



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kiragu v Munyi & 2 others (Appeal E18 of 2023)  
[2025] KEELC 693 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 693 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
APPEAL E18 OF 2023  
JM MUTUNGI, J  
FEBRUARY 20, 2025**

**BETWEEN**

**JOHN KARANI KIRAGU ..... APPELLANT**

**AND**

**MAINA MUNYI ..... 1<sup>ST</sup> RESPONDENT**

**HENRY MBIRITI MWAURA ..... 2<sup>ND</sup> RESPONDENT**

**MBURU MWAURA ..... 3<sup>RD</sup> RESPONDENT**

*(An Appeal arising from the Judgment of the Honourable D.N Sure-SRM delivered on 19th November 2018 in Civil Suit No.88 OF 2013 in the Magistrate's Court at Wang'uru)*

**JUDGMENT**

1. This Appeal arises from the Judgment of Hon. Sure (SRM), delivered on 19<sup>th</sup> November, 2018 in Wang'uru PMCC No. 88 of 2013. The Learned Trial Magistrate dismissed the appellant's case on the grounds that the Appellant failed to meet the required standard of proof. In her judgment, the Learned Magistrate observed that although both parties agreed on the ownership of Mwea/Tebera/B/253 (the contested land) and acknowledged the Respondents' license for rice holding No. 692, they disputed the precise location of the boundary between the two properties.
2. The Learned Magistrate observed that the parties recorded a consent on 20<sup>th</sup> January, 2015, in which they referred the boundary dispute to the Land Registrar and the National Irrigation Board (NIB) Surveyor. The Learned Trial Magistrate noted that the report dated 22<sup>nd</sup> January 2018, submitted by the Land Registrar, indicated that the Appellant had encroached on the NIB's land and had uprooted the boundary beacons. The Land Registrar further observed that new beacons were subsequently erected based on a fixed survey.



3. The Learned Magistrate further observed that the site visit conducted by the Court revealed that the Appellant had encroached approximately 5 meters into NIB land from the canal when the beacons were pointed out. Based on the Land Registrar's report and the evidence presented during the site visit, the Learned Magistrate concluded that the Appellant had not established his case on a balance of probabilities and dismissed the same with costs.
4. Aggrieved and dissatisfied with the Court's decision, the Appellant appealed to this Court and filed Record of Appeal dated 26<sup>th</sup> May 2023.
5. The Appellant's Memorandum of Appeal set out 9 grounds of Appeal as follows:-
  1. That the Learned Resident Magistrate erred in both law and fact when she failed/refused to hear or consider the evidence of the Appellant in the case.
  2. That the Learned Resident Magistrate erred in both law and fact when she failed/refused or otherwise neglected to follow the Registry index map of the area as earlier traced by the District Surveyor.
  3. That, the Learned Resident Magistrate erred by refusing to note that the dispute was not between the National Irrigation Board but between the parties to the suit.
  4. That the Learned Magistrate erred both in law and fact when she visited the area in dispute and or refused to insist upon the Land Registrar to show her the actual boundary in dispute.
  5. That the survey so conducted was not done so procedurally and the Kirinyaga County Surveyor was neither clear not precise in his survey exercise which was not done satisfactorily ab initio.
  6. That the findings of the Learned Resident Magistrate are against the Court evidence adduced at the hearing.
  7. That the trial in its entirety was a mistrial and occasioned a miscarriage of justice.
  8. That the Appellant craves leave to, add to omit, combine and/or amend any of the grounds listed here above.
  9. That findings and the judgment of the Learned Resident Magistrate has no support of the evidence.
6. The Appellant prayed that the appeal be allowed and the Judgment in Wang'uru PMCC Case No. 88 of 2013 be set aside and be substituted with an order entering Judgment in favour of the Appellant. Additionally, the Appellant prayed that this Court order a fresh survey to establish the disputed boundary, with the Court's involvement in the process.
7. In order to contextualize the appeal, it is necessary to set out the facts of the case before the Lower Court, albeit, briefly. In the suit before the Lower Court, the Appellant prayed for an order of permanent injunction restraining the Respondents from entering into the land parcel No. Mwea/Tebere/B/253 or interfering in other way with the Appellants possession, boundary, use and occupation of the same. The evidence presented indicated that the parties involved were neighbours whose properties shared a common boundary. The Appellant claimed that the Respondents had unlawfully intruded on his property by removing the boundary posts and wire that separated his land from theirs. The Appellant further asserted that the Respondents had ignored multiple requests to cease their illegal actions. As a consequence, he sought a permanent injunction to prevent the Respondents, along with their agents, servants, and employees, from entering his property.



