



Mutwaruhiu (As the Personal and Legal Representative of the Estate of Ibrahim Muturuhiu Kimamo - Deceased) v Kingathia (Civil Appeal 129 of 2018) [2025] KECA 1104 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KECA 1104 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 129 OF 2018
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
JUNE 20, 2025**

BETWEEN

**MARGARET WAMBUI MUTWARUHIU APPELLANT
AS THE PERSONAL AND LEGAL REPRESENTATIVE OF THE ESTATE OF
IBRAHIM MUTURUHIU KIMAMO - DECEASED**

AND

NDIRITU KINGATHIA RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Nyeri (L. N. Waithaka, J.) dated 12th June 2018 in Nyeri ELC No. 34 of 2014)

JUDGMENT

Background

1. This appeal arises from the decision of the Environment and Land Court (ELC) at Nyeri (L. N. Waithaka, J.). dated and delivered on 12th June 2018. In the impugned judgment, the ELC dismissed the suit filed by the deceased appellant, Ibrahim Muturuhiu Kimamo with costs to the respondent, Ndiritu Kingathia.
2. By way of a plaint dated 7th March 2014 the deceased appellant sought: a declaration that the respondent unlawfully entered and occupied part of land parcel Konyu/Ichuga/2092 (suit parcel); a permanent injunction against the respondent restraining him from entering and occupying the suit parcel and vacate the same; damages for trespass; costs of the suit; that the Land Registrar, Nyeri be ordered to visit the scene and mark the boundaries to settle the dispute; removal of the restriction lodged by the respondent; and any other relief that the ELC deemed fit.



3. The contextual background of the dispute is that the deceased appellant claimed that he was the registered owner of the suit parcel measuring 0.708Ha. That the respondent has been in occupation of the land parcel number Konyu/Ichuga/834 measuring 0.98 acres which is registered under the names of his grandfather, Ndiira S/O Kiriaku. The appellant's grievance was that the respondent had encroached into the suit parcel and to his detriment, he destroyed at least 85 trees planted at the boundary of the two parcels of land. The deceased appellant was also displeased by the fact that the respondent had lodged a restriction over the suit parcel alleging that it had a pending criminal case before the Chief Magistrate's Court in Nyeri being Criminal Case No. 255 of 2013 while there was no such case existing.
4. The deceased appellant further pleaded that the respondent had engaged a Private Surveyor to mark the boundary which he opposed and instead reported the matter to the Land Disputes Tribunal. The deceased appellant stated that the respondent was taking advantage of his advanced age to encroach onto the suit property.
5. In a brief statement of defence, the respondent denied the contents of the deceased appellant's plaint in totality and put him to strict proof thereof. He stated that the Lands Disputes Tribunal Act having been repealed by the [Land Registration Act](#), the Land Tribunal Boards have since been abolished. Thus, there is no matter pending as alleged. The respondent further averred that the Private Surveyor came to the site but the appellant disagreed with his findings as the boundary was found to be in order. The respondent termed the appellant's suit as malicious, vexatious, premature and an abuse of the court's process and urged it to be dismissed with costs.
6. By consent of the parties, the Land Registrar was directed to visit the two parcels of land to ascertain the boundary between them and file a report within sixty (60) days. On 21st May 2018, the Land Registrar, Nyeri, Ms. Susan Mwanja Mueni, presented the report to the court. We shall revisit the contents of the report later in our findings. The deceased appellant and the respondent did not adduce further evidence and the suit was reserved for judgment.
7. The ELC determined whether the respondent had unlawfully encroached on the suit parcel and if the appellant is deserving of the orders sought. The ELC considered the Land Registrar's report and in dismissing the suit, held as follows: -

“The report of the Land Registrar established that the defendant had not encroached into the plaintiff's parcel of land. According to the report, the plaintiff had encroached the defendant's land by 1 metre. The Land Registrar corrected the boundaries by marking one metre towards the plaintiff's land. There being no other evidence contrary to the findings of the Land Registrar and the District Land Surveyor, I find and hold that the plaintiff has not made up a case to warrant the orders sought. Consequently, I dismiss the plaintiff's case with costs to the defendant. I also order the plaintiff to pay back the defendant the money he paid to the Land Registrar and Land Surveyor towards their visit.”
8. From the record, the deceased appellant died on 5th September 2018 and was substituted by his widow, Margaret Wambui Mutwaruhiu who was appointed as the legal representative of the deceased appellant on 19th December 2018. On 7th December 2022 this Court (L. Kimaru, JA.) allowed the application for substitution of the deceased appellant with Margaret Wambui Mutwaruhiu (the appellant)
9. Aggrieved by the decision of the ELC, the deceased appellant has proffered the instant appeal on 8 grounds of appeal that the ELC: -



