

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VIHIGA

VIHIGA ELCA NO. E008 OF 2025

HENRY AGUFA MWANZALI alias BOB.....APPELLANT

VERSUS

JOEL KAYELI LISAMILA.....RESPONDENT

(Being an Appeal from the entire Ruling delivered by the Hon. J. Agonda on the 30th day of January 2025 at Vihiga in MCELC Misc Case No E003 of 2024)

JUDGEMENT

The Appellant was the 1st Respondent in VIHIGA MISC ELC APPLICATION NO. E003 of 2024 in which the Respondent herein vide an application dated 6/6/2024 sought for orders that ;-

- a) The application be certified urgent and heard on priority basis.

- b) The honourable court do find fit to order the Respondents to avail themselves when the Vihiga County Survey Office shall visit land parcel numbers SOUTH MARAGOLI/BUYONGA/1911, 768, 1912 and 774 ascertaining of boundaries and opening of the road leading to land parcels SOUTH MARAGOLI/BUYONGA/768 and 1911.

- c) That upon the boundaries being ascertained and the road opened, the respondents be compelled to abide by the outcome and not to interfere with the same
- d) The OCS Vihiga police station do provide security in any case need for the same arises during the exercise.
- e) Costs be recovered from the Respondent
- f) The honourable court do issue such other orders as shall deem fit to meet justice for the applicant.

The application was supported by the averments in the Supporting Affidavit sworn by the Respondent herein on 6th June 2024 and the annextures thereto.

The record shows that the trial court considered the application and vide the ruling dated 30th January 2025 found that the applicant (Respondent herein) had proved his claim and allowed the application as prayed.

The appeal

Dissatisfied with the ruling, the appellant filed the present appeal vide the Memorandum of appeal dated 25th February 2025 and sought for orders that: -

- a) The appeal be allowed
- b) The whole ruling delivered by Hon. J. A Agonda on the 30th January 2025 in Vihiga MCELC Misc App No. E003 of 2024 be set aside and the application be dismissed with costs.
- c) The Respondent be ordered to bear the costs of the appeal.

Vide directions given on 7/7/2025, the appeal was heard by way of written submissions.

Submissions for the appellant

Vide his written submissions dated 16th September 2025 filed on his behalf by the firm of Orlando & Co Advocates, the appellant framed 2 issues for determination namely: -

- a) Whether the learned Magistrate erred in law and fact by failing to rely on /or overlooked the appellant's Replying Affidavit sworn on 22nd October 2024 and written submissions dated 18th December 2024.

- b) Whether the trial Magistrate erred in law and fact in disregarding a boundary dispute has already been determined by the Land Registrar in accordance with section 18 and 19 of the Land Registration Act and if affirmative, whether this honourable court should substitute the trial court's orders with its orders.

On the first issue, Counsel submitted that contrary to the findings of the trial court that "the Respondents did not file their Replying Affidavit and have not challenged the applicants ownership of the suit property.....", the appellant had filed his Replying Affidavit sworn on 22nd October 2024 and filed on 23rd October 2024. Counsel invited the court to consider the Replying Affidavit which is part of the record of appeal and the evidential documents annexed thereto.

On the second issue, Counsel submitted that the law of resolving boundary issues was premised on sections 18 and 19 of the Land Registration Act. That the trial court had no jurisdiction to handle a boundary dispute claim. Counsel relied on the

case of Peter Muraya Kaguri- vs Simon Mbaria Muchuru (2015) eKLR among others to support the submission.

That the Land Registrar had heard the dispute and made a ruling that :-

- 1) The access road to be marked on the ground.
- 2) Unsatisfied parties to appeal to the High Court within 30 days.

That hence the only remedy available to an unsatisfied party was to appeal.

Counsel urged the court to allow the appeal.

Submissions for the Respondent

On behalf of the Respondent, written submissions dated 29th September 2025 were filed by the firm of A.B.L Musiega & Company Advocates.

On whether the appeal has merit, Counsel submitted that the application before the trial court had four (4) respondents. That the 2nd Respondent who was present in court during the hearing of the application did not oppose the application, hence had not filed his response.

That the 3rd and 4th Respondents did not attend court or file any response opposing the application. That if the Respondent filed the Replying Affidavit sworn on 22nd October 2024 on 23rd of the same month then the same was filed out of time as timelines had been given.

That the dispute was not a boundary dispute but also involved an access road leading to land parcel registration number SOUTH MARAGOLI/BUNYONGA/765 and 1911.

Counsel submitted further that the Land Registrar at one time visited the parcels in question and the road and made a determination and stated that the unsatisfied

parties to appeal to the High court. That thereafter the Respondent who was dissatisfied with the determination of the Land Registrar through the firm of Mwamu Nyanga & Co. Advocates wrote a letter. That the Respondent was asked to pay some money to Vihiga land registry which he paid but that nonetheless, the Land Registrar did not visit the disputed parcel of land to survey as indicated. That it is not true that the boundary dispute between the appellant, the Respondent and other parties who were part of the matter in the trial court has been resolved.

