



REPUBLIC OF KENYA



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**Ndegwa & another v Gichuki (Environment and Land Appeal
E011 of 2023) [2024] KEELC 1308 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1308 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E011 OF 2023**

LN GACHERU, J

MARCH 7, 2024

BETWEEN

JAMES GITAU NDEGWA 1ST APPELLANT

HILLARY GITHUKU NDEGWA 2ND APPELLANT

AND

LYDIA WAIGWE GICHUKI RESPONDENT

JUDGMENT

1. The Appellants herein were Defendants in Muranga MCE & L No. E030 of 2021, wherein a Judgement was entered in favour of the Respondent herein, who was Plaintiff in the above stated case. The trial Court delivered its Judgement on 19th April 2023, wherein the Appellants herein as Defendants were aggrieved by the said determination and thus this Appeal.
2. Vide a Memorandum of Appeal dated 24th April 2023, the Appellants sought for the following orders; -
 - a. That the appeal be allowed and the judgment of the lower court set aside and judgment be entered in favor of the appellants.
 - b. That the appeal be allowed with costs to the appellants.
 - c. That the appellants be granted costs in the trial court.”
3. The grounds of Appeal are:
 - a. That the Learned Magistrate erred in law and in facts in disregarding Section 18 and 19 of the [Land Registration Act](#).
 - b. That the Learned Magistrate erred in law and in facts in not considering the submissions of the Appellants.



- c. That the Learned Magistrate erred in law and facts in acting ultra vires.
 - d. That the Learned Magistrate erred in law and facts in not considering the evidence of the Appellants.
 - e. That the Learned Magistrate erred in law and facts against a party who is not the registered owners of the suitland.
4. The facts leading to this Appeal are; -the Respondent herein Lydia Waigwe Gichuki, filed a suit against the Appellants in Muranga CMCC NO. E030 of 2021, on 10th May 2021, wherein she alleged that the Appellants had encroached on her land parcel No. LOC. 11/Maragi/1938. The Respondent had sought for order that the Land Registrar and District Surveyor Muranga, be ordered to demarcate, and fix boundaries for land Parcel No. Loc 11/Maragi/ 1938, and eviction of the Appellants/Defendants from the said suit land.
 5. The Appellants denied the said allegations vide their Statement of Defence dated 29th June 2021. They also filed a Counter claim, wherein they sought for injunction order to restrain the Plaintiff now Respondent, from interfering with the ancestral boundaries existing on land parcels No. Loc 11/ Maragi/ 3300 and 3298.
 6. After the viva voce evidence, the trial court entered Judgment on 19th April 2023, wherein it found in favour of the Respondent herein, by issuing an order directing the Land Registrar, and the District Surveyor, Murang'a, to demarcate and fix the boundaries of LR No. LOC. 11/Maragi/1938, as sought by the Respondent
 7. Further, the trial court ordered eviction of the Appellants herein from LR No. LOC. 11/Maragi/1938, and costs were awarded to the Respondent herein. It is that determination that aggrieved the Appellants herein and thus this Appeal.
 8. The Court directed that the instant Appeal be canvassed by way of written submissions. In compliance thereto, the Appellants filed their submissions on 27th September 2023, through Waweru Nyambura & Co Advocates, wherein, they set out two issues for determination and these issues are; -
 - i. whether the trial court erred in law and in fact in disregarding sections 18 and 19 of the [Land Registration Act](#);
 - ii. whether the trial court erred in law and fact in acting ultra vires.
 9. The Appellants relied on various decided cases among them the case of Victoria Wanjiru Murigi (suing as the Administrator to the Estate of Jane Njoli Murigi(Deceased) v Evans Murigi Muhia [2020] eKLR, The Owners of the Motor Vessel "Lilian S" v Caltex Oil(Kenya) Ltd [1989] EKLR 1 & Paul Muraya Kaguri v Simon Mbaria Muchunu[2015] EKLR.
 10. In conclusion, the Appellants submitted that the trial court had no Jurisdiction to determine a boundary dispute claim. Reliance was placed in the case of Paul Muraya Kaguri v Simon Mbaria Muchunu[2015] eKLR, where the Court held that;

“It is now trite law that where a statute establishes a dispute resolution mechanism, that mechanism must be followed. Where a party fails to follow the established dispute mechanism, they cannot be heard to say that their rights were denied.”
 11. On her part, the Respondent filed her written submissions on 7th



November 2023, through Chege Kibathi & Co Advocates and argued that the trial court was correct in holding as it did. Further, that the trial court had jurisdiction to determine the matter as donated by section 13(2) of the ELC Act, which states;

- “(2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes——
- a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.”