- i. erred in finding that the respondent had not encroached into the appellant's parcel of land number 2092;
 - ii. erred in relying on contradictory survey report by the Land Registrar in finding that the appellant had encroached into the respondent's parcel of land by 1 metre;
 - iii. erred in adopting the Land Registrar's report contrary to the consent that the Land Registrar was to ascertain the disputed boundary but not to change or correct the boundary in favour of any party;
 - iv. erred in finding that the acreage of the appellant's parcel of land did not change despite the excise of the one metre from the appellant's parcel of land in favour of the respondent;
 - v. erred in admitting the production of the documentary and viva voce evidence of the Land Registrar who was not present on the ground during the ascertainment of the boundaries nor was she the marker of the report as it was made by one J.M. Mwambia;
 - vi. erred in finding that the 85 trees that had been planted by the appellant since 1978 to the date of felling by the respondent, belonged to the respondent and that the felling of the said trees by the respondent did not amount to trespass;
 - vii. erred in placing the full cost of the survey and ascertainment of the boundary on the appellant despite the same having been agreed by consent as to be shared equally.
9. The appellant sought an order that the judgment of the ELC be set aside; that the appellant's appeal be allowed as prayed with costs; and any further orders as this Court may deem fit and just.

Submissions by Counsel

10. At the hearing of this appeal, learned counsel Mr. Njogo holding brief for Ms. J. Wangechi was present for the appellant. There was no appearance on behalf of the respondent despite service. Rule 105 (2) of this Court's Rules provides that in the absence of the respondent, the hearing ought to proceed and if there is a cross appeal, it may be dismissed. Both parties had filed and served their respective submissions.
11. Mr. Njogo submitted that the ELC did not perform its duty of properly hearing the matter. Counsel submitted that there is no reference of the appellant's testimony in the impugned judgment. Counsel further submitted that the Registry Index Map (RIM) is not a proper tool to be used on its own to ascertain boundaries. Counsel urged that Section 18 of the [Land Registration Act](#) provides that except where in accordance with Section 20 of the [Land Registration Act](#) it is noted in the register that the boundaries of a parcel have been fixed, the cadastal map and any filed plan shall be deemed to indicate the appropriate boundaries and the approximate situation of the parcel. Counsel further urged that the RIM is not an authority in boundary disputes as it was held by Makhandia J. (as he then was) in *Samuel Wanjau vs Attorney General, Land Registrar Murang'a & James Kimani Mwangi* (2008) KEHC 34 (KLR).
12. Counsel further submitted that where there are disputes in relation to general boundaries as in the instant case, the Land Registrar or Surveyor should in addition to referring to the RIM, consider the physical features on the ground such as fences and witnesses who know the boundary. To support this submission, counsel referred to the decision of this Court in *Azzuri Limited vs Pink Properties Limited* (2018) KECA 392 (KLR) which upheld the decision of the ELC (Angote, J.) who held that reliance on the RIM was not sufficient to resolve a boundary dispute.