8. The Respondents, on their part, refuted the Appellant's claim in the Plaint and dismissed the pleading as faulty, defective, and lacking reasonable cause of action.
9. On 20<sup>th</sup> January 2015, the parties by consent agreed to have the matter referred to the Land Registrar and the District Surveyor to have the parcel boundary established and beacons placed. On 15<sup>th</sup> October 2018, a site visit took place in the presence of the parties involved, their Advocates, the Land Registrar, the County Surveyor, the Assistant County Surveyor, the Plaintiff's Surveyors, and representatives from the National Irrigation Board (NIB). During this visit, the Land Registrar confirmed that the Appellant had encroached on the Respondents land by approximately 5 meters. Additionally, the County Surveyor observed that the canal shown on the map should not be passing through the Appellant's land as it did. Based on the report filed by the Land Registrar, his evidence, and the County Surveyor, the Learned Magistrate reached the decision that she did.
10. The Court directed the parties to canvas the appeal by way of written submissions. The Appellant filed his written submissions dated 11<sup>th</sup> July 2024 and on behalf of the Appellant, Counsel acknowledged that the main issue was the boundary location between the parties' parcels of land. Counsel denied the involvement of the Appellant in uprooting the beacons and insisted that it was the Respondents who carried out the act. He blamed the Land Registrar for not visiting the site as instructed by the court, stating that the Land Registrar sent his own private surveyor along with the NIB, but they did not go to the ground. Additionally, the Appellant argued that the Land Registrar failed to invite the parties to witness the process.
11. The Appellant submitted that he had occupied his land without interruption since land demarcation and that there have always been clearly marked boundaries between his land and that of the National Irrigation Board. He further pointed out that the Land Registrar's sketch Plan indicated a portion of the Appellant's land as being planted with rice; however, during the site visit, the registrar did not identify this area.
12. Counsel for the Appellant further submitted that the Land Registrar is responsible for resolving boundary disputes, yet he failed to indicate the boundary between the parties parcels of land. Counsel relied on Section 18 of the [Land Registration Act](#) 2012, which provides that:

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)
13. The Appellant's Counsel further emphasized that Section 19 of the Act outlines the procedure for determining the relevant boundaries. Counsel submitted that this section requires the Land Registrar to have the boundaries accurately defined by a survey, to file a plan with the necessary details, and to make a record in the register indicating that the boundaries have been established. Counsel argued that the general boundary system should not be determined by physical features, and he contended that the



Land Registrar's use of the canal to determine the actual boundary between the two survey marks was incorrect. He contended that the canal relied upon by the Land Registrar was not the original canal.

