



REPUBLIC OF KENYA



**Muiruri v Ndewa & 3 others (Environment & Land Case 19 of 2022)
[2024] KEELC 1590 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1590 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 19 OF 2022**

**LN GACHERU, J
MARCH 14, 2024**

BETWEEN

MERCY NYAMBURA MUIRURI PLAINTIFF

AND

BONIFACE NDEWA 1ST DEFENDANT

JAMES KYALO 2ND DEFENDANT

SIMON MUTUNGA 3RD DEFENDANT

ENIYE NGUYATO ITULE 4TH DEFENDANT

JUDGMENT

1. The Plaintiff herein Mercy Nyambura Muiruri, brought this suit against the Defendants herein vide a Plaint dated 26th March 2018, wherein she sought for Judgement against the Defendants, jointly and severally for the following Orders:
 - a. That an order of eviction and demolition of all illegal structures erected on the land parcel known as Kakuzi/ithanga/gituamba/block1/787 by the Defendants be granted so as to grant vacant possession.
 - b. Mesne profit.
 - c. Costs and interest of the suit”.
2. In her claim, the Plaintiff averred that she is the registered proprietor of land parcel number Kakuzi/ithanga/gituamba/block1/787 (the suit property), which is approx. 2.009 ha.
3. It was her contention that the Defendants have illegally encroached or trespassed on part of the suit property, without the consent, authority or permission of the Plaintiff who is the absolute registered owner of the suit land.



4. The Plaintiff further alleged that the Defendants have encroached on her parcel of land by erecting permanent structures thereon, and have prevented her from accessing her own land by taking possession of the same without her authority; thus, violating the Plaintiff's constitutional right to own property.
5. She reiterated that the Defendants have no color of light to remain on her parcel of land as there is no permission, consent or authority from her as the registered owner of the suit property.
7. The Plaintiff annexed a copy of Certificate of Official Search dated 22nd February 2018, and a copy of the title deed for Kakuzi/ithanga/gituamba/block 1/787, dated 27th October 2009, showing "Mercy Nyambura Muiruri ID/174K7060" as the registered proprietor thereof. The acreage of the suit land is stated thereon as 2.009 Hectares.
8. The Defendants opposed the suit via a Statement of Amended Defence filed on 11th October 2018, wherein they denied trespassing and encroaching on the Plaintiff's parcel of land. They reiterated that they have been in occupation of their parcel of land number Kakuzi/ithanga/gituamba/block 1/558, and have never transgressed their boundaries by settling on the Plaintiff's parcel of land, which is the suit property.
9. Further the Defendants alleged that the instant suit is misconceived, incompetent and abuse of the process of the Court, and they further alleged that their activities are restricted to their parcel of land; - Kakuzi/ Gituamba/ Block 1/558, and did put the Plaintiff to strict proof thereof.
10. Vide a Notice of Motion dated 1st APRIL 2019, the Plaintiff sought for an Order that the District Land Registrar, and the Land Surveyor do visit the suit land, and the Defendants' parcel of land, for purposes of establishing the actual boundaries between the two parcels of land and upon establishing the same, to file a Report in Court indicating the aforesaid boundaries.
11. On 21st May 2019, the Court granted the orders sought by consent and directed the District Land Registrar and Land Surveyor, to visit the two land parcels number Kakuzi/ithanga/gituamba /block 1/787, and Kakuzi/ithanga/gituamba/block 1/558, and establish their respective boundaries and, thereafter to submit the said Report to Court, indicating the exact boundaries between the aforesaid parcels of land.
12. The said visit was done on 14th April 2021, wherein the suit land and Kakuzi/ithanga/gituamba/block 1/558, were visited and thereafter the National Government Surveyor (Thika, Kiambu County), filed a Report dated 19th April 2021, with the following two findings; -
 - (a) The boundary between the two parcels Kakuzi/ithanga/gituamba/block1/558, and Kakuzi/ithanga/gituamba/block1/787, was not existing physically on the ground at the time of survey.
 - (b) The Registry Index Map (R.I.M.), was used to establish the actual boundary separating the two land parcels on the ground. (See the attached sketch map).
13. Subsequently, the matter was transferred from ELC Thika to this court and given Number, Murang'a ELC Case No. 19 of 2022. Further on 9th May 2023, the court directed Murang'a County Surveyor and the Muranga Land Registrar, to revisit the two parcels of land, take the exact measurements and state the acreage of each parcel of land and the extent of encroachment if any. The Court also granted leave to each party to have their private surveyor accompany the government surveyor in executing the aforesaid tasks.