13. On the second issue, counsel submitted that there was a reference in the deceased appellant's pleadings that some 85 trees had been felled but there was no adjudication over the matter. Counsel submitted that since there was a claim for damages, the ELC ought to have adjudicated on it. Counsel further submitted that the ELC failed to acknowledge that the appellant's 85 trees did not all occupy the contested 1 metre space at the boundary.
14. Counsel asserted that in as much as there was no figure provided for prayer for general damages, it could be inferred that the appellant intended to pray for general damages. Counsel urged us to be persuaded by the decision of the ELC in *Rhoda S Kiilu v Jiangxi Water and Hydropower Construction Kenya Limited* (2019) KEELC 1664 (KLR) and this court's decision *Kenya Power & Lighting Company Limited v Fleetwood Enterprises Limited* (2017) KECA 358 (KLR) on what constitutes an action on trespass.
15. On the issue of payment of the cost of the survey, counsel submitted that it was the consent of the parties that the County Land Registrar and Surveyor should visit the suit parcel and determine the boundary between the two parcels of land within 7 days and that the cost was to be shared by the parties. Counsel further submitted that the order for the deceased appellant to pay the respondent the money he used to pay the County Land Registrar and the Surveyor was irregular. Counsel relied on the decision of the ELC in *Republic vs Chairman Keiyo Land Tribunal & 3 Others ex parte James Kipngethich Kipsitei* (2012) KEHC 1734 (KLR) where it was held that it is advisable for parties to share the cost of the Surveyor and/or related expenses where there is a boundary dispute to be resolved.
16. Counsel asserted that there was some irregularity in the manner in which the trial was conducted and that the appellant's prayer is that the file be remitted back to the ELC for a fresh hearing, so as to ensure that none of the parties suffers injustice and to fairly settle the boundary dispute with finality. Counsel submitted that in the alternative, that a survey and ascertainment of the boundary by a private surveyor be agreed upon by both parties for purposes of a fresh report to be compared with the findings of the Land Registrar's report dated 16th May 2018.
17. Messrs Mercy Kabethi & Co. Advocates, learned counsel for the respondent filed written submissions opposing the appeal. Counsel submitted that the instant appeal is vexatious, misconceived and a total abuse of the court's process, which must fail. Counsel submitted that the claim in the ELC revolved around a boundary dispute that the appellant's prayer was: "that the land registrar Nyeri be ordered by this honourable court to visit the scene and mark the boundaries to settle the dispute..."
18. Counsel further submitted that parties took directions in the ELC and by consent of the court ordered the Land Registrar and the County Surveyor to visit the suit land within 60 days and determine the boundaries of the suit properties.
19. Counsel submitted that the Land Registrar and three (3) Surveyors visited the two parcels of land to ascertain the respective boundaries. Thereafter, the Land Registrar filed a report on 16th May 2018, which was adopted by the court. Counsel asserted that nobody raised an objection in the exercise of ascertaining the boundary.
20. Counsel further submitted that the Land Registrar who was in the company of 3 surveyors made elaborate findings/observations in his report. In his report the Land Registrar found that the suit parcel (the appellant's land) measured 32 meters on the upper side and 34 meters on the lower side, while Parcel No Konyu/Ichuga/834 (the respondent's land) measures 17 meters by 17 meters.
21. Counsel further submitted that it was discovered that the marked boundary was one metre towards the appellant's land from top to bottom from the position the appellant had assumed common boundary.



- Counsel submitted that from the findings, it is the deceased appellant who had encroached on the respondent's land. Counsel further submitted that when the report was presented in court on 21st May 2018, there was no objection to it and both parties closed their cases without calling any other witness.
22. Counsel further submitted that the deceased appellant did not request to have his Surveyor during the visit and the respondent's wife together with other witnesses were present during the visit. Counsel submitted that there was factual evidence that the appellant had encroached onto the respondent's land. Counsel asserted that the ELC relied on the filed registrar's report and did not therefore err in dismissing the appellant's claim.
23. On the alleged felling of the 85 trees by the respondent, counsel submitted that the appellant never adduced any evidence to support the same. That having found that the respondent had not encroached on the appellant's land, there was no trespass as alleged or at all. On the issue of costs, counsel submitted that costs follow the event and the ELC properly exercised its discretion. The respondent urged that the appeal be dismissed with costs.