14. The Respondents filed their written submissions dated 22<sup>nd</sup> July 2024. Counsel for the Respondent argued that the Appellant's claim that the Land Registrar failed to fulfill his mandate was unfounded. Counsel submitted that the Land Registrar identified the beacons and determined that the Appellant had encroached onto the National Irrigation Board (NIB) land in the presence of surveyors from both the National Irrigation Board (NIB) and the Appellant's private surveyors.
15. The Respondents Counsel asserted that the Land Registrar effectively resolved the boundary dispute, contrary to the Appellant's allegations, and acted in good faith while implementing the Court's Orders/directions. He emphasized that the Appellant did not challenge the Land Registrar's report, which revealed/established that the Appellant had encroached on NIB land. Counsel further submitted the Trial Court did not decide the boundary issue itself as the Land Registrar had established the positioning of the boundary and the Magistrate merely relied on the report by the Land Registrar and the Surveyor.
16. In their submission, Counsel referenced Sections 16(1) and 21(1) of the *Land Registration Act*, which provides as follows:
  16.
    - (1) The office or authority responsible for the survey of land may rectify the line or position of any boundary shown on the cadastral map based on an approved subdivision plan, and such correction shall not be effected except on the instructions of the Registrar, in writing, in the prescribed form, and in accordance with any law relating to subdivision of land that is for the time being in force.
17. Section 21 (1) of the *Land Registration Act* provides:
  - (1) Any person who defaces, removes, injures, or otherwise impairs a boundary feature or any part of it, unless authorized to do so by the Registrar, commits an offense and is liable on conviction to imprisonment for a term not exceeding two years or to a fine not exceeding two hundred thousand shillings or to both.
18. The Respondents further asserted that the authority to alter boundaries lies with the Land Registrar acting in conjunction with the Land Surveyor. The Respondents contended that the process conducted by both the Land Registrar and the Surveyor fell within their legal mandate.
19. I have reviewed the record of appeal and the submissions from both parties. The singular issue upon which this appeal turns is whether the Learned Trial Magistrate erred in her evaluation of the evidence and thereby reached a decision that was not supported and/or borne out by the evidence.
20. This Court being an Appellate Court of first instance must re-evaluate the evidence presented before the Trial Court in keeping with the principle in the Case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123 to ascertain whether the decision reached by the Lower Court was justified on the basis of the evidence adduced. In the Case the Court of Appeal stated as follows:-

“----- This Court is not bound necessarily to accept the findings of fact by the Court below. An Appeal to this Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must 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 this respect.”

21. The Appellant acknowledged that the matter in question touched on and related to a boundary dispute explaining the basis of entering a consent to refer the matter to the Land Registrar and the Surveyor to have the boundary established. The Appellant however contended that the process undertaken by the Land Registrar was improper, resulting in incorrect findings by the Learned Magistrate.
22. The Appellant faulted the process used to establish the boundaries, arguing that the Land Registrar did not personally visit the site. He stated the Land Registrar instead delegated this responsibility to private Surveyors and Surveyors from the National Irrigation Board (NIB). The Appellant further claimed the parties involved in the dispute were not notified about the boundary fixing, and the beacons were only marked during a site visit that occurred in the presence of the Court. The Appellant asserted that the Surveyors did not physically visit the site either. Furthermore, he argued that the Land Registrar failed to establish the boundaries as mandated by Section 19 of the [Land Registration Act](#). The Appellant contends that the surveyor relied on physical features, specifically the canal, rather than conducting an accurate survey of the land to determine the boundaries of the disputed properties.
23. The issues for determination in this Appeal are whether the Learned Trial Magistrate acted properly in accepting and basing her determination on the Land Registrar’s report and whether the Land Registrar acted procedurally when he established and ascertained the land parcel boundaries of the Appellant’s land parcel Mwea/Tebera/B/253 and Rice holding No. 692 licensed to the Respondents by the National Irrigation Board (NIB).

Section 18 and 19 of the [Land Registration Act](#), 2012 provide for establishment and fixing of boundaries whenever there is a dispute concerning boundary of any land registered under the Act. Indeed Section 18(2) of the Act, divests Courts of jurisdiction to handle disputes relating to boundary.

Section 18(2) provides as follows:-

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- (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.

Section 19 of the Act provides in an elaborate manner the procedure the Land Registrar has to follow in the establishment and ascertainment of any disputed boundary. It provides as follows:-

19.

- (1) if the Registrar considers it desirable to indicate on a field 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.