14. There is a Surveyor's Report dated 19th April 2023, on record which was filed before the Court on 8th May 2023, and signed Jointly by Peter Njeru on behalf of the Land Surveyor and Grace Saya on behalf of the Land Registrar.
15. The Surveyor's Report dated 19th April 2023, shows that the survey of Kakuzi/ithanga/gituamba/block 1/558 and Kakuzi/ Ithanga/gituamba/block 1/787, took place in the presence of the Plaintiff, her private Surveyor and the Plaintiff's witness James Mwangi Mbugua. The Report reflects that all four Defendants plus their brother Joseph Mutisya Itule were also present on 14th April 2023, during the said Survey visit.
16. The Surveyor's Report dated 19th April 2023 makes the following seven observations under the heading "findings"
 1. The annexure 1 is the position in the RIM.
 2. It's further observed that, from the ground visit, the existing ground boundaries do not correspond with the measurements as captured on the RIM.
 3. Ground picking were done and tabulated as shown in the annexure (1, 11, & 111).
 4. Acreages of each parcel are as indicated on the annexure 1 (attached).
 5. The are of encroachment is 0.05ha and is as shown on the shaded part in annexure 111 (attached).
 6. Attached are photos of pictures taken on the area of encroachment.
 7. Google imagery showing boundaries as they are on the ground is attached for your reference."
17. Thereafter, the matter proceeded for hearing by way of viva voce evidence.

Plaintiff's Case.

18. PW 1 Mercy Nyambura Muiruri, the Plaintiff herein stated that she owns land parcel No. Kakuzi/ Ithanga/Gituamba/ Block1/ 787, having bought the same in 2009. She adopted her witness statement dated 26th March 2018, as her evidence in chief. She produced her list of documents dated 26th March 2018, marked as P Exhibits 1-3.
19. It was her evidence that the portion of her land which the Defendants have encroached upon comprises of 0.5 Hectares. Further, that the surveyor's report states that the Defendants have encroached on her parcel of land. She also stated that the Defendants have built a number of shops on her parcel of land without her permission.
20. On cross-examination by counsel for the Defendants, she stated that the vendor who sold the suit property to her in 2009, did not show her the beacons for the said land, but advised her to get a Surveyor to point out the beacons to her.
21. It was her further evidence that the vendor later died without having shown her the beacons. She maintained that the acreage of her parcel of land is 2.09 Hectares, as reflected in the certificate of official



search. She also confirmed having seen the Defendants copy of certificate of official search. The Plaintiff confirmed that the Defendants parcel of land is 2.103 Hectares and is bigger than hers.

21. The Plaintiff also stated that the Surveyor visited the land, measured the size of the two parcels of land, and compiled a Report, which was filed in Court, but that the aforesaid Report was not explained to her. It was her contention that she has come to Court to pursue justice having noticed that the Defendants' encroachment in 2018.
23. On re-examination, she stated that she has fenced her parcel of land, except the side which has been encroached upon by the Defendants herein, and on which they have built shops.

Defence Case.

24. DW1, Boniface Ndewa Itule, the 1st Defendant, adopted his written Statement dated 1st February 2019, as his evidence in chief. He confirmed that the District Surveyor visited the two parcels of land parcels, Kakuzi/ithanga/gituamba/block 1/558 and Kakuzi/ithanga/gituamba/block 1/787, on 14th April 2021. However, he was not aware of the findings of the Surveyor upon the scene visit.
25. He also testified that a clear boundary between the two parcels of land exists, and has been in place for a long time. It was his further testimony that he did not have any dispute with the previous owner of Kakuzi/ithanga/gituamba/block1/787, regarding boundaries. He urged the court to dismiss the instant suit.
26. On cross-examination by counsel for the Plaintiff, he stated that his father was the original owner of Kakuzi/ithanga/gituamba /block1/558, whose boundaries are of long-standing. He reiterated that the District Surveyor visited the two parcels of land and prepared a Report. However, he alleged the said Surveyor arrived at the wrong boundaries of the two parcels of land. Consequently, he disagreed with the findings contained in the surveyor's report.
27. On re-examination, he testified that there exist clear boundaries demarcating the two parcels of land, which he has been aware of all his life, as he was born and raised on Kakuzi /ithanga /gituamba/ block1/558, and attended the neighboring Primary school.
28. DW 2 Eunice Nguyato Itule, adopted her written statement dated 19th February 2019, as her evidence in chief. Further, she testified that she has lived on the suit land for long, and during all this time there were no problems regarding boundaries with the owner of the parcel of land which is currently owned by the Plaintiff.
29. On cross-examination by counsel for the Plaintiff, she testified that her late husband Willy Itule was the proprietor of Kakuzi/ithanga/gituamba/block1/558. She also stated that the Defendants have not encroached on the Plaintiff's land. She rejected the District Surveyor's Report and stated that she was not present during the scene visit by the said Surveyor. She confirmed that she had not filed her Surveyor's Report in the Court.
30. DW 3 Franco Tom Odhiambo, a land Surveyor with a 40 years' experience confirmed that he visited the two parcels of land together with the Land Registrar, Muranga. It was his evidence that he carried out survey work on the two parcels of land in question, and prepared a Report which he filed in Court.
31. It was his further testimony that the genesis of the present dispute stems from the Plaintiff's claim that the acreage of her parcel of land as stated on the R.I.M. does not correspond to the actual situation on the ground.