12. The Respondent submitted that the Appellants had instituted criminal charges against her in Murang’a Criminal Case No. 594 of 2020 R v Lydia Waigwe Gichuki whereby, she was charged with trespass with intent to annoy contrary to Section 5(2) of the *Trespass Act*, CAP 294. It was her further submissions that she was acquitted of all charges and the criminal trial Court did enter a finding to the effect that the Appellants herein had encroached on her LR No. LOC. 11/MARAGI/1938.
13. Further, that in the proceedings before the trial Court in ELC Case No. E030 of 2021, the Appellants did not raise the main issue which they have raised in the subject Appeal, that is the jurisdiction of the trial Court to direct the County Land Registrar and County Surveyor, Murang’a to visit, survey, demarcate and fix the boundaries of LR No. LOC. 11/MARAGI/1938.
14. It was further submitted that in the Defence filed by both Appellants in the trial Court did not question the trial Court’s jurisdiction to direct the Land Registrar and County Surveyor to demarcate the boundaries of LR No. LOC. 11/MARAGI/1938 (the suit land).
15. Reliance was placed in the cases of Stanley Maore v Geoffrey Mwenda Njeri C/A.147/2002 and Stephen Kilonzo Nyondo v Samuel Wahome Kibuthu [2015] eKLR, on the mandate of a Court sitting on a first appeal which is to re-evaluate the evidence tendered in the subordinate Court on both issues of law and fact, and come up with its findings and conclusions.
16. There was further reliance on Section 18 of the *Land Registration Act*, 2012, wherein it was submitted the said section did not completely oust the jurisdiction of the trial Court to determine a dispute relating to boundaries of registered land. Emphasis was laid on the finding of the court in the case of Thika Environment & Land Court Case No. ELC 602 of 2017-Fredrick Ng’ang’a Thuo v Prof. Peter Mungai Njuho; and, the case of Nelly Atieno Oluoch v Damaris A nyawalo & 2 others [2021]e KLR, for the proposition that the Land Registrar has jurisdiction where the boundaries of land have not been fixed, but where the boundaries are fixed, the Court has jurisdiction to hear and determine the matter.
17. Therefore, it was the Respondent submissions that the trial Court had jurisdiction to hear and determine the matter and thus, did not act ultra vires as claimed by the Appellants.



18. On the issue of costs, the Respondent relied on the provisions of Section 27 of the *Civil Procedure Act* and Halsbury's Laws of England (4th Edition) Volume 37 at page 552 in support of the submission that costs follow the event and a successful party is entitled to costs.
19. Ultimately, the Respondent urged the court to dismiss the Appellants Appeal with costs
20. The above are the pleadings and the evidence tendered before the trial court as contained in the Record of Appeal herein. There is no doubt that the Parties herein border each other. They have title deeds to their respective parcels of land, and there is no dispute over ownership of their parcels of land. However, there is a long standing boundary dispute between the Respondent and 2nd Appellant, which culminated in a criminal case No 594 of 2020, wherein, the Respondent herein was charged with a criminal offence of trespass with intent to annoy, C/S section 5(2) of *Trespass Act*, Cap 294 LOK.
21. After trial, the Respondent was acquitted on 29th March 2022, under section 215 of the CPC. The Respondent was charged on 4th February 2021, wherein she pleaded not guilty. During the pendency of the criminal case, the Respondent filed her civil claim on 10th May 2021, accusing the Appellants of encroachment. Therefore, the parties herein have counter blamed each other.
22. It is evident that this is a first Appeal, and as provided by Section 65(b) of the *Civil Procedure Act*, this court is allowed to determine the Appeal both on the issue of facts and law.
23. Further, as the court determines the Appeal, it will consider that the trial court had the advantage of taking first hand evidence from the parties, observed their demeanour and thus, this court cannot just interfere with that discretion just because this is an Appeal. See the case of *Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others* [2019] eKLR, had this to say about interfering with the appellate powers;

“In reiterating the above position, we affirm that we would only interfere with the Appellate Court’s exercise of discretion if we reach the conclusion that in exercise of such discretion, the Appellate Court acted arbitrary or capriciously or ignored relevant facts or completely disregarded the principles of the governing law leading to an unjust order. Conversely, if we find that the discretion has been exercised reasonably and judiciously, then the fact that we would have arrived at a different conclusion than the Court of Appeal is not a reason to interfere with the Court’s exercise of discretion.”
24. This court will be guided by the principles set out in the case of *Mbogo vs Shah* [1968] EA 93, where Sir Charles Newbold P expressly approved Harris J’s test of the principles to consider in the exercise of the judicial discretion as to whether to set aside a judgment or not, on appeal. These principles are;

“An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.” “The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”
25. The Appellants herein must operate within the above parameters, and without sufficient evidence, this court cannot simply interfere with the trial courts discretion.