That the Respondent found that the only place to resort to for help is the court so that he could get orders to have the issue resolved. That the applicant was not satisfied with the proceedings dated 30th September 2023 particularly the findings and ruling, he resorted to seek more help from the land registry but in vain hence the filing of the application dated 6th June 2024.

That if the dispute had been resolved, then the Land Registry could not require the appellant to avail himself together with other parties for the opening of the road leading to Land Parcel number SOUTH MARAGOLI/BUYONGA/765 and 1911.

Counsel relied on the annexures to the Supporting Affidavit sworn on 6th June 2024 and the annexures to the further affidavit sworn by the applicant on 7th November 2024.

Counsel urged the court to uphold the ruling delivered on 30th January 2025 and to dismiss the appeal with costs.

Issues for determination

From the grounds of appeal, the record of appeal generally and the submissions made, the issues that emerge for determination are:-

- a) Whether or not the boundary disputes the subject of the proceedings before the trial court had been resolved earlier.
- b) Whether or not the trial court erred in allowing the respondents application dated 6th June 2024.
- c) Whether the appeal has merit
- d) Costs of the appeal.

Analysis and determination

The application that resulted in the ruling the subject of this appeal was dated 6th June 2024. A copy thereof is on pages 3-12 of the Record of appeal. The appellant herein was the 1st Respondent in the application. The substantive relief sought was for the court to compel the 4 respondents named in the application to avail themselves at the suite of Land Parcel Number SOUTH MARAGOLI/BUYONGA/1911,768,1912 and 774 during the visit of the Vihiga County Survey office to ascertain the boundaries and opening of the road leading to Land parcel number SOUTH MARAGOLI//BUYONGA/768 and 1911.

It was acknowledged in ground (b) of the application that there was a ruling touching on the land parcels which was done by the Land Registrar Vihiga that there be an access road as was marked on the ground which road was 1 1/2(one and half) meters on the ground. The ruling was attached to the Supporting Affidavit sworn on the same date as the application and marked as annexure JKL-1, It is on page 7 to 10 of the record of appeal.

Perusal of the said ruling shows that it was dated 30th September 2003. The subject matter was Boundary Dispute proceedings in respect of SOUTH MARAGOLI./BUYONGA/1911,768,1912 - VS 744, 768 and 773. The parcels are the subject

matter in the application the subject matter in this appeal. The Respondent herein was the applicant together with one Alfred Ralph Kihima.

The proceedings were taken by one David Dunya Omol District Land Registrar Vihiga.

It shows that the Land Registrar found that the access road which was visible on the ground measured about 1 1/2 (one and half) meters wide. The Land Registrar found that while Mr, Agufa had encroached on the upper part the applicant and Mr Agufa had encroached onto the road on the middle part and that on the lower part it was one of the complainants who had encroached. That the surveyor identified the position of the road and marks were shown to mark the extent of the road and Euphobia trees planted on it.

The Land Registrar consequently ruled that the access road to be marked on the ground. That unsatisfied parties were to appeal to the High court within 30 days of the ruling.

It is not denied that it is the same dispute that the Respondent took back to the land Registrar and paid monies as he claims for the surveyors to visit the suit land and resolve. One of the grounds upon which the application before the trial court was brought was that the boundaries which were fixed by the County Surveyor to indicate where the road is have since been interfered with and that the road is no longer visible on the ground.

I find that from the material placed before court the boundary dispute was already resolved by the land Registrar in accordance of sections 18 and 19 of the Land Registration Act.

On whether or not the trial court erred in allowing the application, the procedure that follows after determination of a boundary dispute by a Land Registrar is either implementation of the ruling or appeal by an aggrieved party.

Under Rule 40 of the Land Registration (General) Regulations No. 278 of 2017, the procedure for ascertaining boundary disputes is provided for Rule 40(6) provides that a party not satisfied with the determination of the Land Registrar may within 30 days of the date of notification of the determination appeal the decision to the court. No appeal was preferred by any of the parties.

The Respondent through the application sought for the appellant and other to be present on the ground when the Vihiga County Survey office was to visit the same parcel of ascertaining of boundaries and opening of the road leading to SOUTH MARAGOLI/BUYONGA/768 and 1911.

It is clear that this had already been done by the Land Registrar. The trial court therefore erred in allowing the application hence issuing orders compelling the appellant to avail himself in the exercise.

I find that the appeal has merit and hereby allow it. The ruling of the trial court dated 30th January 2025 is hereby set aside and replaced with an order dismissing the application dated 6/6/2024.

Costs of the appeal are awarded to the appellant.

Orders accordingly.

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

E. ASATI,

JUDGE.

In the Presence of; -

Patricia- Court Assistant

Obadiah h/b for Orlando for the appellant.

Malanda for the Respondent.