



**Kinyuni v Nyambura & another (Civil Appeal 163 of 2017)
[2022] KECA 923 (KLR) (19 August 2022) (Judgment)**

Neutral citation: [2022] KECA 923 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 163 OF 2017
HM OKWENGU, F SICHALE & A MBOGHOLI-MSAGHA, JJA
AUGUST 19, 2022**

BETWEEN

SIMON KABUGI KINYUNI APPELLANT

AND

LAWRENCE KAIRU NYAMBURA 1ST RESPONDENT

COUNTY LAND REGISTRAR NYERI 2ND RESPONDENT

(Being an appeal against the ruling of the High Court of Kenya at Nyeri (Waitbaka J.) dated 31st October 2017.) In ELC CASE NO. 30 OF 2015 formerly HCCA 110/2000)

JUDGMENT

1. We begin our Judgment by observing that this is a convoluted matter due to the litigation that has taken place over the years prompted by the original allottees of the parcels of land in dispute alongside their successors and or administrators.
2. This appeal arises from the Ruling of L.N. Waitbaka J. dated 31st October 2017 in Environment and Land Court case NO. 30 of 2015 formerly Nyeri HCCC No. 110 of 2008. The facts of this appeal can be summarized as follows. Moses Kinyuru Gathogo (Deceased) was the original owner of L.R. Nyeri/Watuka/739, which land was neighboring L.R. Nyeri/Watuka/738 owned by Grace Nyambura Kairu(Deceased).

Moses Kinyuru Gathigi had at one time lodged a complaint before the Mweiga Law Disputes Tribunal being case No. 24 of 2001 in which he sought a boundary clarification accusing the respondent to have taken 10 Ha of his land.
3. This came to the knowledge of Moses at the time he wanted to sub-divide his land in the year 2000 and found that, instead of measuring 39 Ha, the same was 29 Ha. The measurement on the ground was not commensurate with what was on paper at the land's office.



4. The respondent on the other hand stated that, they had lived on the parcel from 1978 when they were settled by the settlement officer, and the acreage of the land had remained the same even to the time his mother Grace Nyambura, who had been allocated the land in the year 1963, died.
5. In its findings, the Tribunal made an award as follows,
 - “That the existing boundary between plot No. Nyeri/Watuka/739 of Moses Kinyuru Gathogo and Nyeri/Watuka/738 of Grace Nyambura Kairu to remain as it was fenced in 1967 up to date”.
6. Being dissatisfied with the above verdict, the appellant herein appealed to the Provincial Appeals Committee which heard the appeal and gave the award as follows,
 - “1. This Provincial panel having listened to both sides and having perused all the relevant documents keeps Nyeri Tribunal aside and rules that Nyeri District Registrar visits the cite and settle the dispute of the suit parcel No. Nyeri/Watuka/738 and 739.
 2. 60 days of appeal awarded.
 3. No costs awarded”
7. The respondent in this appeal, Lawrence Kairu Nyambura, was aggrieved by that award and filed an appeal to the High Court disputing the jurisdiction of the tribunal to resolve the matter. The High Court in Civil Appeal No. 110 of 2008 determined that this was an issue of boundary and therefore the Tribunal had jurisdiction to determine the matter. Following that judgment, the 2010 Constitution was inaugurated leading to the repealing of the Land Disputes Tribunal Act and the establishment or creation of the Environment and Land Court (ELC).
8. The appellant in this appeal, that is Simon Kabugi Kinyuni, then sought the enforcement of the award of the Provincial Appeals Tribunal Committee before the ELC. Subsequently, the Land Registrar appeared before the ELC and secured an order to determine the boundary between the two parcels of land which he did. The report was presented before the ELC and in a ruling made on 16th May, 2014 the ELC rejected the report on the ground that the land Registrar had not complied with the Provincial Land Disputes Appeals Committee, in that he had not determined the boundary issue according to the respective acreages.
9. Another order was issued by the ELC for the Land Registrar to repeat the exercise and ensure that LR Nyeri/Watuka/738 measured 29 hectares and LR Nyeri/Watuka/737 measured 39 hectares. This order aggrieved the respondent who filed an appeal before this Court.
10. This Court considered the matter and, in a judgment, dated 3rd February 2015, made an order to the effect that: -
 - “Consequently, we allow the appeal and set aside the ruling of the High Court delivered on the 16th May, 2014. The order that renders itself just in the circumstances of this matter is an order that another Land Registrar, other than S.N Mburu do determine the boundaries of Parcel Nos. Nyeri /Watuka 738 AND Nyeri/ Watuka 739, according to the applicable laws. The report be filed before the Land and Environment Court within 90 days from the date of this judgment. The appellant shall have the costs of this appeal.”
11. The matter thus reverted back to the Land Registrar to determine the boundary of the two parcels of land in accordance with applicable laws. In compliance with the above order albeit late, the County



Land Registrar (Nyeri) and his team visited the disputed parcels of land and prepared a report dated 9th March, 2016. In the said report, the Land Registrar attributed the delay in submitting the report to the Director, Land Adjudication and Settlement, who failed to provide an authenticated copy of the development map and area list on time.

