



**Njihia v Gathuku & 2 others (Environment and Land Appeal
E022 of 2023) [2024] KEELC 4624 (KLR) (10 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4624 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E022 OF 2023**

BM EBOSO, J

JUNE 10, 2024

BETWEEN

FRANCIS NJOGU NJIHIA APPELLANT

AND

STANLEY NDUNGU GATHUKU 1ST RESPONDENT

THE LAND REGISTRAR, KIAMBU 2ND RESPONDENT

THE DISTRICT LAND SURVEYOR, KIAMBU 3RD RESPONDENT

(Being an Appeal against the Ruling of Hon. P. Muholi, Principal Magistrate, delivered on 16/3/2023 in Githunguri Principal Magistrate Court E & L Case No. E42 of 2022)

JUDGMENT

Introduction

1. This appeal challenges the ruling of Hon P Muholi, Principal Magistrate, rendered on 16/3/2023 in Githunguri PMCC Case No E042 of 2022. Through the impugned ruling, the Principal Magistrate Court allowed the 1st respondent's application dated 13/12/2022 in which he sought an order of temporary injunction restraining the appellant, together with the Land Registrar Kiambu [the 2nd respondent] and the District Land Surveyor, Kiambu [3rd respondent] from, among other things, undertaking a boundary determination within the framework of Section 18 of the [Land Registration Act](#). Before I dispose the key issues that fall for determination in the appeal, I will briefly outline the background to the appeal.

Background

2. The 1st respondent sued the appellant; the 2nd respondent; and the 3rd respondent, in the Principal Magistrate Court at Githunguri seeking, among other reliefs, a declaration that the boundaries



between parcel numbers Gatamaiyu/Kagwe/1219 and Gatamaiyu/Kagwe/2081 had been surveyed, ascertained and fixed as evidenced by the existing boundary marks on the ground, hedges, stone wall and beacons; an order of permanent injunction restraining the trio and their agents from interfering with, entering into, alienating or in any manner whatsoever interfering with his use, possession, occupation and/or development of parcel numbers Gatamaiyu/ Kagwe/ 2081 or in any manner whatsoever from interfering, shifting, altering and or moving the existing boundary on the ground between parcels number Gatamaiyu/Kagwe/1219 and Gatamaiyu/ Kagwe/ 2081; and an order setting aside the order of mandamus issued in Miscellaneous Application Number 17 of 2019. Together with the plaint, the 1st respondent filed a notice of motion dated 13/12/2022 seeking, among other interlocutory reliefs, an order barring the Land Registrar against interfering with, shifting, altering or moving the existing boundary between the two abutting parcels. I will, for convenience, refer to the two abutting parcels as “parcel number 1219” and “parcel number 2018” respectively.