32. He testified that according to the R.I.M., the boundary of the Plaintiff's land goes all the way to the main road, whereas the foregoing is not the position at the ground. He further stated that the area in dispute is V-shaped and is currently being utilized by the Defendants herein.
33. Further that that there is a difference of 0.3 Acres, in terms of the acreage of Kakuzi/ithanga/gituamba/block 1/558, as stated in the certificate of title which reads 5.2 Acres, and the actual measurement of the aforesaid plot on the ground which is 4.9 Acres. He also stated that Kakuzi/ithanga/Gituamba/block1/787 reads 4.96 Acres, on the certificate of title whereas on the ground the same parcel of land measures 5.67 Acres, exclusive of the portion of land in dispute in the subject suit. It was his testimony that that the foregoing information was not captured by the Government Surveyor in his Report.
34. He argued that if the Court is to declare that the disputed area of 0.37 Acres, belongs to the Plaintiff, then the Plaintiff's land would measure 6 Acres, which would be anomalous as the certificate of title of the same land states the acreage is 4.96 Acres.
35. It was his testimony that R.I.M. is not an authoritative source of reference with regard to boundary disputes, and that as there was no fixed boundary between the Plaintiff and the Defendants, the same parties who are tasked to maintain their boundaries. He testified that the Defendants have maintained clear boundaries.
36. Further that a R.I.M. cannot be used to align boundaries and the correct procedure to resolve boundary disputes is for the Land Registrar to collaborate with the Director of Survey to address the same. He added that the R.I.M. ought to be amended to reflect the situation on the ground. He also testified that should the V-shaped area, which is in contention be taken off from the Defendants' land, the results would be a diminishing in acreage of the same, which would not correspond to the acreage given in the Defendant's Certificate of Title. Further that if added to the Plaintiff's land, it would create an increase in acreage that would offend the figures stated in her certificate of title.
37. On cross-examination by counsel for the Plaintiff, he confirmed the scene visit by the Government Surveyor and also confirmed that he was present when the measurements were taken. He maintained that the disputed area measures 0.37 Acres. He admitted that there is a discrepancy in terms of the acreage of the disputed area between the government surveyor and his findings. Further, that he was disputing the Government Surveyor's Report, and that the boundary used by the Government Surveyor is a general boundary for which one must allow a margin error.
38. He testified that he had not filed any report before the Court, and also maintained that R.I.M. is not used for measurement, but for registration and indexing. It was his further testimony that the Government Surveyor was wrong in using R.I.M. to fix the boundaries of the suit land. He reiterated that R.I.M. does not constitute a sound basis for a lawsuit.
40. Thereafter, the parties filed their respective written submissions as directed by the court.
41. The Plaintiff filed her written submissions on 11th August 2023, through Kanyi Kiruchi & Co Advocates, wherein she set out three issues determination as follows:
 - i. what is the actual acreage of Kakuzi/ithanga /Block1 /558, and Kakuzi/ithanga/gituamba/block 1/787?
 - ii. what is the acreage of the disputed area;
 - iii. who owns the disputed area?