12. The report by the Land Registrar recommended that the boundaries of the two parcels in dispute remain the same, since they had been undisturbed for over a period of 15 years, and the appellant had been caught up by time under Section 7 of the *Limitation of Actions Act* (Cap 22). As such, the Registry Index Map (RIM) ought to be amended to tally with the adjudication diagram.
13. The appellant objected to the adoption of the report before the ELC (Waithaka J). We discern from the record that when the matter came up before Waithaka J. on 26th May 2016, it was adjourned as the respondent had not received the same. The matter was put off to a date when the respondent would acquaint himself with the report.
14. In her ruling dated 31st October 2017, the learned Judge proceeded to adopt the report of the Land Registrar dated 9th March 2016 and filed on 14th March 2016. The learned judge stated thus:

“6. I have considered the affidavit sworn by the applicant on 26th April, 2016 and filed on an even date. Although I agree with the applicant that the visit and report by the Land Registrar did not comply with the timelines set by the court, I am satisfied with the explanation given by the Land Registrar about what caused the delay, which explanation I find reasonable under the circumstances. I also do not see what prejudice the respondent has suffered as a result of the delay in visiting the locus and filing the report.

7. Having found the County Land Registrar, Nyeri to have complied with the orders of the court of Appeal, I also find that this court has no jurisdiction to interfere with the report by the Land Registrar and I adopt the report by the Land Registrar dated 9th March, 2016 and filed on 14th March, 2016. I direct the Land Registrar Nyeri to recall the titles for Nyeri/Watuka/738 and Nyeri/Watuka/739 for amendment of their respective acreages and also amend the Registry Index Map to tally with the Adjudication diagram.”

15. Being aggrieved, the appellant has appealed to this court against the said ruling of Waithaka J. citing five grounds as hereunder:
 - a) The learned Judge erred in law in admitting/adopting a report from the Land Registrar out of time and in delaying the ruling for over 11/2 years.
 - b) The Learned Judge erred in law in adopting a report which was made without the relevant legal standards as ordered by this Court and without the enforcement of all applicable laws.
 - c) The learned Judge erred in law in admitting/adopting a report from the Land Registrar that was only based on the *Limitation of Actions Act* without considering that the issue touching on limitation of action was properly addressed in the High Court and a thorough judgment given thereof which judgment was not appealed against.
 - d) The Learned Judge erred in law in not setting her eyes on the entire Court of appeal judgment and/or didn't put into considerations the issue of acreages as set out in the court of Appeal judgment and the fact that the Registrar had been ordered to set the boundary in full compliance of all applicable law.
 - e) The learned Judge erred in law in citing lack of jurisdiction whereas the High Court has unlimited jurisdiction.