24. In the instant matter, the parties were agreed that the dispute involved the boundary of the Appellant's parcel of land registered under the Land Registration Act, 2012 and the National Irrigation Board land out of which they had licensed Rice holding No. 692 which bordered the Appellant's land parcel to the Respondents. The parties on 20<sup>th</sup> January 2015 by consent agreed to have the dispute referred to the Land Registrar and the District Surveyor to ascertain the boundary and place beacons. The consent was in the following terms:-

- 1). That the Land Registrar and District Surveyor do visit the land owned by the Plaintiff(Appellant) and Mwea Irrigation Scheme and put beacons.
- 2). That the Chief of the area be present to ensure correct boundary is indicated.
- 3). That the OCS Wang'uru Police Station do provide security during the exercise.
- 4). That costs be in the cause.

25. The Land Registrar submitted a report to the Court dated 22<sup>nd</sup> January 2018 which for ease of reference is reproduced hereunder:-

RE: CIVIL SUIT NO. 88 OF 2013

JOHN KARANI KIRAGU –VS- MAINA MUNYI & OTHERS.

Your Court Order dated 11<sup>th</sup> March 2015 on above subject matter refers.

The District Surveyor, a team from National Irrigation Board(N.I.B) and myself visited the suit lands and established the beacons forming the boundary between the parcels and wish to submit my report as hereunder:-

-That the boundary between land parcel Number Mwea/Tebere/B/253 and N.I.B land is marked by beacons erected by a fixed survey.

- That the said beacons are easily identifiable by use of modern technology using G.P.S equipment.

-That we established beacons forming the boundary between N.I.B land and parcel No. 253 among others as detailed by the attached diagram.

-That the diagram clearly identifies the extent of encroachment by parcel No. 253 into N.I.B lands.

-That owner of Parcel No. 253 has interfered with two (2) beacons by uprooting them.

- That from the diagram, it is worth noting that the N.I.B canal does not form the boundary but is inside the N.I.B land.

From the above, we scheduled 16<sup>th</sup> January, 2018 as the day to point out the beacons to the parties as agreed in Court on 20<sup>th</sup> November, 2017 when I appeared in Court. We indeed visited the site on the scheduled date but the proprietor of parcel No. 253 with people he claimed were his sons and beneficiaries of his parcel refused to recognize the beacons as established and described by the attached sketch and demanded that all they wanted was their land to be measured.



However, the refusal by the owner of Parcel No. 253 to recognize the beacons does not change any situation as the beacons forming the boundary are erected by a fixed survey which CANNOT change.

In conclusion, we recommend that National Irrigation Board to dig a furrow along the boundary as shown on the sketch to define the boundary between their land and the freehold titles to avoid future encroachments and disputes.

SIGN

MUTHEE, J. K.

