



REPUBLIC OF KENYA



KENYA LAW
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**Sikuku v Siaka (Environment and Land Appeal E010 of 2022)
[2024] KEELC 3945 (KLR) (29 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3945 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E010 OF 2022**

DO OHUNGO, J

APRIL 29, 2024

BETWEEN

SIFUMA KAJERO SIKUKU APPELLANT

AND

ISAAC FULA SIAKA RESPONDENT

(Being an appeal from the judgment and decree of the Senior Principal Magistrate's Court at Butali (Hon. Z J Nyakundi, Senior Principal Magistrate) delivered on 11th April 2022 in Butali MCELC No. 160 of 2018)

JUDGMENT

1. Litigation leading to this appeal started before the Subordinate Court on 20th April 2018 when the respondent filed plaint dated 17th April 2018 against the appellant. He averred in the plaint that he was the registered proprietor of the parcel of land known as N/Kabras/Luandeti/3102 (the suit property) and that sometime in August 2017 the appellant removed boundary features, trespassed into, and ploughed the suit property. The respondent therefore prayed for judgment against the appellant for an injunction to restrain the appellant, his agents, and servants from further encroachment, remaining in or interfering with the suit property.
2. The appellant filed a statement of defence in which he denied the respondent's averments and stated that the suit property did not exist. The appellant further averred that the respondent's title was a forgery and had been obtained fraudulently. He therefore urged the Subordinate Court to dismiss the respondent's case with costs.
3. Upon hearing the matter, the Subordinate Court (Hon. Z J Nyakundi, Senior Principal Magistrate) delivered judgment on 11th April 2022 and ordered that the County Land Registrar and the County Surveyor visit land parcel numbers N/Kabras/Luandeti/3102 and N/Kabras/Luandeti/3103 with a view to demarcating and erecting a clear boundary between the two parcels and that the OCS



- Lumakanda to provide adequate security during the demarcation exercise. He further ordered each party to bear own costs.
4. Dissatisfied with that outcome, the appellant filed this appeal through Memorandum of Appeal dated 22nd April 2022. He prayed that the judgment be set aside and be replaced with an order dismissing the respondent's case. The grounds of appeal are listed on the face of the Memorandum of Appeal. In summary, they are that the learned magistrate awarded orders that were not sought, that the learned magistrate did not have jurisdiction and that the findings went against the weight of the evidence.
 5. The appeal was canvassed through written submissions. The appellant argued that the learned magistrate granted orders that were not sought in the plaint and also made orders over parcel number N/Kabras/Luandeti/3103 which the respondent did not include in his pleadings. The appellant relied on the case of *Otieno, Ragot and Company Advocates v National Bank of Kenya Limited* [2020] eKLR and further argued that the learned magistrate ended up redrafting pleadings and descended into the arena of conflict. The appellant further cited Section 18 (2) of the *Land Registration Act* and argued that the Subordinate Court did not have jurisdiction to hear and determine a boundary dispute. The appellant also argued that the totality of the evidence on record shows that the respondent had not proven his case and further that this being a civil dispute, there was no room for involvement of the police in the manner the learned magistrate ordered. He cited the case of *John Ndungu Mwaura & 20 others v Municipal Council of Nakuru* [2019] eKLR in support of that argument and urged this court to allow the appeal.
 6. In reply, the respondent argued that he included in his plaint the prayer "any other relief this honourable court deems fit to grant" and that the prayer gave both the Subordinate Court and the parties an opportunity to settle the dispute expeditiously and cost effectively by making the orders that the court granted. Relying on the case of *Mbogo and Another v Shah* [1968] EA 93, the respondent argued that this appeal amounts to a fishing expedition on a non-existent issue. He further argued that courts have discretion, and that litigation should end. He therefore urged this court to dismiss the appeal with costs.
 7. This is a first appeal. Consequently, the mandate of this court is to re-consider and re-evaluate the pleadings, the evidence, and the material on record and to determine whether the conclusions reached by the learned Magistrate are to stand or not and to give reasons either way. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 and *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
 8. The issues that arise for determination in this appeal are whether the Subordinate Court had jurisdiction and whether the reliefs that were granted should have issued.
 9. If there is an issue that a lot of judicial time has been invested in emphasising, it is that jurisdiction is the cornerstone of all judicial proceedings. A court of law cannot take any valid step in the absence of jurisdiction. The court's jurisdiction flows from either *the Constitution* or legislation or both and it can only exercise jurisdiction as conferred on it by law. See *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR. Any order or step taken by a court in the absence of jurisdiction is a nullity. See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR and *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR.
 10. The respondent's case as pleaded in the plaint was that he was the registered proprietor of the suit property and that sometime in August 2017 the appellant removed boundary features, trespassed into, and ploughed the suit property. He produced a copy of a title deed in his name, dated 14th April 2016.