16. The appellant prays that this court sets aside the ruling dated 31st October 2017 and all consequential orders and direct the Land Registrar to fix the boundaries in accordance with the applicable laws and in conformity with this Court's judgment of 3rd February 2015 among other orders.
17. When the matter came before us on 17th May 2022 for hearing, parties indicated that they had filed their respective written submissions which they wholly wished to rely on. The appellants' submissions are dated 11th August 2020 whilst those of the 1st Respondent are dated 5th September 2020.
18. According to the appellant, three issues stand out to be resolved;
 - a) Was the Land Registrar's report dated 5th February 2016 admissible in view of the time line set for its filing?
 - b) Did the ELC have jurisdiction to interfere with the Land Registrar's report dated 5th February 2016.
 - c) If the answer to (b) above is in the affirmative to what extent could the ELC interfere with the Land Registrar's report dated 5th February 2016.
19. On issue (a) above, the appellant submitted that the court erred by adopting a report that had been made outside the 90 days period prescribed by this court; and that what was needed was an extension order from this Court before the report could be adopted.
20. On issue (b) about jurisdiction, the appellant submitted that under section 86(1) of the [Land Registration Act](#), 2012 the jurisdiction of the High court is wide and any aggrieved party was at liberty to approach the court and seek the court's opinion. Relying on the decision of this Court in *Mwangi Muraguri V. Kamara Rukenya* [1983] eKLR, the appellant submitted that the court had jurisdiction to hear the appellant's objection to the adoption of the report and interfere with the same if need arose.
21. The appellant further submitted that this court had, vide its earlier judgment, directed the Land Registrar to determine the boundary between the two parcels of land in accordance with applicable laws. That the applicable law therefore is section 18 & 19 of the [Land Registration Act](#) which empowered her to fix boundaries. The appellant submitted that the two parcels of land being registered and before opening of their respective registers, their survey plans ought to have been prepared and incorporated in the Registry Index Map.
22. In addition, failure by the Land Registrar to consider the fact that the area list, the registers for the two parcels of land and the Registry Index Map tallied in terms of measurements of the two parcels of land meant that applicable laws were not adhered to, hence it was necessary for the court to interfere with the report. Moreover, the order from the Provincial Surveyor did not authorize the Land Registrar to create new boundaries, as was done by the Registrar in the current case, by recommending increase and reduction of acreage and amendment of the Registry Index Map.
23. On limitation of time, the appellant submitted that the Land Registrar went beyond what she was required and/or directed to do by this court. Secondly that the particular issue had been settled earlier between the parties by Serгон J in Nyeri HCA No. 110 of 2008 when he ruled that there was no limitation to filing a boundary dispute. That by the Land Registrar stating that the matter had been caught up by the limitations of time, the Registrar was sitting on appeal of the finding of Sergon J., and that with all these irregularities in the report, it should be rejected by the Court.
24. The 1st respondent on the other hand opposed the appeal. It was his submission that upon delivery of the judgment by this Court, the court became *functus officio*. That although the Land Registrar visited the land out of the 90 days window period, he was aware of this timeline hence he gave an explanation



which explanation the court found reasonable and acceptable. That the extension of time was an issue of discretion which the court did judiciously. Whilst relying on the case of *Mbogo & Another V. shah* [1968] EA 93, the 1st respondent submitted that this Court has held that it cannot interfere with the decision of a superior Court unless the court has misdirected itself; that no prejudice had been occasioned to the appellant by the adoption of the report.

25. The 1st respondent submitted further that, the Registrar was not moving under the provisions of Section 86(i) of the [Land Registration Act](#), but rather under an order of court. That there was a case in court already hence the Registrar's report was not subject to the said section, and the report was not challenged by filing any application in court but rather an affidavit by the appellant.
26. The 1st respondent thus submitted that the Environment and Land Court had no jurisdiction to overrule the Land Registrar's report, as a reading of section 18(2) of the Registration of Land Act, section 86(I) of this Act is not available to the appellant. Section 19 of the Registration Land Act is not applicable to the appellant as the boundaries within Watuka settlement scheme are what are referred to as "general boundaries" defined in Section 18(1), otherwise called beacons, and not fixed, and thus the case of *Terry C. Maina Vs. District Land Registrar, Kajiado* [2015] eKLR.
27. That Registry Index Maps are not an authority on boundaries as found in the High Court case of *Samuel Wanjau V Attorney General & 2 Others* [2009] eKLR. The 1st respondent further submitted that the determination of a boundary will depend on many factors while citing this Court's judgment in the case of *Azzuri Limited v Pink Properties Limited* [2018] eKLR to emphasise that the Registry Index Map only indicates the approximate boundaries and approximate situations on the ground, and as such the maps cannot be the only determinants of such disputes.
28. That the Land Registrar did not award any party in the dispute additional land. The 1st respondent thus submitted that the report of the Land Registrar complied with the judgment of the court. That the inclusion of The County Land Registrar in this appeal, and who has never been a party to all other proceedings in the courts below, is wrong and the appeal should to be dismissed on that ground alone.
29. The duty of the Court in a first appeal is to reconsider and evaluate the evidence and draw its own conclusions as was set out in the case of *Kenya Ports Authority versus Kusthon (Kenya) Limited* (2009) 2EA 212 where this Court held, inter alia, that,

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

30. From the record of appeal and submissions by counsel, there is only one issue for determination; whether the learned judge rightly or wrongly adopted the report and recommendation of the Land Registrar in respect of the boundary dispute.

Parties are bound by their pleadings and the court cannot be left to guess what parties have not put across in their pleadings. From the pleadings it is evident that the appellant's claim was for the boundaries to be adjusted to correspond with the Registry Index Map, and order for recovery of land that the appellant believes had been taken by the respondent.