Determination

24. As the first appellate court, our duty is to re - appraise the material before the Superior Court as we are mandated to under Rule 31 (1) of this Court's Rules. Our scope was further expounded in *Selle vs Associated Motorboat Company Limited* (1968) EA 123 with the exception that where there were witnesses who testified, we did not have the advantage of hearing, seeing and appreciating their demeanour.
25. Addressing the issue on interfering with the trial court's discretion, this Court in *Tracom Limited & Another vs Hasssan Mohamed .Adan* (2009) KECA 48 KLR pronounced itself as hereunder:-
- In law, sitting on appeal, we are duty bound to be slow in interfering with the assessment made by the trial Judge as in doing so the trial Judge is exercising discretionary powers. We can, however, interfere only where the trial Judge either considered matters that he ought not to have considered or did not consider what he should have considered or misapprehended certain aspects of the case, or on looking at the award in itself the award is either too low or too high that it must have reflected improper award – see the case of *Henry H. Ilanga vs. M. Manyoka* [1961] EA 705 at page 713.”
26. We have given due consideration to the record of appeal before us, the submissions by counsel, the authorities cited and the law. We discern the issue for determination to be whether the decision of the trial court was properly arrived at.
27. The deceased appellant's grievance is, inter alia, that there was no oral evidence adduced before the ELC and therefore the ELC erred in finding as it did. There is no contention that the subject dispute between the parties was in essence a boundary issue. The appellant claimed that the respondent encroached onto his parcel of land and felled 85 trees. The trial court's proceedings show that, on 21st November 2014, the deceased appellant appeared in court and the following consent was recorded: -
- “By consent the County Land Registrar and County Surveyor to visit the suit land within 60 days and determine the boundaries of the Konyu/Ichuga/2092. The report to be filed within 7 days. Costs of the visit of Land Registrar and Surveyor to be shared by the parties.”
28. From the record, on 21st May 2018, the Land Registrar, Nyeri reported the findings to the trial court. Learned counsel Ms. Kabethi for the respondent informed the court that she would not be adducing any evidence and so did the deceased appellant who stated: “I leave it to the court.”



29. The burden to prove a case lies with the party alleging. In the appeal before us, the appellant desired the ELC to enter a favourable judgment on his behalf that the respondent had encroached his parcel of land to the extent of one metre and he destroyed 85 trees.
30. A scrutiny of the findings of the report by the Land Registrar reveals that he reverted to the RIM on the basis that although there was a live fence marking the boundary on the lower side, the boundary could only be ascertained with the help of the RIM. At the site, there is no indication that there was opposition by any party on the reliance of the RIM.
31. The Land Registrar stated that the measurements of the appellant's land on the upper side is 32 metres and 34 metres on the lower side while the respondent's land is 17 metres on both the upper and lower side. The report stated that these measurements were used to fix the common boundary on the ground. The conclusion thereof was that the position of the marked boundary was put one metre towards the appellant's land from top to bottom of the parcels of land from the position that the appellant has assumed as the common boundary. In the absence of rebuttal of the Land Registrar's report, the ELC was left with no choice but to rely on it.
32. The parties agreed that the boundary dispute between them be determined by the Land Registrar, the Land Registrar visited the parcels and determined where the boundary between the two parcels fell. A report was prepared and filed into court. None of the parties sought to cross-examine the Land Registrar, if indeed there were any issues with the report. None of the parties sought to call any further evidence to either support or contradict the report. It follows that the parties were bound by what the Land Registrar had found regarding the boundary between their parcels of land. The appellant, in filing this appeal, is seeking to resile from the consent and the findings of the Land Registrar. He cannot be allowed to do that.
33. The responsibility of this Court in exercising its appellate jurisdiction is to rule on the evidence on record and not to introduce extraneous matters not dealt with parties in evidence. Our reasoning is in consonance with the findings of this Court in *Baber Alibhai Mwaji vs Sultan Hashim Lalji & Another* (2010) KECA (306) KLR, where the Court explained:-
- “ A court of law cannot pluck issues literally from the air and purport to make determinations on them. It is the pleadings which determine the issues for determination.”
34. The appellant has urged us to remit the matter back to the ELC for re-hearing. We certainly do have the residual jurisdiction to remit matters to the ELC for fresh consideration as per Rule 31 (1) (c) of this Court's Rules. In exercising our powers to remit the matter to the trial court for re – hearing, it should be done in special and exceptional circumstances including that the ELC did not consider at all the subject matter in dispute. See this Court's findings in *RE: SS (Baby) (2019) KECA 399 (KLR)* and *Islam & 4 others vs Magumba & 2 Others (2024) KECA 1828 (KLR)*. We reiterate that the parties elected not to give evidence and instead rely on the report by the Land Registrar. The appellant cannot complain that she was not heard.
35. Considering the foregone findings, we are not persuaded that the ELC considered extraneous issues beyond its purview or failed to consider relevant material in arriving at its decision. Ultimately, we find that the appeal is devoid of merit and we dismiss it with costs to the respondent.

DATED AND DELIVERED AT NYERI THIS 20TH DAY OF JUNE, 2025.

W. KARANJA

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**JUDGE OF APPEAL
JAMILA MOHAMMED**

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**JUDGE OF APPEAL
A. O. MUCHELULE**

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

