Njagi v Musa (Environment and Land Appeal 28 of 2019)
[2025] KEELC 5753 (KLR) (30 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5753 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT AND LAND APPEAL 28 OF 2019

A KANIARU, J

JULY 30, 2025

BETWEEN

JOHN NJERU NJAGI ..... APPELLANT

AND

DANIEL NTHIGA MUSA ..... RESPONDENT

(Being an appeal against the Judgement of the Chief Magistrate Hon. M.N. Gicheru dated 14th October 2019 in Embu ELC No. 6 of 2018)

JUDGMENT

1. The appeal before me is essentially the second round of a legal contest that started in the lower court (Hon. M.N. Gicheru, Chief Magistrate) which was handled as ELC No. 6 of 2018. In the lower court, the respondent – Daniel Nthiga Musa – had impleaded the appellant – John Njeru Njagi – alleging, interalia, encroachment into his land parcel No. Gaturi/Nembure/491. The appellant was sued with another party – Kezia Njura Njogu – who is not a party to this appeal.

2. Two other land parcels also featured in the lower court dispute. They were Gaturi/Nembure/576 and Gaturi/Nembure/13961. Parcel No. 13961 was said to be a resultant portion from the sub-division of parcel No. 576. The sued parties were said to have been trying to justify the alleged encroachment on the basis that part of parcel No. 491 was actually a portion of Land parcel No. 576 owned by Kezia Njura Njogu.

3. In the lower court matter the respondent wanted the court to make various orders including ordering the Land Registrar to mark the boundary between land parcels No. 491 and 13961 and also remove the caution registered against parcel No. 491 by the appellant. The respondent also wanted a permanent restraining order to stop the parties sued from encroaching on parcel No. 491.

4. The court record shows that the appellant filed a defence 16/5/2018 in which he pleaded, interalia, that the boundary issue had already been settled and that the matter filed in court was Res Judicata.

5. It is apparent from the record that the matter was not heard. On 1/2/2019, the court ordered that the Land Registrar determine the boundary between Land parcels No. Gaturi/Nembure/491 and Gaturi/Nembure/13961. After such determination, the Land Registrar was to file a report. It appears plain to me that a report dated 1/7/2019 was filed and the court accepted it as "a fair determination of the dispute". It further observed that "The encroachment on Land parcel number 491 by Land number 576 is obvious". Based on this, the court entered judgement in favour of the plaintiff "as prayed for in the plaint".

6. It is this entry of judgement that provoked the appeal now before this court. The appeal rests on three (3) postulates as follows:

    1. The trial magistrate erred in law and in failing to uphold the preliminary objection dated 9/7/2018 and make a finding that the M ELC Case No. 6 of 2018 was Res Judicata vide the verdict of the District Land Dispute Tribunal case No. 21 of 2004 dated 21/5/2009 and the subordinate court award No. 37 of 2009 dated 28/7/2015; which adopted the verdict dated 21/5/2009 as the judgement of the court.

    2. The trial magistrate erred in law and in fact by failing to appreciate that M ELC case No. 6 of 2018 was an action or proceedings relating to a dispute as to the boundaries between land parcel No. Gaturi/Nembure/491 and land parcel No. Gaturi/Nembure/576 and thereafter find that the subordinate court lacked jurisdiction to hear and determine the action or proceedings as stipulated under Section 18 of the *Land Registration Act*, 2012.

    3. That the trial magistrate erred in law and fact by summarily allowing the suit as prayed in the plaint dated 6/2/2018 without calling for witness evidence and documentary evidence but solely based this finding on the report by the surveyor dated 1/7/2019 Yet the said report did not disclose sufficient evidence to prove prayers (a) (b) and (c) in the plaint.

7. The appellant's expectation is that the appeal will be determined in his favour. He therefore asked the court to allow the appel, set aside the lower court judgement, and uphold the verdict of the subordinate court in award No. 37 of 2009 dated 28/7/2015.

8. The appeal was canvassed by way of written submissions. The appellants submissions were filed on 25/10/2022. The appellant started by addressing ground 1 of the appeal which faults the lower court for not upholding the issue of Res Judicata raised by him via a preliminary objection dated 9/7/2018. It was pointed out that for Res Judicata to hold, the suit said to be affected by it should be similar to the suit previously decided, the previous suit must have been fully determined, and the parties must be the same.