3. The 1st respondent’s case was that he was the registered proprietor of parcel number 2081, having purchased it in 2002 from the appellant’s half-brother, one David Mburu. He added that parcel number 2081 was hived off land parcel number Gatamaiyu/Kagwe/397 and abutted parcel number 1291 belonging to the appellant. The 1st respondent contended that he lived peacefully until sometime in 2018 when the appellant submitted a complaint to the local Administration who referred him to the Land Registrar. The 1st respondent added that instead of the appellant approaching the 2nd and 3rd respondents as advised, he instead filed numerous court cases culminating in one case being dismissed and in him being granted “an order of mandamus” in Githunguri SPMC Miscellaneous Application No. 17 of 2019 compelling the 2nd and 3rd respondents to fix the boundaries between parcel number 1291 and parcel number 2081. The 1st respondent averred that the said order was erroneous because there already existed fixed boundaries which were ascertainable by boundary markers and beacons on the ground. The 1st respondent contended that the appellant’s intention was to grab his land by irregularly and illegally shifting the boundary between the two abutting parcels of land. He added that the appellant, the 2nd respondent and the 3rd respondents had been harassing him and threatening him with unspecified consequences if he did not accede to their demand, causing him to file the suit at the trial court together with a notice of motion dated 13/12/2022 seeking interlocutory injunctive orders.
4. In response to the application dated 13/12/2022, the appellant filed a notice of preliminary objection and a replying affidavit, both dated 19/12/2022. His case was that the trial court lacked jurisdiction to entertain and determine the claim, given that the claim related to a boundary dispute which ought to be adjudicated on by the Land Registrar as required under Section 18 of the *Land Registration Act*.
5. On 5/1/2023, counsel for the 1st respondent acknowledged receipt of the replying affidavit alongside the preliminary objection and urged that both the 1st respondent’s application and the appellant’s preliminary objection be canvassed through written submissions. Upon receiving presentations from the parties’ advocates, the Presiding Magistrate directed that the application and the preliminary objection were to be heard together. He further directed parties to canvass the two items through written submissions. He set down the matter for mention on 23/2/2023 to confirm filing of written submissions. On 23/2/2023, upon parties confirming that they had filed and exchanged submissions on the two items, the Presiding Magistrate reserved 16/3/2023 as the date for ruling.
6. The Principal Magistrate Court subsequently rendered a ruling dated 16/3/2023, in which it made the following verbatim findings:

“What comes out from the affidavit evidence is that the parties have lived together for long, each appears to be on their parcels, if there exists any dispute the same cannot be decided by



affidavit evidence, the 1st respondent cannot purport to then do survey without involving the applicant. He has shown a right that needs to be protected by the court. If there is nay dispute then the court ought to determine it by way of viva voce. In my view therefore the applicant has established a prima facie case.”

7. The Principal Magistrate Court did make any mention of or any finding on the appellant’s preliminary objection or on the issues that had been raised in the preliminary objection. The Court granted the 1st respondent the interlocutory injunctive orders sought in his application.

Appeal

8. Aggrieved by the ruling of the Principal Magistrate, the appellant brought this appeal, advancing the following seven verbatim grounds:

1. That the honourable Learned Magistrate erred in law and in fact by failing to appreciate the fact that the appellant’s replying affidavit deponed on 19/12/2022, preliminary objection dated 19/12/2022 and written submissions dated 20/12/2023 raised triable issues worthy to dismiss/ strike out the application and entire suit.
2. That the honourable Learned Magistrate applied wrong principles of law in arriving at the decision to allow the plaintiff’s application dated 13/12/2022 and dismissing the 1st defendant’s preliminary objection dated 19/12/2022.
3. That the honourable Learned Magistrate erred in law and in fact in failing to appreciate the issues raised in the preliminary objection dated 19/12/2022 that:

“The courts lack jurisdiction to entertain the application as presented to wit; the application offend the law and specifically, Section 21 (4) of the *Land Registration Act* which deprived the 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 in that section. Section 18 (2), the *Land Registration Act, 2012* (LRA), similarly prohibits the 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. Under section 19 of *Land Registration Act, 2012*, the duty to fix boundaries to be registered land is vested in the Land Registrar.

The Learned trial Magistrate erred in law in holding that it has jurisdiction.’

4. That the honourable Learned Magistrate erred in law and in fact by failing to find that the plaintiff both in the application and plaint raised issues on boundary dispute between the appellant and the respondents despite uncontested documents and evidence tendered before him especially as evident in the plaintiff’s pleadings and respondents replying affidavit deponed on 19/12/2022.
5. That the honourable Learned Magistrate erred in law and in fact by failing to find on the evidence before him that the 1st respondent had not met the conditions for granting of an order of injunction as set out in the case of *Giella vs Cassman Brown*. The learned trial magistrate erred in law in addressing the issues of law raised by the appellant.
6. That the honourable Learned Magistrate erred in law and in fact by grossly misdirecting himself in ignoring the evidence and written submissions presented and filed by the appellant in their entirety.



