



**Mungu'ra v Njagi (Civil Appeal E041 of 2021)  
[2023] KECA 1185 (KLR) (6 October 2023) (Judgment)**

Neutral citation: [2023] KECA 1185 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPEAL E041 OF 2021  
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA  
OCTOBER 6, 2023**

**BETWEEN**

**GLADYS MUTHINI MUNGU'RA ..... APPELLANT**

**AND**

**JULIUS NGARI NJAGI ..... RESPONDENT**

*(An appeal from the judgment of the Environment and Land Court at  
Malindi (Olola, J.) dated 19th February 2021 in ELC Appeal No. 7 of 2019)*

**JUDGMENT**

1. This is a second appeal from the judgment of the Environment and Land Court (ELC) at Malindi (J.O. Olola, J.) delivered on February 19, 2021 dismissing the appellant's appeal from a decision of the Land Registrar Kilifi dated May 3, 2019 declining the appellant's request to review and fix boundaries between her property known as Gede/Mijombani/1583 and the respondent's property known as Gede/Mijombani/1583.
2. The background in brief, based on the record of appeal, is that appellant purchased from the respondent the property known as Gede/Mijombani/1583 measuring approximately 0.25 acres, a sub-division of Gede/Mijombani/1543. Upon obtaining the title deed for the same, the appellant complained that the respondent had moved the boundary marks established by the surveyor thereby reducing the size of her property.
3. She further complained that the respondent prevented her from accessing her property through the official Government surrendered road and was constrained to purchase from the respondent an extra parcel of approximately 4 meters by 20 meters despite which the respondent persisted in preventing her from using the official access road. It is averred that on January 23, 2019, the appellant made an application to the Land Registrar, Kilifi, to settle the matter.



4. By a notice dated March 22, 2019 titled “Boundary Dispute” in reference to “Parcel No Gede/ Mijomboni/1583”, the District Land Registrar, Kilifi summoned appellant and the respondent, among other interested persons, for a hearing of the dispute.
5. Having undertaken a site visit in the presence of the parties, the Land Registrar made a report dated 3<sup>rd</sup> May 2019. In that report, it was observed that: according to the Map, the road serving the subdivided plots was to be in the middle of the property. In that regard reference was made to a surveyor’s report. It was also noted in the report that: on the ground, the respondent, Julius Ngala, advised the purchasers of Plot Nos. 1583, 1546, 1545, and 1544 to build their properties facing Plot No 59; that there is an existing road used by the community which does not appear on the map and which was not adopted on the Map when the adjudication was being done; and that the community and neighbours present insist they would like the road adopted as an official road.
6. Following from those observations, the Land Registrar made findings that: the road on the Map does not exist on the ground; that there is a road on the ground that is not on the map; that the Chief, neighbours and Community would like the road on the ground adopted; that the plot number 1583 has encroached on the existing road by approximately 0.5 m; and that the plot sizes on the ground are smaller than on the titles and the Map.
7. The Registrar concluded in the report that the area has common boundaries that can be amended. That the road on the ground should be adopted by a change of common boundary on the Map. On the way forward, the Registrar stated:

“All parties bordering the existing road should make an application through the area Chief to the Surveyor- Malindi to have the common boundaries changed to adopt the existing road. The affected parties are at liberty to appeal this decision to the High Court of Kenya within 90 days of the day here in.”
8. Dissatisfied, the appellant filed an appeal before the ELC, being Civil Appeal No 7 of 2019 that culminated in the impugned judgment delivered on February 19, 2021. The appellant complained that the Land Registrar erred in: failing to have the boundaries of the portions in question fixed; failing to find that the road existing on the map having been surrendered to the Government at the time of the approval of the subdivision scheme was a public thoroughfare that could not be converted to private use; failing to direct rectification of the boundaries to ensure what was on the ground corresponds with the Map.
9. Having considered the appeal and submissions by the parties, the learned Judge of the ELC in dismissing the appeal upheld the respondent’s contention that what was before the Land Registrar was not a boundary dispute as contemplated under Sections 18(1) and 19(1) of the [Land Registration Act](#) and that all that the appellant had requested for was the Registrar to excise the road serving her property. The Judge concluded thus:

“In the instant matter, I did not think that Registrar could be faulted for failing to proceed to ascertain and fix the boundaries of the two parcels of land, as provided under section 19 (1) of the [Land Registration Act](#) where that was not the application before her. Similarly, I did not think the Registrar could be faulted for to rectify the acreage of the parcels of land in the affected area as provided under section 79 (1)(c) of the [Land Registration Act](#) where there was no application for rectification.”
10. Consequently, the ELC dismissed the appeal hence the present appeal.



11. Learned counsel for the appellant Mr. Tukero Ole Kina in his written submissions urged that on a second appeal such as this which is confined to matters of law, the Court is entitled to interfere with the decision of the first appellate court if it is shown that it considered matters it should not have or failed to consider matters it should have or looking at the entire decision, it is perverse. The decision in Stanley N. Muriithi & another vs. Bernard Munene Ithiga [2016] eKLR was cited in support.
12. Counsel for the appellant submitted that the Judge erred in failing to appreciate that what was before the Land Registrar was a boundary dispute as contemplated under Sections 18(1) and 19(1) of the [Land Registration Act](#) and failed to consider the material before him; that appellant had established that the road on the Map that was surrendered to the Government at the time of approval of the subdivision scheme was a public thoroughfare that could not be converted into private use.
13. Counsel urged the Court to allow the appeal and to direct that the boundaries between the appellant's property Gede/Mijombani/1583 and the respondent's property known as Gede/Mijombani/1583 be reviewed and fixed as provided by law.
14. Learned counsel for the respondent, Mr. Shujaa in his written submissions in opposition to the appeal urged that the learned Judge was right in concluding that the dispute referred to the Land Registrar was not a boundary dispute; that based on the material made available, there was no application before the Land Registrar to fix boundaries or to rectify the acreage of the parcels of land. It was submitted that the notice issued by the Land Registrar summoning parties for a site meeting related to a site visit on 18<sup>th</sup> April 2019 and not the site visit made on 5<sup>th</sup> April 2019 when the Registrar visited the site, and that the appellant had the burden to produce the notice relating to the site visit of 5<sup>th</sup> April 2019.
15. Counsel for the respondent urged that it was incumbent upon the appellant to include in the record of appeal before the ELC the survey report referred to by the Land Registrar in her report but instead included in her record "extraneous evidence" comprising of her surveyor's report and mutation form which had not been placed before the Land Registrar and to which the ELC could not therefore have regard as it had not been tendered before the Land Registrar.
16. We have considered the appeal and the rival written submissions on which counsel relied. On a second appeal such as this, our mandate is restricted to matters of law. As the Court stated in [Stanley N. Muriithi & another vs. Bernard Munene Ithiga](#) to which we were referred:

"We are conscious of our limited jurisdiction when dealing with a second appeal. Our reading of Section 72(1) of the [Civil Procedure Act](#), Chapter 21, Laws of Kenya, which provides for the circumstances when a second appeal shall lie from the appellate decrees of the High Court, indicates that the appeal must be on matters of law.

In *Kenya Breweries Limited v Godfrey Odoyo* [2010] eKLR (Civil Appeal No 127 of 2007) Onyango Otieno, J.A. put it succinctly in the following words:

"In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

We hasten to observe, however, that failure on the part of the first appellate court to re-evaluate the evidence tendered before the trial court and as a result, arriving at the wrong conclusion is a point of law."



