



**Simba v Mathenge (Environment and Land Appeal 11 of 2019)
[2024] KEELC 3523 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 3523 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL 11 OF 2019
A KANIARU, J
JANUARY 31, 2024**

BETWEEN

NGUO SIMBA APPELLANT

AND

HELLENA NGIMA MATHENGE RESPONDENT

*(Being an appeal from the judgement of Hon. M. Gicheru
delivered on 8th April 2019 in EMBU CMCC No. 279 of 2010)*

JUDGMENT

1. The Respondent herein – Hellena Ngima Mathenge – had impleaded the Appellant – Nguo Simba - in the lower court in a dispute relating to a common boundary between land parcel No. Gandori/Kiriari/1279 belonging to the Respondent and land parcel No. Ngandori/Kiriari/1344 belonging to the Appellant. In the said case, the Respondent was complaining that the Appellant had in the year 2003 changed the course of a river which acts as their land boundary, towards her parcel of land. That she moved the Water Resource Management Board for proper relocation of the river and the Board visited the site and ordered relocation of the river under its supervision. That soil-filled sacks were used to get the river back to its normal path but the appellant later the same day destroyed the sacks and got the river back where it was. That the Water Resource Management Department sued him for that act but its matter was dismissed and termed as a land boundary dispute. She was praying for an order authorizing the Land Registrar and the District Surveyor to locate the original common boundary between the two parcels of land and determine whether the same had been interfered with. She also asked for costs of the suit and any other relief that the court found fit and just to grant.
2. The Appellant had filed a defence in the lower court case in which he denied the Respondents allegations and pleaded, inter alia, that he did not encroach into the Respondents parcel of land or relocate its boundary as he utilizes his portion and has never had a reason or intention of taking or



acquiring the plaintiff's portion. He pleaded further, that the trial court lacked jurisdiction to hear the Respondents case.

3. The lower court at Embu (Hon. M.N Gicheru CM) heard the matter and in a judgement delivered on 08.04.2019 held that the court had jurisdiction to determine the case by virtue of Section 18(2) of the Land Registration Act which provides that the court has no jurisdiction unless the boundaries have been determined by the Registrar; that the Registrar made a determination of the boundaries on 03.04.2018; after the Registrars decision, the trial court acquired jurisdiction by virtue of that decision; the trial court further held that the Appellants land was bigger than it should be, a fact which he was unable to explain whereas the Respondents land was smaller than it should be, which fact corroborated the Respondent's assertions. He therefore entered judgement in favour of the Respondent.
4. The outcome of the lower court case is what triggered the appeal now before me. The memorandum of appeal came with nine (9) grounds as follows:
 1. That the learned trial magistrate erred in law and fact in reaching a judgement that the court had jurisdiction to hear and determine the suit as provided for under Section 18 (2) of the Land Registration Act (Act No. 3 of 2012) whereas the Respondents suit was filed in the year 2010 and the court did not have jurisdiction to hear and determine the same under Section 21(2) & (4) of the Registered Land Act Cap 300 Repealed.
 2. That the learned trial magistrate erred in law and fact in reaching a judgement that since the Land Registrar made a determination of the boundaries on 03.04.2018, the court had jurisdiction by virtue of the Registrars decision whereas the court is vested with jurisdiction to determine a suit on the first instance of filing the suit and not during the hearing and determination of a suit.
 3. That the learned trial magistrate erred in law and fact in reaching a judgement that the Appellant herein interfered with the boundaries for land parcels No. Ngandori/Kiriari/1279 and 1344 whereas there was no evidence produced either by the Respondent or the District Land Registrar, Embu to prove even on a balance of probability or at all that it is the Appellant who interfered with the river course and thus the boundaries.
 4. That the learned trial magistrate erred in law and fact in failing to appreciate the District Land Registrar, Embu observations in his report that the river course is prone to changing its course during floods which is a natural cause rather than man made and the Registrar did not fault the Appellant with obstruction of the river course.
 5. That the learned trial magistrate erred in law and fact reaching a decision that though the Appellant was acquitted in Embu SPMC Criminal Case No. 1893 of 2008, it did not mean that he did not interfere with the boundary and the said decision by the learned trial Magistrate Hon. M.N Gicheru (CM) amounts to sitting on an appeal of the said Criminal Case No. 1893 of 2008 whereas no appeal was preferred against the decision reached by the court to acquit the Appellant herein in Embu SPMC Criminal Case No. 1893 of 2008.
 6. That the learned trial magistrate erred in law and fact in reaching a decision that it was a fact that the Appellant changed the river course which fact was allegedly corroborated by the Appellant being charged in Embu SPMC Criminal Case No. 1893 of 2008 with the offence of obstruction and diversion of a water course whereas the Appellant was acquitted of the said offence under Section 215 of the Criminal Procedure Code.