31. Under the [Registered Land Act](#), Cap 300 (repealed), Section 21(4) deprived this Court the power to entertain any action or other proceedings relating to a dispute as to the boundaries of registered land, unless the boundaries have been determined as provided under the laws. Section 18(2) of the [Land](#)



Registration Act, 2012, similarly prohibits this Court from entertaining any action or other proceedings relating to a dispute as to the boundaries of registered land, unless the boundaries have been determined as provided in that section. It 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.

(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”

32. Under Section 19 of Land Registration Act, 2012 the duty to fix boundaries to registered land is vested in the Land Registrar. It provides as follows,

“19. (1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

(2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.

(3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.

33. The orders of this Court in its judgment of 3rd February, 2015 provided as follows;

“Consequently, we allow the appeal and set aside the ruling of the High Court delivered on the 16th May, 2014. The order that renders itself just in the circumstances of this matter is an order that another Land Registrar, other than S.N Mburu do determine the boundaries of Parcel Nos. Nyeri /Watuka 738 AND Nyeri/ Watuka 739, according to the applicable laws. The report be filed before the Land and Environment Court within 90 days from the date of this judgment. The appellant shall have the cost of this appeal.”

34. In disposition of the issues before the bench that had heard that matter before, the Court had observed that,

“The only dispute that there was between the two parties was over the existing boundary. According to counsel for the appellant the Judge overstepped his mandate by directing the Land Registrar how to do his work when no evidence was adduced before the Judge regarding the acreage to assign to each plot. Also, the order by the Provincial Appeals’ Committee did not direct the Land Registrar how to place the boundaries. Since this matter started before the Land Registration Act came into effect, we would wish to highlight some



provisions under the repealed Registered Land Act which made provisions on how to determine boundary disputes: “

Section 20:

“ The Registrar may cause a survey to be made for any purpose connected with this Act, but, where the registry map is maintained by the Director of Surveys such survey shall be used to amend the Registry Map only if it is approved by the Director of Survey.

21. (1) Except where, under section 22, it is noted in the register that the boundaries of a parcel have been fixed, the Registry Map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(2) Where uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary.

(3) Where the Registrar exercises the power conferred by subsection (2), he shall make a note to that effect on the Registry Map in the register and shall file such plan or description as may be necessary to record his decision.

(4) No court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section”.

35. These provisions of the law, gave the Land Registrar the power to determine the boundaries. He has powers to summon evidence from the Survey records and other sources that he may deem necessary and the courts have no role in that regard.

36. To us, the Court was clear in its orders that the Registrar was to determine the boundaries of the two disputed parcels of land based on applicable laws and nothing more. It is after the determination by the Land Registrar that parties are now mandated to move to court and maybe challenge the said report of otherwise deal accordingly. In the Court of Appeal Case of *Estate Sonrisa Ltd & another v Samuel Kamau Macharia & 2 others* [2020] eKLR, the court stated thus,

“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 landowners. 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.”

37. It is 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 provisions of Sections 79 (3A), 80, 86 and 91 (9) of the *Land Registration Act*. We find that the report adopted was in line with the law and the court had no reason to interrogate the said report. Ideally, the appellant has avenues to deal with the report, as under section 86 of the *Land Registration Act*, any party aggrieved by or with the decision, or by the exercise of any power by the Registrar, can apply for review of the Registrar’s decision by way of a case stated for the court’s opinion.

Section 86 provides:

86.(1) If any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on the Registrar by this Act, the Registrar or any aggrieved person shall state a case for the opinion of the court and thereupon the court shall give its opinion, which shall be binding upon the parties.

38. We therefore conclude that we see nothing wrong with the ruling of the court in adopting the report. On the issue of the report having been filed late, the court rightly considered the reason for the delay and was in agreement with the same. We equally find the reason plausible and see no reason why the appellant proposes the parties should have come back to this Court to have the time extended. The court indeed became functus officio and the matter was reverted back to the trial court who rightly considered the reasons for delay.

39. We however hasten to state that the issue of adverse possession was not the province of The County Land Registrar to address. To that end, the comment by the said officer was of no consequence as only the court can make a determination on the same.

40. The end result is that the appeal before us is devoid of merit. The same is dismissed in its entirety. The parties shall bear their own costs considering their relationship as neighbours.

Orders accordingly.

Dated and delivered at Nairobi this 19th day of August 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