DISTRICT LAND REGISTRAR

KIRINYAGA

26. It is evident from the report that the N.I.B land had been surveyed and was defined by fixed beacons which the Land Registrar and the team of Surveyors were able to pick easily using the G.P.S equipment that they had. The Land Registrar's report attached a detailed survey diagram that showed the delineation of the disputed parcels of land. From the report it is apparent that the Appellant was shown the boundary beacons delineating the N.I.B land and his land but he apparently refused to accept that the beacons defined the extent of his land.
27. As pointed out by the Land Registrar, the N.I.B Land was defined by survey that had fixed beacons and those could not be changed. In contrast, the Appellant's land parcel only had general boundaries defined by the Registry Index Map (RIM). These only indicate approximate boundaries. Angote, J in the case of Ali Mohamed Salim –vs- Faisal Hassan Ali (2014) eKLR elaborated the distinction of boundaries under the repealed Registered Land Act (RLA) and boundaries under the repealed Registration of Titles Act (RTA) which comprised of fixed beacons. In a Ruling delivered on 8<sup>th</sup> May 2014 at paragraphs 12, 13 and 14 he stated thus:-
  12. A distinction has to be made between the “general boundaries” as defined under the repealed Registered Land Act and “fixed boundaries” which are applicable in land registered under the repealed Registration of Titles Act.
  13. Under Section 18 of the repealed Registered Land Act, the Director of Surveys was required to prepare and maintain a series of maps for every registration district. The type of survey that generated the Registry Index Maps is what was known as “general boundaries” which has been defined in Section 18(1) of the Land Registered Act, 2012 to mean “the approximate boundaries and the approximate situation only of the parcel.” Indeed, most of the titles under the repealed Registered Land Act were issued on the basis of the general boundaries, meaning that such parcel of land had no fixed beacons.
  14. On the other hand, land registered under the Registration of Titles Act required a cadastral survey to be prepared, which is based on a fixed boundary survey principle. Such a survey has an accurate linear and angular measurements to aid the registration of a title of on plot. The boundaries of land registered under the Registration of Titles Act can easily be identified by any surveyor because of the fixed nature of its beacons.
28. I agree with the Judge's exposition of the Law as relates to “General Boundaries” and “fixed Boundaries”. In the present case the delineation of the National Irrigation Board (NIB) land was as a result of fixed survey and hence had fixed beacons and had accurate linear and angular measurements for purposes of delineating the land that fell under the Irrigation Scheme.



29. I have in keeping with the obligation of this Court as an Appellate Court re evaluated the pleadings, the record of Appeal and the evidence presented before the Trial Court. The Appellant's evidence was simply that his land was as defined by the RIM and that he had occupied the same until 2012 when Surveyors from NIB came and conducted a re-survey and fixed their own beacons. He stated the Respondents entered into his land in January 2013 which prompted him to engage the services of Geomatics Surveyors who vide a letter dated 4<sup>th</sup> July 2013 confirmed that the ground measurements of his land matched with the area as per the title. The Appellant disputed the report prepared by the Land Registrar following the order of reference by the Court.
30. The Respondents stated they were licensees of NIB and were only utilizing the land as shown to them by NIB. The Respondents affirmed that the Land Registrar, Surveyors and NIB Officials came to the land and placed beacons which the Appellant removed. The Respondents however stated the beacons were replaced following directions of the Court given in 2017.
31. The Court record indicates that on 15<sup>th</sup> October 2018 the Court in the presence of the parties, the Land Registrar, County Surveyor, the Appellant's Surveyors and an Officer from NIB visited the site at 2.00 Pm and the Land Registrar and the County Surveyor pointed out the survey beacons and were cross examined by the Appellant's Advocate. The County Surveyor in his evidence stated thus:-
- “----Any licensed Surveyor can identify fixed points. The canal is not falling on free land areas. It would be wrong for NIA to encroach on 253. Fixed Survey supersedes any other survey and if 253 is disputing the survey, he can only petition the Director of survey.
32. Upon a careful evaluation of the evidence I find no basis upon which the Learned Trial Magistrate could be faulted. The Learned Trial Magistrate did not act outside her jurisdiction. The parties on their own accord acknowledged the dispute related to a boundary dispute and properly urged the Court to have the dispute referred to the Land Registrar and the Surveyor who under the [Land Registration Act](#), 2012 were the Officers vested with power to handle and determine boundary disputes. Indeed the Court under Section 18(2) of the Act, is divested of jurisdiction to entertain such disputes. This is for good reason since the Courts lack the technical ability and expertise to handle such issues which are best left to experts in the area. Indeed even in the instant case, the Land Registrar observed they were able to easily pick the fixed survey beacons by use of GPS Technology illustrating that expertise in the field was required.
33. On the basis of the evidence I am satisfied that the Learned Trial Magistrate properly relied on the report by the Land Registrar to find that the Appellant had not proved his case on balance of probabilities and hence dismissed the same. The appeal lacks merit and the same is dismissed with costs to the Respondents.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 20<sup>TH</sup> DAY OF FEBRUARY 2025.**

**J. M. MUTUNGI**

**ELC - JUDGE**