7. That the learned trial magistrate erred in law and fact by finding that the Appellant had failed to explain why his land had an extra 0.28 Acres whereas he was not taken to task to prove the same and the burden of proof did not lie with the Appellant.
 8. That the learned trial magistrate erred in law and in fact by finding that the Respondent had proved that her land which should be 0.98 Acres is actually 0.89 Acres whereas no evidence was produced by the Appellant to that effect.
 9. That the learned trial magistrate erred in law and fact in entering judgement in favour of the Respondent and ordering the Appellant to pay costs of the suit whereas there was no evidence produced against the Appellant either by the Respondent or the District Land Registrar, Embu.
5. The court was urged to allow the appeal and that the decision by the trial court be set aside. The appellant also asked for costs of the Appeal.
 6. It was agreed that the Appeal be disposed of by way of written submissions. The Respondent, despite being served severally with hearing notices for the Appeal, never appeared in court and therefore only the appellant filed submissions. His submissions were filed on 31.05.2023.
 7. It was submitted that the entity that has the statutory mandate to make available an accurate plan of defined boundaries is the office of the Land Registrar. That this is also the entity which has the requisite expertise to undertake the said task. That disputes relating to boundaries ought to be resolved by the Land Registrar in the first instance and that the decision can then be challenged in court pursuant to the provisions of Sections 79 (3A), 80, 86 and 91(9) of the Land Registration Act. That where the law has given a legal obligation to a Government department, it is important for the court to let that department proceed to meet the legal obligations. That in this case, the office of the Land Registrar is mandated to deal with the general boundary dispute first before the same is escalated to court. That further, the fact that the Land Registrar determined the boundary dispute when the dispute had already been lodged in court cannot cure the fact that the dispute relating to boundaries ought to be resolved by the Land Registrar, in the first instance either under Section 18(2) of the Land Registration Act 2012 or under Section 21(4) of the Registered Land Act. That therefore the dispute was prematurely before the trial court and the court therefore lacked jurisdiction to hear and determine the same. The case of *Azzuri Ltd v Pink Properties Ltd* (2018) Eklr was cited to support that position.
 8. The Appellant further submitted that the learned magistrate despite lacking jurisdiction to hear and determine the boundary dispute, based on the Registrars report proceeded to make findings that the fact that the defendant's land was bigger than it should be while the plaintiff's was smaller corroborated the plaintiff's assertion that the defendant interfered with the boundary. That from the conclusion in the said report, the Land Registrar did not indicate and/or conclude that the Appellant had interfered with the boundary.
 9. He submitted further, that the learned trial magistrate made a finding that the Appellants acquittal in the criminal case did not necessarily mean that he did not interfere with the boundary and only meant that the case was not proved beyond reasonable doubt. That the trial magistrate failed to appreciate that the court hearing and deciding the criminal case had the benefit of hearing and interrogating all the evidence produced against the Appellant. That the decision made by the trial magistrate amounted to sitting on appeal of the criminal case. He urged that the appeal be allowed in favour of the appellant and the judgement of the trial court be set aside.
 10. I have considered the appeal filed as well as the Appellants submissions. My duty as the first appellate court is to re-evaluate and re-assess the evidence that was before the lower court and make my own



conclusions while bearing in mind that the lower court had the advantage of handling the evidence first hand. The decided cases of *Selle Vs Associated Motor Boat Company Limited* [1968] EA 123 and *Mbogo Vs Shah* [1968] EA 93 serve to remind me that I should not rush to interfere with the findings of fact by the lower court unless I am completely convinced that the lower court was wholly wrong in its appreciation of the evidence before it.