7. That the honourable Learned Magistrate erred in law and in fact by failing to apply himself judicially and to adequately evaluate the appellant's evidence, submissions and authorities thereto and the applicable law and thereby arrive at a decision unsustainable in law.
9. The appellant sought the following verbatim reliefs from this court: (i) that the appeal be allowed; (ii) that the 2nd and 3rd respondent be ordered to ascertain and fix the boundary in dispute; (iii) that the lower court suit be struck out and/or dismissed; and (iv) that orders of the trial magistrate be set aside.

Appellant's Submissions

10. The appeal was canvassed through written submissions dated 9/10/2023, filed by M/s Mulinge & Ochieng Co Advocates. Counsel for the appellant submitted that the issues raised in the preliminary objection were serious and pure issues of law which the court was duty-bound to determine prior to setting down the case for trial on merit. Counsel referred to Sections 13 of the [Environment and Land Court Act](#) and Sections 18 and 19 of the [Land Registration Act](#) in submitting that the mandate to determine boundary disputes is vested in the Land Registrar in the first instance. Counsel added that institution of the suit in the trial court was wholly unnecessary and constituted an abuse of the due process of the court. Counsel contended that the dispute between the parties in this appeal was a boundary dispute, hence it ought to have been taken to the Land Registrar for determination in the first instance. Counsel urged the court to find that the trial court lacked jurisdiction to entertain the suit and the application before it and have the suit struck out. Counsel relied on the decisions in the cases of: (i) [Azzuri Limited v Pink Properties Limited](#) [2018] eKLR; and (ii) [George Kamau Macharia v Dexka Limited](#) [2019] eKLR.
11. Counsel contended that the 1st respondent's pleadings clearly indicated that the dispute revolved around the common boundary even though the 1st respondent denied it. Counsel further contended that the 1st respondent did not avail any evidence to show that the boundary of the two parcels had been fixed by the Land Registrar. Counsel added that the appellant had initiated the process to have the Land Registrar determine the boundaries but the process was thwarted by the 1st respondent's action. Counsel argued that the 1st respondent's contention that the boundary had been fixed during the time of subdivision of the land was baseless. Counsel faulted the 1st respondent for his failure to avail reports from the Land Registrar and the Surveyor to show that the boundary dispute had been determined.
12. On whether the 1st respondent established a case to warrant issuance of injunctive orders, counsel submitted that the 1st respondent had not established a prima facie case with the probability of success to warrant the grant of the injunctive orders. Counsel contended that the appellant and the 1st respondent were neighbours who shared a common boundary. Counsel further contended that the 1st respondent did not show the court how the appellant encroached on his parcel of land. He added that the 1st respondent did not show that he had a genuine case against the appellant to warrant issuance of the injunctive orders. On whether the 1st respondent was likely to suffer irreparable injury, counsel submitted that the 1st respondent failed to demonstrate any irreparable damage he would suffer. On the balance of convenience, counsel submitted that the 1st respondent acted in an untoward manner, thereby exposing the appellant to untold damages. Counsel added that the 1st respondent delayed the resolution of the boundary dispute.
13. Counsel contended that an injunction is an equitable remedy and that whoever approached the court for grant of an equitable remedy ought to do so with clean hands. Counsel further contended that the 1st respondent had soiled his hands and was therefore not entitled to an equitable remedy. Counsel relied on the decision in the case of [Daniel Kamau Mugambi v Housing Finance Company of Kenya](#) [2006] eKLR in support of his submissions. Counsel urged the court to allow the appeal in terms of



the order sought in the memorandum of appeal. On costs, counsel submitted that the appellant was entitled to costs pursuant to the principle that costs should follow the event.