42. It was submitted that there was a discrepancy in terms of the acreage stated in the Certificates of Official Search, where the total acreage of Kakuzi/ithanga/gituamba/block 1/558, is 2.103 Hectares and Kakuzi/ithanga/gituamba/Block1/787, is 2.009 Hectares, and the figures on the Government Surveyor's Report dated 8th May 2023, the acreage of Kakuzi/ithanga/gituamba/ Block 1/787, is indicated as 1.94 Hectares while the acreage of Kakuzi/ithanga/gituamba/block 1/558, is stated to be 1.74 Hectares.
43. Further, it was submitted that the disputed area forms part of Kakuzi/ithanga/gituamba/block1/787, as no mutation forms were registered pursuant to Section 19 (1) of the [Land Registration Act](#). That the Plaintiff is entitled to the rights of a registered owner of land pursuant to Section 26 of the [Land Registration Act](#).
44. The Plaintiff argued that it could not be dispelled that the Defendants have been occupying her land because DW1 and DW2 confirmed that for the entire time they have been living on Kakuzi/ithanga/gituamba/block1/558, they have never consulted a surveyor to establish the boundaries of their parcel of land.
45. Reliance was placed in the case of Ali Mohamed Salim Vs Faisal Hassan Ali (2014)e KLR., wherein the court had emphasized the fact that a Registry Index Map (R.I.M.) established "general boundaries" which refers to "approximate boundaries" of a piece of land.
46. It was further her further submissions that the Court should disregard the evidence of DW 3, as it is of no probative value because DW 3 never filed any pleadings or report in the suit. The Plaintiff cited the decision of the Supreme Court of Nigeria in the case of Adetoun Oladeji Vs Nigeria Breweries PLC SC 91/2002 and the decision of the Supreme Court of Kenya in Raila Amolo Odinga & Another Vs IEBC & 2 Others (2017)e KLR.
47. The Defendants filed their written submissions on 7th November 2023, through P. N. Morigori & Co Advocates, and submitted that the present suit is premature for failure to pursue the dispute resolution mechanism (ADR), set out under Sections 18 and 19 of the [Land Registration Act](#) 2012, concerning resolution of boundary disputes.
48. The Defendants also submitted that the portion of the Plaintiff's land shown on the R.I.M. as being utilized by the Defendants has been utilized by them for many years, and is separated from the Plaintiff's land by clear hedges and a fence.
49. It was their further submissions that R.I.M. is not an authoritative guide with regard to boundary disputes, and that there is a caveat at the bottom of each R.I.M. stating that R.I.M. is not an authority on boundary issues, unless the boundary has been fixed in accordance with Section 19 of the [Land Registration Act](#), 2012.
50. They Defendants ultimately submitted that there was no evidence placed before the Court to show that the boundary between land parcel No. Kakuzi/ithanga/gituamba/Block1/558, and Kakuzi/ Ithanga/gituamba/Block1/787, has been fixed in accordance with Section 19 of the [Land Registration Act](#), 2012. Further, that the boundary, between the two parcels of land is a general boundary, which requires evidence to be taken from the neighborhoods to ascertain the boundary and that the evidence taken at the scene by the Surveyor was not analyzed to assist in fixing the actual boundary as the said Surveyor merely duplicated the information provided in the R.I.M.
51. In their submissions, the Defendants objected to the Surveyor's Report filed on 8th May 2023, terming it as ambiguous and of no assistance to the court in resolving the boundary dispute herein between the proprietors of Kakuzi/ithanga/gituamba/block 1/558, and Kakuzi/ithanga/gituamba/Block 1/787.



It was their submissions that the aforesaid Surveyors Report does not reconcile the acreages of the two parcels of land as stated in the respective title deeds and on the ground.