To better understand the respondent's case, one needs to peruse his letter dated 14th November 2016 which he wrote to the District Land Registrar Kakamega. The letter reads in part:

Re: Boundary Dispute: Application for Boundary Confirmation of Land Parcel KK/Lwendeti/3102:

I kindly apply for the above boundary confirmation of land parcel in question. The owner of land parcel KK/Lwendeti/3103 has encroached into my parcel and whenever I request for amicable solution he has refused and he is not cooperative.

My parcel of land borders land No. KK/Ldt/3103, KK/Ldt/3098 and 3101.

Thanking you in advance for the service to be accorded."

11. Thus, although framed and disguised as a claim for an injunction against a trespasser, the underlying dispute, which the respondent was very much aware of in view of his above exhibit, was a boundary dispute between him and the appellant who was the registered proprietor of adjoining registered land. Through the letter dated 14th November 2016, the respondent invited the land registrar to settle the boundary dispute between them.

12. Section 18 (2) of the *Land Registration Act* provides:

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.

13. There is nothing on record to show that the registrar ever established the boundary as requested by the respondent or that the boundaries have been determined in accordance with the above section. In those circumstances, the learned magistrate had no jurisdiction to hear and determine the case which was a boundary dispute. He clearly misdirected himself in proceeding to hear and determine the case. The case ought to have been struck out for want of jurisdiction.

14. The appellant has argued that the learned magistrate granted orders that were not sought. It is important to remember the basic principle that parties are bound by their pleadings. The court too is in a sense bound by the parties' pleadings since they circumscribe the issues for determination and reliefs sought. See *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR.

15. The vital role of pleadings was restated by the authors of *Bullen and Leake and Jacob's Precedents of Pleadings*, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5) as follows:

The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.

16. The respondent prayed in his plaint for judgment against the appellant for an injunction to restrain the appellant, his agents, and servants from further encroachment, remaining in or interfering with the suit property. The learned magistrate did not grant that relief. Instead, he ordered that the County Land Registrar and the County Surveyor to visit land parcel numbers N/Kabras/Luandeti/3102 and



N/Kabras/Luandeti/3103 with a view to demarcating and erecting a clear boundary between the two parcels and that the OCS Lumakanda to provide adequate security during the demarcation exercise.

17. Whereas the respondent has argued that the order was validly made under his prayer for “any other relief this honourable court deems fit to grant,” such a prayer does not open the door for a court to make just about any order. The order made under such a prayer must arise logically from the case pleaded and advanced. It should not be an opportunity to ambush litigants with reliefs that they could not contemplate and could not therefore answer in their pleadings, evidence, and submissions.
18. I have agonised over whether to interfere with the final order that the learned magistrate made. Clearly, the boundaries need to be determined in accordance with the Act. The important question in this case, however, is that the dispute was improperly before the Subordinate Court. Jurisdiction, however well intentioned, cannot be granted even by consent. An order granted without jurisdiction is void and of no use. See *Macfoy v United Africa Co. Ltd* [1961] 3 All E.R. 1169. It is worse when the order is also one that the parties did not seek. For those reasons, I have come to the inevitable conclusion that the order issued by the learned magistrate has to be set aside. The parties should resolve the underlying boundary dispute by following the procedure laid down in the [Land Registration Act](#).
19. In view of the foregoing discourse, I find merit in this appeal, and I therefore allow it. I set aside the judgment of the Subordinate Court and replace it with an order striking out the respondent’s case in the Subordinate Court. The appellant shall have costs of both this appeal and the proceedings in the Subordinate Court.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 29TH DAY OF APRIL 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Adeka holding brief for Mr K Mukavale for the Appellant

Mr Mondia for the Respondent

Court Assistant: M Nguyayi