17. With that in mind, the pertinent issue for resolution is whether the learned Judge of the ELC erred in concluding that the dispute referred to the Land Registrar was not a boundary dispute.
18. As submitted by counsel for the respondent, the appellant's advocates letter dated 23<sup>rd</sup> January 2019 placing her grievance with the respondent before the Land Registrar does not form part of the record before this Court. It was not part of the record before the ELC either as stated by the learned Judge in paragraph 12 of the impugned judgment. However, there is on record the appellant's advocates reminder dated 26<sup>th</sup> February 2019 in which the letter of 23<sup>rd</sup> January 2019 is referred. In that reminder of 26<sup>th</sup> February 2019, counsel for the appellant requested the Land Registrar to hear the dispute "and to avail the summons for service on the respondent and the neighbours". What followed was the District Land Registrar's notice dated 22<sup>nd</sup> March 2019 which we have already mentioned. The notice read, in relevant part as follows:

"The proprietor of the piece of land comprised in the above-mentioned title has applied to me under both section 18(3) and section 19(1) of the *Land Registration Act*, No3 of 2012 and also section 21(2) of the Registered *Land Act* cap. (300) of the laws of Kenya (repealed) to determine the disputed boundary between his/her land and your land registered under the title No Gede/ Mijomboni/1582, 1546, 1545, 1544, 1037...

I shall visit the disputed boundary undermined and indicate its position on 18<sup>th</sup> April 2019 at 10.00 am.

You are therefore hereby summoned to appear before me at the place of the disputed boundary on the day and time before mentioned and bring any witness you may wish to call to give evidence relevant to the application.

Now take notice that in default of your appearance on the day and time at the place before mentioned, the evidence of the applicant and his/her witness will be heard, considered and the position of the disputed boundary determined in your absence..." [Emphasis added]

19. That notice speaks for itself. There can be no doubt that the purpose for which the parties were being summoned by the Land Registrar was for purpose of resolving a boundary dispute. The notice dated 22<sup>nd</sup> March 2019 was part of the record before the ELC. The learned Judge in reaching his conclusion that there was no boundary dispute did not make any reference or consider that the contents of that notice. Had he done so, no doubt he would have concluded, as we do, that what the appellant had referred to the Land Registrar was a boundary dispute.
20. The result is that the learned Judge failed to consider relevant matters and thereby reached a wrong conclusion. We are therefore entitled to interfere with his decision. The argument by the respondent that the notice of 22<sup>nd</sup> March 2019 related to a site visit proposed for 18<sup>th</sup> April 2019 as opposed to the site visit on 5<sup>th</sup> April 2019 implies that the visit that had been scheduled for 18<sup>th</sup> April 2019 related to a different dispute. There is no material on record to support that argument. On the contrary, the Land Registrar's report dated 3<sup>rd</sup> May 2019 leaves no doubt that it relates to the dispute initiated by the appellant.
21. Based on the foregoing, we are satisfied that there is merit in the complaint by the appellant that the learned Judge erred in failing to appreciate that what was before the Land Registrar was a boundary dispute. The Land Registrar had correctly captured in the summons to the parties that the appellant had applied under "section 19(1) of the *Land Registration Act*, No 3 of 2012 and also section 21(2) of the *Registered Land Act* cap (300) of the laws of Kenya (repealed) to determine the disputed boundary"



but instead of resolving it, the Land Registrar recommended in her report that “all parties bordering the existing road” to apply to have “the common boundary changed to adopt the existing road.”

22. Consequently, we allow the appeal. We set aside the judgment and order of the ELC given on February 19, 2021 dismissing the appellant’s appeal and substitute therefor an order allowing the appellant’s appeal against the decision of the Land Registrar given on May 3, 2019. We order and direct that the boundaries between Land Parcel Number Gede/Mijomboni/1583 and Gede/Mijomboni/1582 be reviewed and fixed by the Land Registrar, Kilifi as provided by law.
23. The appellant shall have the costs of this appeal and of the proceedings before the ELC.
24. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 6<sup>TH</sup> DAY OF OCTOBER 2023.**

**S. GATEMBU KAIRU, FCIArb**

.....  
**JUDGE OF APPEAL**

**P. NYAMWEYA**

.....  
**JUDGE OF APPEAL**

**G.V. ODUNGA**

.....  
**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