52. Further that the R.I.M. depicts boundaries on paper, not on the ground; and that a cadastral map is what would give the accurate and precise position of a parcel of land on the ground.
53. The above are the Pleadings and the evidence availed by the witnesses, and their respective written submissions, which this court has carefully read and considered. The court too has considered the relevant provisions of law., and similar decided cases, and finds the issues for determination are; -
 - I. Whether the Plaintiff's case is merited?
 - II. Who should pay costs of the suit?
54. From the claim filed by the Plaintiff herein, it is evident that her claim is on encroachment of her parcel of land by the Defendants herein. The Plaintiff averred that the Defendants have trespassed on her parcel of land and have even put up permanent structures thereon. These allegations have been denied by the Defendants, who alleged that they have always restricted their activities on land parcel No. Kakuzi/ Ithanga/gituamba/ Block1/ 558.
55. From the available evidence, there is no doubt that the Plaintiff herein is the registered owner of land parcel no Kakuzi/Ithanga/Gituamba/ Block 1/787, as is evident from her title deed produced as exhibit 1. Further, it is evident that she purchased the suit land from a neighbour of the Defendants herein. The Defendants testified that they lived with their previous neighbor peacefully and had no dispute at all.
56. Further, there is no doubt that the land parcel No Kakuzi/ithanga/ Gituamba/block1/558, that is occupied by the Defendant is registered in the name of Willy Itule Mawai, who is the Patriarch of the Defendants herein. The Defendants averred that they have always occupied and used the said property the way it is without any claim of encroachment by anyone, until when the Plaintiff purchased her parcel of land from their neighbour. The Defendants denied encroaching on the Plaintiff's parcel of land.
57. The Defendants in their defence and submissions have contended that this suit was brought to court prematurely since the Plaintiff did not exhaust all the mechanism for resolving boundary dispute, especially the instant boundary dispute, before coming to court. It was the Defendants submissions that this matter ought to have been referred to the Land Registrar first before bringing it to court.
58. This allegation goes to the jurisdiction of this court. The court will therefore have to determine that issue, before determining the merit of the case. The Plaintiff has alleged encroachment of her parcel of land by the Defendants. The Defendants have denied the said encroachment.

This is therefore a boundary dispute.
59. The issue of boundary disputes is found in Sections 18 and 19 of the [Land Registration Act](#), which provide;
 - “ 18. Except where, in accordance with section 20, it is noted in the register that the
 - (1) 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.

19. 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.
- (1) 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.
- (2) 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.
- (3)

60. It is clear that section 18(2) of *Land Registration Act*, prohibits courts from entertaining proceedings relating to boundary disputes. It states as follows;

- “(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.”

61. From the above provision law, it is very clear that courts do not have jurisdiction to entertain disputes relating to registered land, unless the boundaries have been determined and fixed by the Land Registrar. For a court to arrive at a finding on whether it has jurisdiction to hear a matter on boundary dispute or not, it has to first determine whether the boundaries have been fixed or not.

62. The boundaries are fixed in accordance with section 19 of *Land Registration Act*, which provides that boundaries of a registered land are fixed by the Land Registrar. Section 19(2) states;

- “(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.”

63. From the above section, it is obvious that once a boundary has been fixed, then the Land Registrar makes a note in the register that the boundaries have been fixed, and the plan shall be deemed to be accurate.



64. Is there evidence of such note in the registers of the two parcels of land? None at all. Therefore, this court finds and holds that the boundaries herein have not been fixed. If the boundaries have not been fixed, then as provided by Section 18(2) of *Land Registration Act*, then this court finds and holds, that it was premature to have brought this dispute to court.
65. In the case of Paul Muraya Kaguri vs Simon Mbaria Muchuna (2015), the court held: it is trite that where a statute establishes resolution mechanism, that mechanism must be followed. Where a party fails to follow the established dispute mechanism, they cannot be heard to say her/his rights were denied”
66. The Plaintiff herein testified on how the Defendants have encroached on her parcel of land. The court even directed the County Land Registrar and Land Surveyor to visit the two parcels of land and prepare a report. The said Report was filed in court, which showed that the Defendants parcel of land had overlapped some portion of the Plaintiff’s land. However, there is no evidence that the boundaries for these two parcels of land were ever fixed. No evidence of a note in the register to confirm that the boundaries had been fixed.
68. The law is very clear on who has mandate to deal with disputes over registered land without fixed boundaries; that is the Land Registrar. The parties herein should first present themselves before the Land Registrar, who will resolve the boundary dispute. Only if any of the party is aggrieved by the determination of the Land Registrar can they come to court.
69. There are plethora of decisions on this issue of boundary disputes of registered land without fixed boundaries are a preserve of Land Registrar. See the case of George Kamau Macharia Vs Dexka Limited (2019) eKLR court stated as follows:
- “From the above provisions of the law, it is manifestly clear that the above section gives the mandate to the Land Registrar to resolve boundary disputes of land with general boundaries. Registry index map (RIM) only indicates approximate boundaries and the approximate situation on the ground. Even if this court was to hear and determine this matter it will still require the input of the Land Registrar. The framers of section 18 (2) of the *Land Registration Act* placed this matter before the land registrar who has the technical advice and resources of the district surveyor to determine and ascertain the boundaries. It is trite law that where the law has given a legal obligation to a department of government, it is important for the court to let that department proceed to meet its legal obligations. 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 the court. It is the view of this court that the dispute is prematurely before the court”.
70. Further, in the Court of Appeal in the Case of Azzuri Limited v Pink Properties Limited [2018] eKLR, it stated as follows in relation to the application of Section 18 of the *Land Registration Act*:
- “This means that under the aforesaid provisions, boundary disputes pertaining to lands falling within general boundary areas must be referred to the Land Registrar for resolution.....From this analysis of the law, it should be clear from the above that, we are in agreement with the learned Judge’s conclusion that the dispute ought to have been heard by the Land Registrar as stated in the statute. Jurisdiction is everything. It has been said many times before, that, without it a court has no powers to make one more step, irrespective of the strength and nature of evidence in the parties’ possession.