26. Before arriving at a determination on whether to interfere with the trial court's decision, this court as an Appellate, will have to play its role as provided by section 78 of the Civil Procedure Act, which is to re-evaluate, re-analyze and re-consider the available evidence as contained in the Record of Appeal, and then come up with its own independent decision. See the case of Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278, the Court of Appeal held that:

“A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

And also the case of Peter M. Kariuki v Attorney General [2014] eKLR, where it was held that:

“We have also, as we are duty bound to do as a first appellate Court, re-consider the evidence adduced before the trial Court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.

27. Having considered the above decided cases on the duty of Appellate court, and having re-evaluated, re-considered and re-analyzed the available evidence before the trial court as can be gleaned from the Record of Appeal, and the written submissions, this court finds the issues for determination are; -

- i. Whether the trial court had jurisdiction to hear and determine, the boundary dispute issue, or was barred by sections 18 and 19 of Land Registration Act.
- ii. Whether the Appeal herein is merited.

28. It is trite that jurisdiction to hear and determines any matter is crucial. If a court has no jurisdiction, then whatever decision made by a court of law is null and void. The issue of Jurisdiction was determined in the celebrated case of Owners of Motor Vessel “Lilian S” v Caltex Oil (Kenya) Limited [1989] IKLR, where the Court held:

“Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given”.

29. It is evident that the Plaintiff before the trial court, who is the Respondent herein had alleged that there was long standing dispute between herself and the Appellants herein, over demarcation of their parcels of land, which were adjacent to each other. She had also alleged that the boundary between herself and the Appellants had been improperly fixed. Therefore, the issue herein was a boundary dispute.

30. The law of resolving boundary issues is found in Section 18 of the Land Registration Act, 2012, which provides as follows:

“Boundaries



- (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).”

31. Section 19 of the [Land Registration Act](#), 2012 states as follows:

“Fixed boundaries

- (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.”

32. The Respondent claim emanates from an alleged Surveyor’s Report dated 12th October 2020, which was prepared by one Peter

Njeru, District Surveyor, Muranga. In the said Report, the surveyor had allegedly found that land parcel No. Loc 11/Maragi/ 3300 and Loc 11/ Maragi/3298, had overlapped on Loc 11/ Maragi/ 1938, belonging to the Respondent herein.

33. Further, the said Surveyor had recommended that the complainant, who is the Respondent herein should seek assistance of Land Registrar, or go to court. The Respondent chose to file the suit before the trial court.



34. As rightly held by the trial court, the jurisdiction of the trial court, flows from Article 162(2)(b) of *the Constitution* and section 13(2) of the ELC Act which provides;

“(2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes——

- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- (b) relating to compulsory acquisition of land;
- (c) relating to land administration and management;
- (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- (e) any other dispute relating to environment and land.”

35. Further, the Magistrates Court Act, gives magistrates jurisdiction to handles land matters. The matter to be handled by the subordinate courts are land matters, are the ones provided by section 13 of ELC Act, then as provided by section 13(a), of the said Act, disputes relating to boundaries are some of them.

36. However, section 18(2), of the *Land Registration Act* prohibits court from entertaining any disputes or proceedings relating to a dispute as to boundaries of a registered land, unless the boundaries have been determined as provided in the Act. The said section provides 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.

37. This section 18(2), of *Land Registration Act*, is couched in mandatory terms that disputes relating to boundaries should be determined by the Land Registrar, unless the boundaries are fixed.

38. How are boundaries fixed? The boundaries can be deemed to have been fixed as provided by section 19(3) of *Land Registration Act*, which provides;

“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”

39. For this court to find and hold that the boundaries herein had been fixed, then the Respondent or the parties ought to have availed evidence of a plan verified by the office responsible for survey of land, with a note made in the Register, that the boundaries have been fixed. This section of law contains mandatory provisions. No such evidence of a note in the Register was available and therefore, this court cannot deem that the boundaries had been fixed.

40. If the boundaries were not fixed, then the provisions of section 18(2) of *Land Registration Act*, applies herein, and the matter ought to have been referred to the Land Registrar first to determine the boundary dispute.