11. Based on the memorandum of appeal and the submissions by the parties herein, I find that the issues for determination are as follows;

- i. Whether the trial court had the jurisdiction to hear and determine the lower court case.
- ii. Whether the findings of the Learned Chief Magistrate were against the weight of the evidence adduced.

12. The Appellant has contended that the Trial Court should not have made the determination it did for the reason that the office with the mandate to determine boundaries is the office of the Land Registrar as stipulated in Section 18(2) of the [Land Registration Act](#) 2012. Section 18 of the [Land Registration Act](#) No.3 of 2012 provides as follows:

18.

- (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.
- (2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.
- (3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:

Provided that where all the boundaries are defined under section 19 (3), the determination of the position of any uncertain boundary shall be done as stipulated in the [Survey Act](#), Cap. 299.

13. From the above, the Court by virtue of Section 18(2) is precluded from entertaining any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined. Under Section 18 and 19 of the [Land Registration Act](#) No.3 of 2012, the Land Registrar and the Surveyor have been given the power and mandate to handle issues relating to boundary disputes. Section 19 of the [Land Registration Act](#) provides follows:

19.

- (1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.
- (2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register



that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.

- (3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.
14. From the record before me, on 28.10.2014 both parties, being the Appellant and the Respondent, on their own motion agreed to have the matter settled by the Land Registrar and the Land Surveyor who were to visit the two parcels of land being Ngandori/Kiriari/1279 and Ngandori/Kiriari/1344 to determine the boundary and file a report within 60 days. I understand that the two officials visited the land and on 03.04.2018 filed a report. It is on the basis of this report that the trial court proceeded to make its determination.
15. The trial court proceeded to make its determination on the basis that the provisions of Section 18(2) of the *Land registration Act* (Act No. 3 of 2012) provide that the court has no jurisdiction unless the boundaries have been determined by the Registrar. The court further observed that the Registrar made a determination of the boundaries on 03.04.2018 and that after the Registrars decision, this court got jurisdiction by virtue of that decision.
16. The Respondent’s case in the trial court was that the Appellant had encroached and trespassed into her parcel of land and was seeking to have him move out from the portion he had encroached. To determine whether the Appellant had encroached on the said land, the boundaries of the two parcels of land had to be determined first. The parties did indeed resolve to have the Land Registrar and the District Surveyor visit the two parcels of land to determine the boundary in dispute, which they did and then filed a report. What the court merely did was to enforce the findings of that report, which in my view was not beyond the court’s jurisdiction. The trial court rightly found, it acquired jurisdiction once the Land Registrar determined the boundaries.
17. Further, I am guided by the observations of the court made in the case of *Munyali v Musyoka* (Environment and Land Appeal 19 of 2021) [2022] KEELC 3247 (KLR) (26 July 2022) (Judgment) where it was observed;
- “I have considered as part of the fundamental question that arises for determination in this appeal as whether the provisions of section 18(2) of the *Land Registration Act* precludes the ELC from determining a matter involving a boundary dispute. In my view the provisions of Section 18 (2) of the *Land Registration Act* have to be considered alongside the provisions of Section 13 (2) (a) of the Environmental and Land Court Act. It is necessary to restate the said provisions;
- “In exercise of its jurisdiction under Article 162(2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes—
- i. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;



Further consideration must be given to the provisions of by Section 9 of the Magistrates' Courts Act No.26 of 2015 which stipulates that:

“In the exercise of the jurisdiction conferred upon it by section 26 of the Environment and Land Court Act (No. 19 of 2011) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to —

- i. environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

18. The court went on further to cite the case of D.T Dobie Company (K) Limited v. Muchina (1982) KLR where the court relied on Wenlock v. Moloney (1965) where it was stated that;