9. According to the appellant, the Land tribunal proceedings conducted as Tribunal case No. 21 of 2004 and adopted by the court as judgement in Award No. PMCC 37 of 2009 essentially related to parcels No. 491 and 576 which are the same parcels of land in the lower court matter. The only small change was the subdivision of parcel No. 576 which gave rise to parcel No. 13961. Submitted the appellant: "In essence therefore, the subject matter in the two civil actions is a boundary dispute relating to the same parcels of land. In addition, the litigating parties as disclosed in the two civil actions are the same persons, their agents and/or servants."

10. On ground 2, which is about the matter strictly being a boundary dispute fit only for determination by the Land Registrar and not the court, the appellant submitted that the main prayer in the suit was about marking of the boundary, with the other prayers being "subsidiary" or appurtenant to it. Section 18(2) and (3) of the *Land Registration Act*, 2012, were cited to make the point that the court is bereft

of jurisdiction to handle boundary disputes and that it is the Land Registrar who is statutorily clothed with that jurisdiction.

11. Then there was the final issue which related to the summary manner in which the lower court matter was decided. The lower court was faulted for relying solely on the surveyors report as its basis for disposing of the matter. The report itself was faulted for being prepared by a private surveyor instead of a government surveyor. Further, the court was said to have failed to give opportunity to party's counsel to cross-examine the surveyor concerning the report.

12. The respondents report was filed on 17/5/2023. The respondent submitted, interalia, that the lower court did not err in failing to uphold the preliminary objection. The respondent drew the attention of the court to Section 7 of the *Civil Procedure Act* (Cap 21) and the decision of the Supreme Court in John Florence Maritime Services Limited & Another v Cabinet Secretary, Transport and Infrastructure & 3 Others [2021] eKLR which highlight the quintessence of Res Judicata. It was then submitted that the previous dispute was about removal of "braces" while the lower court matter was not. It was further submitted that the encroachment complained of in the lower court started in the year 2017 while the complaint in the earlier dispute related to an earlier period. The suit in the lower court was also said to have some prayers which the Land Registrar could not grant.

13. On whether the lower court lacked jurisdiction on the basis that the matter related to a boundary dispute, this is an issue that the appellant was said not to have raised in the lower court and was therefore termed an "afterthought". To reinforce the point, the case of Janice Achieng Osawa (suing as the administratrix of the estate of Serfine Owiti Wandu) v Nurq Ramadhan [2021] eKLR, was cited. On that basis, the appellant was said to be "estopped" from raising the issue of jurisdiction at this stage. It was emphasized that the issue before the court was encroachment, not boundary dispute.

14. Further, the court was said to have recognized the critical role of the Land Registrar in the matter when it directed him to demarcate the boundaries and file a report. The court was said to have jurisdiction to handle the issue of encroachment. For guidance and persuasion, the case of Keiyan Group Ranch v Samuel Oruta & 9 Others [2021] eKLR was cited.

15. The respondents submission on the issue of relying on the Land Registrar's report only to decide the case was that the court correctly adopted the Land Registrar's report and not the surveyor's report as alleged by the appellant. The respondent relied on the case of Beatrice Matoya & Another v Attorney General & 6 others [2021] eKLR to drive the point home.

16. I have considered the appeal as filed, the rival submissions, and the lower court record made available to this court. This is a first appeal and the way to handle it was expressed well in the case of Selle v Associated Motor Boat Company Ltd [1968] EA 123 where it was stated thus:

> " An appeal to this court from a trial by the High court is by way of a 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. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

17. Further, the court has enabling power under Section 78 of the *Civil Procedure Act* (Cap. 21) to determine the case finally, remand the case, to frame issues and refer them for trial, take additional

evidence or direct the evidence to be taken, or order a new trial. While doing so, the appellate court has the same powers and can perform the same duties as the court that first handled the dispute.

18. As I have already pointed out, I have looked at the lower court record. That court seems to me to have been a bit casual in the manner it handled the suit. I think I need to explain: the respondent filed the suit vide a plaint dated 6/2/2018. The appellant filed a defence dated 16/5/2018. I have not seen the defence of the party on record. Both sides filed some documents. The statement of the respondent is even on record. Ordinarily, and as procedure would require – see order 11 of the Civil Procedure Rules, 2010 – the matter was supposed to be made ready for hearing. This was not done. Instead, the court suo moto decided that the matter was a boundary dispute and proceeded to direct the Land Registrar to visit the suit, fix boundaries, and make a report to it.