71. Similarly in the case of *Willis Ocholla vs Mary Ndege* (2016) eKLR, the court while dealing with similar issue held;

“That in terms of section 18 (2) of the *Land Registration Act*, proprietors of registered land with a boundary dispute are obligated to first seek redress or solution from the Land Registrar before moving or escalating the dispute to this court. That where such a party fails to do so, and comes to court without first seeking redress from the land registrar, the court being a court of law, has to remind such a party that he/she has moved the court prematurely. That the provisions of section 18 (2) of the *land registration act* shows clearly that the court is without jurisdiction on boundary disputes of registered land until after the land registrar’s determination on the same has been rendered”.

72. Again, the Court of Appeal in *Case of Estate Sonrisa Ltd & Another v Samuel Kamau Macharia & 2 others* [2020] eKLR , held as follows;-

“It is the *Land Registration Act* that makes provisions relating to the determination of boundaries. Those provisions are found in sections 16 to 19. Specifically, for this dispute, the Registrar is empowered, after giving notice to all the affected parties, in this case, the 1st appellant and 1st respondent, indeed as well as any owner whose land adjoins the boundaries in question, and with the assistance of the surveyor, to ascertain and fix the disputed boundaries.

73. From the above decided case, it is evident that the Land Registrar is the office that is mandated to resolve boundary disputes, where the boundaries have not been fixed. The Plaintiff should have employed the available dispute resolution mechanism before coming to court for a claim of encroachment

74. On exhaustion of dispute mechanism first before coming to court, this court relies on the holding in the case of *Bethwell Allan Omondi Okal v Telkom (K) Ltd (founder) & 9 others* [2017] eKLR, where the court stated as follows: “

The appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High Court by way of constitutional petitions”.

75. After a thorough analysis of the available evidence, this court is convinced that it is deprived of jurisdiction in the matter before it. Section 18(2) of the *Land Registration Act* is clear that from the very beginning the Plaintiff or the parties herein ought to have submitted themselves before the Land registrar for determination of this boundary dispute. The Plaintiff did not first use the avenue available to them.

76. In the case of *Sasomuna Holdings Company Limited v Kenya National Highways Authority* (2022) eKLR , it was held as follows;-“

Where the statute contains and provides a specific recourse and mechanism for the determination of a particular dispute, such avenue must be exhausted, complied with and adhered to”

77. Having considered the available evidence and the submissions by the parties, this court concurs with the Defence that the matter was rushed to court, the court has no jurisdiction to hear a boundary



dispute of registered land, unless the boundaries are fixed. There is no evidence that the boundaries herein are fixed, and thus this court has no jurisdiction to determine the boundary dispute herein.

II) who should pay costs of the suit?

78. Ordinarily costs of an action or proceeding are granted at the discretion of the court. However, the general rule is that costs shall follow the event in accordance with the provisions to Section 27 of the *Civil Procedure Act*. A successful party should ordinarily be awarded costs of the suit, unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co Ltd* [1967] EA 287.
79. The Plaintiff's suit has been dismissed, and therefore, the Defendants are the successful parties. However, given that the issue at hand still remains unresolved, this court finds that each of the parties herein should bear their own costs.
80. In a nutshell, this court finds that the boundary dispute herein of these registered parcels of land, but with unfixed boundary ought to go to the Land Registrar first. This court has no Jurisdiction, and it thus down its tools, with an order that each party to bear his/her own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANGA 14TH THIS DAY OF MARCH 2024.

L. GACHERU

JUDGE.

Delivered Virtually in the presence of; -

Mr Kanyi Kiruchi for the Plaintiff

1st Defendant

Mr Morigori for the 2nd Defendant

3rd Defendant

4th Defendant

Joel Njonjo – Court Assistant

L. GACHERU

JUDGE

14/3/2024