1st Respondent's Submissions

14. The 1st respondent filed written submissions dated 15/12/2023 through M/s Wanjohi & Wawuda Advocates. Counsel for the 1st respondent identified the following as the two issues that fell for determination in the appeal: (i) Whether the lower court had the requisite jurisdiction to entertain the suit before it; and (ii) Whether the 1st respondent was entitled to the orders of temporary injunction issued by the honourable lower court.
15. On whether the lower court had the requisite jurisdiction to entertain the suit before it, counsel submitted that the plaint dated 13/12/2022 revealed that the appellant's assertion that the issue in dispute was purely a boundary dispute was false. Counsel contended that the 1st respondent through his plaint sought an order of permanent injunction and an order setting aside "orders of judicial review" which had been issued in favour of the appellant in a different cause. Counsel further contended that the said orders were neither the preserve of the Land Registrar nor could they be granted by a court before a hearing of the facts. Counsel faulted the appellant for misconstruing Sections 18 and 19 of the *Land Registration Act* in an attempt to put his claim in limbo. Counsel argued that the preliminary objection before the lower court was not competent for failure to meet the criteria set out in the case of *Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributor Ltd* [1969] EA 696.
16. On whether the 1st respondent was entitled to the orders of temporary injunction issued by the trial court, counsel submitted that the remedy of an injunction was an equitable remedy that was discretionary to any court. Counsel referred to the general principle relied on by the court before interfering with the discretionary power of a trial court as was outlined in the case of *Mbogo & Another v Shab* [1968] EA.
17. Counsel referred to the case of *Giella v Cassman Brown* [1973] EA 358 On the criteria for grant of interlocutory injunctive reliefs, counsel submitted that in the application before the lower court, the 1st respondent averred that he was the registered owner of parcel number 2081 and exhibited a copy of his title deed. Counsel added that the 1st respondent sought the protection of the trial court to stop the intrusion onto his land pending the hearing and determination of the main suit. Counsel contended that the balance of convenience tilted in favour of issuance of the temporary injunction to safeguard the subject matter of the suit and avoid trespass onto the 1st respondent's land by the appellant. Counsel added that the appellant did not prove that he would suffer harm from issuance of the order of injunction. Counsel submitted that the lifting of the order of temporary injunction protecting his quiet enjoyment of his land would have the effect of rendering the suit nugatory. Counsel added that the trial court properly exercised its discretion by issuing the order of injunction in his favour as against the appellant. Counsel argued that the appellant had failed to prove that the exercise of discretion was improper to warrant interference by this court. Counsel urged the Court to dismiss the appeal.

Analysis and Determination

18. I have read and considered the record of appeal, the verbatim proceedings of the lower court, the grounds of appeal, and the parties' respective submissions. I have also considered the relevant legal frameworks and the prevailing jurisprudence on the key issues that fall for determination in this appeal. The appellant itemized seven (7) grounds of appeal. The four key issues that flow from the seven (7) grounds of appeal are as follows: (i) Whether the lower court erred in failing to consider and dispose the appellant's notice of preliminary objection dated 19/12/2022; (ii) Whether the dispute before the



lower court was a boundary dispute; (iii) Whether the lower court had the requisite jurisdiction to entertain the dispute at that point; (iv) Whether the 1st respondent satisfied the criteria for grant of interlocutory injunctive reliefs. I will dispose the four issues sequentially in the above order. Before I do that, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.

19. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of a first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Kesbar Shiani* (2013) eKLR as follows:

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyse, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”

20. The above principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”

21. Did the lower court err in failing to consider and dispose the appellant’s preliminary objection? The appellant faults the lower court for failing to consider and dispose the preliminary objection dated 19/12/2022. Through the preliminary objection, the appellant invited the lower court to dismiss the 1st respondent’s suit in limine on the ground of want of jurisdiction. The appellant relied on Sections 18 and 19 of the *Land Registration Act* which bar courts against entertaining any action or other proceedings relating to boundary disputes unless the boundaries have been determined by the Land Registrar. The framework vests primary jurisdiction over boundary disputes in the Land Registrar.