19. The Land Registrar did as directed and when the court received his report, it entered judgement solely on the basis of that report. No opportunity was given to the disputants to interrogate the report or adduce evidence in concurrence or rebuttal thereof. No opportunity also was given to submit before judgement was entered. In simple terms, Order 18 of Civil Procedure Rules, 2010, which provides for hearing and spells out, the rules to be followed in that regard, was largely or even completely ignored.

20. It is this manner of handling the matter which the appellant is contesting in this appeal. I may add that there is a preliminary objection filed by the appellant and both sides are shown to have filed reasoned submissions focused on the objection. Logically and consequently, the court ought to have pronounced itself on that objection through a ruling. I don't see such ruling on record. I think all this is enough to show what I mean by saying that the lower court was a bit casual in its approach to the matter.

21. So when the appellant talks of a preliminary objection that was not upheld, I see a preliminary objection that was neither upheld nor rejected. Nay, I see a preliminary objection that the court did not pronounce itself on. Yet the issue raised in the objection was critical because if the court found in favour of the appellant on this issue, it wouldn't have jurisdiction to handle the matter before it. In this appeal itself, I wouldn't want to pronounce myself on the issue. It was a matter brought before the court of first instance and that the court was supposed to make a decision. My role at this level would be to look at the decision and do my own evaluation. I would then be required to agree or disagree with the decision. I do not understand that I am supposed to handle the issue as a court of first instance.

22. It is clear that the appellant sees the suit as a boundary dispute. For this reason, he submits that the lower court had no jurisdiction to handle it. The respondents side disagrees. It first faults the appellant for not raising the issue of jurisdiction in the lower court. According to the respondent, the appellant is estopped from raising it here. I don't very much agree with the respondent on this. My understanding of the law is that the issue of jurisdiction can be raised at any stage of the proceedings including on appeal.

23. But there is another aspect of the respondents submissions that I agree with. The aspect is that the matter was not about boundary perse. It was about encroachment and forcible acquisition of the portion of the respondents land. The issue of boundary only comes in as an unavoidable and inevitable consideration in the determination of the issue of encroachment. The main issue is encroachment and the issue of boundary is merely ancillary to the determination of encroachment. It is also plain to me that the suit as filed contained other prayers which the Land Registrar could not determine.

24. My considered view is that the appellant is correct regarding the "summary manner" that the lower court made its decision. I have already alluded to this when stating the casual manner in which the suit was handled. In my view, this is the crucial ground in this appeal that is supposed to inform my decision. Without doubt, the lower court was supposed to conduct a hearing. The requirements of

Order 18 of the Civil Procedure Rules, 2010, needed to be complied with. Thereafter, a judgement that meets the requirements of a proper judgment as envisaged in Order 21 rule 4 of Civil Procedure was supposed to be delivered. Rule 4 of the said order requires that a judgement in a defended suit should contain a concise statement of the case, the points for determination, the decision of the court, and the reasons for the decision. Ordinarily also, it is a judgment that makes or produces orders. It is usually not the other way round. But what I see in the proceedings of 14/10/2019 is an order that produced a judgement.

25. In this appeal, the appellant would wish that his appeal is allowed and that the award made by the subordinate court in award No. 37 of 2009 be upheld. I do not see the matter that and that is why elsewhere in this judgment I stated what the court is mandated to do by Section 78 of the *Civil Procedure Act* (Cap. 21). My considerate view is that no proper trial of the case took place in the lower court. I therefore allow the appeal. One of the options is to order a new trial and this is the option that commends itself to me as the most appropriate. I therefore order that a new trial be conducted. Costs of this appeal and of the lower court matter shall abide the outcome of the new trial. I needed to clarify that new trial does not preclude the lower court from entertaining interlocutory applications in the matter including preliminary objections. It does not also prevent that court from pronouncing itself on the preliminary objection filed earlier but never ruled on.

JUDGEMENT DATED, SIGNED AND DELIVERED ONLINE AT KITUI THIS 30TH DAY OF JULY, 2025.

A. KANIARU

ENVIRONMENT & LAND COURT, KITUI

In the presence of;

Ms. Wanjiku for Respondent

Eddie Njiru for Appellant - absent

Appellant – absent

Respondent – absent

Court Assistant - Musyoki