“Having looked at the two enactments within the context of the case before us, we do not think that the jurisdiction of the ELC is divested especially where the issues in dispute are intertwined with others. As the Judge unravels the intricate web of disputes, we find nothing wrong in the order requesting the Land Registrar who is the custodian of the official records of land ownership to avail them to assist the court make a determination on the germane issue of whether the wall constructed on the disputed plot is within its boundary and whether there was trespass. As correctly pointed out by the Judge, the court is enjoined under Article 159 (2) (d) of the Constitution to ensure the ends of justice are met by overlooking technicalities and addressing substantive issues. Striking the entire suit would not serve the ends of justice”

19. Further still, the court observed:

“Following the findings in the above Court of Appeal decision I do find that the jurisdiction of the ELC is not completely divested by the provisions of Section 18 of the Land Registration Act especially where the issues in dispute are not confined to ascertainment of boundaries alone but as in this case involves compensation for trespass and special damages for damage and destruction to trees and vegetation and continued cultivation, farming and planting on the disputed portion of land. Following the above decision I do find that the trial court ought to have referred the dispute to the Land Registrar for determination of the boundary dispute in accordance with the provisions of the Land Registration Act before determining the claim of trespass and destruction of property.”

20. The question then that would be left for this court to determine is whether the findings of the Learned Chief Magistrate were against the weight of the evidence adduced. The Land Registrar in the report dated 03.04.2018 made the following observations:

“At the position of the Disputed River, is a large area of a flood plain. As such, the river course is prone to changing its course during floods.

There are no gullies left behind as the river course changes because from either side of the river are various agricultural activities.

If there were gullies left and minimal cultivation, it could be easy to re-establish the original position of the river.”



21. The Registrar then made an analysis comparing the boundary of the two parcels of land on the ground and on the Registry Index Map (RIM) noting that noticeable differences occur in the area occupied by each parcel of land. He observed that Parcel No. 1279 (belonging to the Respondent) on the ground was 0.36 Ha (0.89 Acres) whereas on the RIM it was 0.44 Ha (1.1 Acres) and that the Registered Area was 0.39 Ha (0.98 Acres). He also observed that Parcel No. 1344 (belonging to the Appellant) on the ground was 0.86 Ha (2.14 Acres) whereas on the RIM it was 0.79 Ha (1.95 Acres) and that the Registered Area was 0.752 Ha (1.86 Acres). He then concluded that:

“It is clear that from the above table all areas are different from various records.

From the Survey Report (attached), it is also clear that the position of the river differs from its position on the RIM in entire flood plain. This is not a unique scenario affecting only the two parcels of land (Ngandori/Kiriari/1279 and 1344).

The river is a continuous physical feature and if its course was to be changed to conform to its position on the RIM, it would require that all the neighbors in this area be part of the exercise.”

22. My understanding of the Land Registrars report was that the changes in the boundary of the two parcels of land was caused by the changes of the course of the river during floods, which is a natural occurrence. That this was not a unique occurrence to the Appellant and Respondent’s land as even the neighboring lands were affected. That if the river’s course was to be changed to conform to its position on the Registry Map index, then all the neighboring parcels of land would have to be affected. For this reason, I do not agree with the trial court’s findings that the Appellant was not able to explain why his land was bigger than it should be. Also it is not true that the fact that the Respondent’s land was smaller than it should be corroborated her allegations that the Appellant had interfered with the boundary. The Land Registrars report does not indicate that there was interference by the Appellant with the boundary. It is abundantly clear that the boundary was interfered with by the changing course of the river that borders the two parcels of land, which he observed is a natural occurrence.

23. For this reason, I find that the appeal has merit to the extent that the Respondent has not proved on a balance of probability that the Appellant interfered with the boundary in dispute or that he had encroached or even trespassed into her land. Therefore, the trial court’s judgment dated 08.04.2019 and the orders directing that the river be returned to its natural course as marked by WARMA are hereby set aside. In essence therefore the appeal herein is allowed. But each side is to bear its own costs of the appeal.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 31ST DAY OF JANUARY, 2024.

In the presence of Mogaka for Fatuma Wanjiku for appellant.

Leadys – Court Assistant

A.K. KANIARU

JUDGE

31. 01.2024