22. For avoidance of doubt, Sections 18 and 19 of the *Land Registration Act* provide as follows:-

- 18.(1) The Director of Surveys shall prepare and thereafter maintain a map or series of maps, to be called the registry map, for every registration district.
- (2) Where for any registration district, or for a part thereof, no map has been so prepared, the Registrar may himself cause a map or series of maps to be prepared for that registration district, or for that part, and thereafter maintained, and such map or series of maps shall be deemed to be the registry map until the Director of Surveys prepares a map or maps under subsection (1) and delivers it to the Registrar.
- (3) On the registry map, every registration district shall be divided into registration sections, which shall be identified by distinctive names, and the registration sections may be further divided into blocks, which shall be given distinctive numbers or letters or combinations of numbers and letters.
- (4) The parcels in each registration section or block shall be numbered consecutively, and the name of the registration section and the number and letter of the block, if any, and the number of the parcel shall together be a sufficient reference to any parcel.
- (5) The Registrar may, at any time, cause registration sections or blocks to be combined or divided, or cause their boundaries to be varied.



- (6) A plan may be filed in respect of a particular parcel to augment the information available from the registry map, and the filing of the plan shall be noted in the register.
- 19.(1) Where the Registrar is maintaining the registry map he may, or in any case he may require the Director of Surveys to, correct the line or position of any boundary shown on the registry map with the agreement of every person shown by the register to be affected by the correction, but no such correction shall be effected except on the instructions of the Registrar in writing in the prescribed form, to be known as a mutation form, and the mutation form shall be filed.
- (2) Whenever the boundary of a parcel is altered on the registry map, the parcel number shall be cancelled and the parcel shall be given a new number.
- (3) Where the Registrar is maintaining the registry map he may, or in any case he may require the Director of Surveys to, prepare a new edition of the registry map or any part thereof, and there may be omitted from the new map any matter which the Registrar considers obsolete.”
23. The court has perused the proceedings of the lower court. On 5/1/2023, counsel for the 1st respondent acknowledged receipt of the appellant’s replying affidavit alongside his preliminary objection and urged that both the 1st respondent’s application and the appellant’s preliminary objection be canvassed through written submissions. Upon receiving presentations from the parties’ advocates, the Presiding Magistrate directed that the application and the preliminary objection were to be heard together. He further directed parties to canvass the two items through written submissions. He set down the matter for mention on 23/2/2023 to confirm filing of written submissions. On 23/2/2023, upon parties confirming that they had filed and exchanged submissions, the Presiding Magistrate reserved 16/3/2023 as the date for ruling.
24. The verbatim proceedings of the lower court read as follows:-
- “ 5/1/2023
- Before Hon. P. Muholi – PM
- Court Assistant: Mwangi
- Parties
- Mr Mulinge for the 1st Defendant/Respondent
- Mr Gatere holding brief for Wanjohi for the applicant
- Mr Wanjohi for the applicant:
- The 2nd and 3rd has been served.
- The case is for hearing of our application dated 13/12/2022.
- We were served with replying affidavit and preliminary objection dated 19/12/2022.
- I need leave to respond to the issues raised in the replying affidavit.
- In the meantime, we seek an order for status quo to be maintained.
- We could canvass the application and preliminary objection by way of written submissions.
- Mr Mulinge:



We seek to dispense with the preliminary objection and we are of the view that the same is vested with the land registrar.

We are agreeable to issue of orders at this juncture.

Court:

I have considered the submissions. I give the following directions.

1. Leave to the applicant to file and serve further affidavit together with submissions within 14 days from today's date.
2. The respondent to file and serve submissions within 7 days after service.
3. Both the preliminary objection and the application to be heard together.
4. An order of status quo be maintained both parties not to undertake any process on L.R. Gatamaiyu/Kagwe/2081 and 2019.
5. Mention to confirm filing of submissions on 23/2/2022 virtual.