The Lower Court held as follows on the import of Section 18(2) of the *Land Registration Act*, 2012 on the Court's jurisdiction to handle matters of boundaries of registered land:

“I am fully aware that Section 18(2) of the *Land Registration Act* prohibits this court from determining a dispute relating to boundaries to registered land and so party who has a dispute relating to a boundary must first approach the Land Registrar before moving to court. However, the said Section was not meant to be a complete ouster of the jurisdiction of the court in determining a dispute relating to the boundaries of registered land. Among the documents produced by the Plaintiff in support of her case is the Surveyor's report dated 12th October 2020 prepared by Peter Njeru, for the District Surveyor, Murang'a and is headed: “Surveyor's Report Loc.11/Maragi/1938”.

41. From the foregoing, it is clear that the trial Court relied entirely on the Survey Report which had been filed before the trial court dealing with criminal case relating to trespass against the Respondent, who was later acquitted. The said Report had indicated the boundaries of the suit land and also of adjacent pieces of land, allegedly owned by the Appellants.
42. Though the trial Court held that it was satisfied that the boundaries of the suit land were demarcated as required by Section 18(2) of the *Land Registration Act*, this court has found and held that there was no evidence that the same was noted in the register, and it cannot deem that the boundaries had been fixed. Since the boundaries were not fixed, then the trial court should have first referred the matter to the Land Registrar, as this is the office that has statutory mandate to avail accurate plan of defined boundaries, and also had requisite expertise to undertake that task. See the case of Reuben Kioko Mutyaene v Hellen Kiunga Miriti & 4 Another; Ntalala Eric Mutura & another(Interated Parties) [2021] eklr.
43. This court will be guided but the decision of the Court of Appeal in the case of; Azzuri Limited v Pink Properties Limited [2018] eKLR, where the Court stated as follows;

“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”.

44. Further, in the case of George Kamau Macharia & 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”.

45. Again, in the case of *Willis Ocholla v Mary Ndege* [2016] eKLR, the court while faced with similar issue rendered itself as follows; -

“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”.

46. Further, the Court of Appeal in the 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.

.....

Under that Act, the Registrar carries out his functions without any restrictions and may rely on any other relevant document and existing records in order to resolve any dispute between Land owners. Because a title deed is only prima facie evidence of the matters shown therein, the Registrar’s investigations, of necessity must encompass all entries in the register, rely on any other relevant document and existing records, conduct proceedings in accordance with section 14(1) and cause a survey to be carried out and determine the dispute.....

It is only after determining the dispute can parties move to court to challenge it (emphasize added).

47. From the above decided cases, it is very clear that the dispute relating to boundaries ought to be resolved by the Land Registrar in the first instance. The decision thereof can then be challenged in court pursuant to the relevant provisions of the *Land Registration Act*.

48. 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 the legal obligations. In this case the office of the Land Registrar has been obligated to deal with boundary disputes, and it should have been the first port of call herein.

49. See the case of *In Speaker of National Assembly –Versus- Karume*(1992)KLR 21 the court held:-

“Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.



Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures”.

See also Whitehorse Investments Ltd vs. Nairobi City County (2019) eKLR (COA).

50. This court as an Appellate court has re-evaluated the available evidence, and the findings of the trial court, wherein it correctly found that section 18(2) of Land, prohibits the court from determining a dispute relating to boundaries to registered land, but erred in law and fact, when it held the said section was not meant to oust the jurisdiction of the court. The trial court should have referred the matter to the Land Registrar in the first instance as provided by sections 18 and 19 of Land Registration Act. In conclusion, this court finds the trial court had no jurisdiction to hear and determine the matter, as this was a preserve of the Land Registrar.
51. Further, in emphasizing that the trial court had no jurisdiction, the court will rely in the case of Victoria Wanjiru Murigi (suing as the Administrator to the Estate of Jane Njoki Murigi (Deceased) v Evans Muringu Muhia [2020] eKLR, where the Court held as follows:

“It is evident that for the Court to have jurisdiction to deal with the instant suit, it must be clear that the parties appeared before the Land Registrar and the Land Registrar after hearing both parties determined and fixed the boundaries and made a note in the register. It is the Plaintiff’s contention that she engaged the service of a registered Land Surveyor to determine the boundaries. To this effect she produced a Surveyor’s Report. The Plaintiff has also produced in evidence a letter jointly signed by the Defendant and herself indicating that there is an encroachment. However, the provisions of law are very clear that it is the Land Registrar and not the Land Surveyor is vested with powers to determine and fix the said boundaries. Though it is not in doubt that the Land Surveyor is crucial in the determination of this question, it is also not in doubt that the office of the Land Surveyor and the office of the Land Registrar are two very distinct and separate offices. The submissions by the Plaintiff that the input of the Land Registrar as required was shown as presented via the map produced is not correct. It is this Court’s considered view that it is the input of the Land Registrar that is required for the determination of the boundaries. In fact it is the input of the Land Surveyor that is required to be able to guide the Land Registrar. It is also not in doubt that as per Section 19(2) of the Land Registration Act, the Land Registrar is required to make a note that the boundaries have been fixed. As already held above, though the evidence of the Plaintiff is uncontroverted, it was still her duty to prove her case to the required standard of balance of probabilities. There is no such evidence of the said note by the Land Registrar and thus there is no evidence that the Land Registrar has already fixed the boundaries.”

52. From the foregoing, it is clear that a Survey Report was authored by the County Surveyor, without input from the Land Registrar and therefore, will not pass the requirements set out under Section 18(2) of the Land Registration Act, 2012. The matter before the trial court therefore ought to have been referred to the relevant office to determine it.

iii. Whether the Appeal is merited?

53. The appellants had filed a Counter claim wherein they sought for injunction. The trial court was completely silent on the said Counter claim. As this court observed earlier, the parties herein have accused each other of trespass or encroaching on each other’s boundary. This court has found and held that the dispute ought to have been referred to the Land Registrar. Therefore, this court will not make any finding on whether the Appellants counter claim was merited or not.



54. Though this court has found and held that as provided by Section 18(2) of Land Registration Act, the boundary dispute herein ought to have first been determined by the Land Registrar, the trial court in its judgement granted prayer No 1 of the claim, and ordered the Land Registrar and District Surveyor to survey and demarcate the boundaries. This court finds that the said order settled the issue of not first having referred the dispute to the Land Registrar. The final order indeed returned the matter to the Land Registrar, and with that reference, it was probable the boundary dispute would be determined once and for all.
 55. However, it is not clear what the Land Registrar report would be like. Will he find for the Appellants of the Respondent? That is not certain, until such time the Land Registrar would move to the disputed boundaries and then carry the task as directed by the court.
 56. Before demarcation and fixing of the boundaries, then it would not be right to order for eviction of the Appellants herein. This court finds that the trial court, erred in law and fact when she ordered for eviction of the Appellants before the demarcation and fixing of boundaries had been done. The Appeal succeeds to that extent and thus this court finds and holds that the Appellants are entitled to setting aside of the order of their eviction before the demarcation has been done.
 57. For the above reasons, the court finds that the Appellants Appeal succeeds to the extent that the trial court did not have Jurisdiction to hear this dispute relating to boundary issues. The trial court was barred by the provisions of section 18(2) of Land Registration Act, and the matter ought to have been referred to the Land Registrar to deal with the boundary dispute as provided by section 19 of Land Registration Act.
 58. However, since the trial court in its final determination directed the Land Registrar to demarcate the boundaries, this court will not interfere with that order, but will set aside the order for eviction of the Appellants as stated in Order No 2 of the decree issued by the court on.
 59. Further, the court also set aside the order that the Appellants do pay costs of the suit before the trial court. The same is substituted with an order that each party to bear its own costs, both at the trial court and for this Appeal.
 60. In a nutshell, the Appeal succeeds, in the above stated terms. Further, this court directs the Muranga County Land Registrar and County Surveyor, to enforce order No (a) of the Decree issued by the trial court on 19th April 2023, within a period of 60 days, from the date of this Judgement.
 61. For avoidance of doubt, this court's Judgement is to the effect that the County Land Registrar and the County Surveyor, do carry out the survey and demarcation works, and then fix the disputed boundaries of Land Parcels No. Loc 11/ Maragi/ 3298 & 3300 and LOC 11/ Maragi 1938, belonging to the parties herein, within the next 60 days from the date hereof.
 62. The County Land Registrar to file such a Report before the Murang'a Chief Magistrate Court, and / or the trial court for completeness of the Order No (a), of the decree issued thereon. Further, after the Report is filed, each of the party is at liberty to Apply.
 63. Each of the parties herein to bear their own costs both for this appeal, and before the trial court.
- This Appeal succeeds as enumerated above.
- It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANGA THIS 7TH MARCH 2024

L. GACHERU



JUDGE

Delivered online in the presence of;

M/s Wanjiru H/B for Waweru Nyambura for the Appellants.

Mr. Wanda H/B for Mr. Juma for the Respondent

Joel Njonjo Court Assistant

L. GACHERU

JUDGE

7/3/2024

