, the report by the surveyor dated 15th December 2021 signed by one Dismas S. Mwisiahi reported that the boundary confirmation was suspended due to the hostility of the owner of the Land parcel SOUTH MARAGOLI/CHAGENDA/1131 and only the road of access was marked.

I have keenly read through the evidence placed before the trial court and I find no evidence that the boundary between the two parcels had ever been fixed.

The dispute was therefore within the purview of sections 18 and 19 of the land Registration Act. Those provisions of the law required the Land Registrar to handle the dispute. The Land Registrar may, as is the case often, work with the surveyor to resolve the dispute but the determination and the report will be that of the Land Registrar.

The Notice of Motion sought for an order of the court directed to the police to provide security. While there is nothing that bars the court from making an order

directing the police to provide security so as to enable the implementation or conducting of lawful exercise, in the present case part of what the applicant intended to do as it clear in prayer 3 of the Notice of Motion was to remove a pit latrine erected by the respondent. The boundary had not been determined so as to know whether the pit latrine was in the applicant's land, or on the respondent's land or on the road of access. There was no court order for eviction or demolition. The application invited the court to exercise its powers where the law had divested the court of such powers.

The ruling of the court apart from granting the prayers sought in the application also made an order directed at the land Registrar to file a report in court. The Land Registrar was not a party in the suit and the parties had not referred the matter to the Land Registrar.

I respectfully find that the trial court erred in entertaining the claim and making the decision that it made.

I find that the appeal has merit and hereby allow it. Given that the parties are neighbours and that they may need to refer the matter to land Registrar for resolution as by law provided, I find it to be in the interest of justice that each party bear own costs of the appeal.

The ruling of the trial court dated 23rd January 2025 is set aside and replaced with an order dismissing the application dated 22nd December 2021 with an order that each party bear own costs of the Misc. application.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY AT VIHIGA THIS
11TH DAY OF DECEMBER, 2025.**

**E. ASATI,
JUDGE.**

In the Presence of; -

Patricia- Court Assistant.

Ihachi h/b for Namenge for the appellant

Respondent present in person.