Muholi

Principal Magistrate

5/1/2023

23/2/2023

Before P. Muholi – PM

Court Assistant: Mwangi

Parties

Mr Mulinge for 1st Defendant/Respondent

Mr Githie holding brief for Wanjohi for Plaintiff

To confirm filing of submissions.

We have filed.

Mr Mulinge:

We have filed this morning.

Court: Ruling on 16/3/2023.

Muholi

Principal Magistrate

23/2/2023

Mr Mulinge:

I do seek leave to appeal

Court

Leave to appeal is granted.

Muholi



Principal Magistrate

16/3/2023”

25. It is clear from the above verbatim excerpts of the proceedings of the lower court that both the 1st respondent’s application for injunction and the appellant’s preliminary objection fell for consideration and disposal through the impugned ruling. Secondly, it is clear from the face of the preliminary objection that through the preliminary objection, the appellant challenged the jurisdiction of the lower court to entertain the suit. Thirdly, given the prevailing jurisprudence on disposal of jurisdictional questions, the lower court was obligated to first consider and dispose the preliminary objection because it raised a jurisdictional question. Indeed, the Court of Appeal [Nyarangi JA] emphasized the priority of jurisdictional questions in *Owners of Motor Vessel “Lillian S” Vs. Caltex Oil (Kenya) Ltd* [1989]eKLR] in the following words:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

26. A perusal of the impugned ruling reveals that the lower court completely omitted to consider and determine the appellant’s preliminary objection. Indeed, the entire ruling is silent on the preliminary objection despite the fact that on 5/1/2023 the lower court gave directions to the effect that both the 1st respondents application and the appellant’s preliminary objection would be heard together and were indeed heard together. To this extent, this court finds that the lower court erred in failing to consider and dispose the appellant’s preliminary objection dated 19/12/2022.

27. Was the dispute before the lower court a boundary dispute? The gist of the 1st respondent’s claim is contained in paragraphs 18, 19, 20 and 21 of the plaint and in prayers (i) and (ii) of the reliefs sought in the plaint. The four paragraphs read as follows:-

18. The attempt by the 1st defendant to unprocedurally have the boundary between his parcel and that of the plaintiff re-aligned and or shifted, is not only illegal, irregular but also intended to deprive the plaintiff his right to peaceably enjoy and use of his land.

19. The defendants have been harassing the plaintiff and threatening him with unspecified consequences if he does not accede to their demands to have the boundary to his parcel of land shifted in favour of the 1st defendant.

20. The 2nd and 3rd defendant actions of attempting to alter the already existing boundaries between Gatamaiyu/Kagwe/1219 and 2081 without first receiving evidence of the parties and in particular the evidence of the plaintiff, are unprocedural and therefore illegal.

21. The plaintiff contends that the 1st defendant has no legitimate claim of a boundary dispute, or any reasonable cause, or any other valid claim whatsoever over the plaintiff’s parcel of land and or boundary between the two parcels.

28. Prayer (i) and (ii) read as follows:-



- i. A declaration that the boundaries between parcel numbers Gatamaiyu/Kagwe/1219 and 2081 have been surveyed, ascertained and fixed as evidenced by the existing boundary marks on the ground, hedges stone wall and beacons.
 - ii. An order of permanent injunction restraining the defendant and their agents from interfering with, entering into alienating or in any other manner whatsoever interfering with the plaintiff's use, possession, occupation and or development of parcel of land title number Gatamaiyu/Kagwe/2081 or in any manner whatsoever from interfering, shifting, altering and or moving the existing boundary on the ground between parcels numbers Gatamaiyu/ Kagwe/1219 and 2081.
29. It is clear from the above excerpts of the pleadings that there was a boundary dispute between the appellant and the 1st respondent. The appellant moved the Land Registrar to determine the boundaries of the two abutting parcels within the framework in Section 18 and 19 of the [Land Registration Act](#). The 1st respondent did not want a determination of the boundary dispute within the above framework, hence his decision to seek orders restraining the Land Registrar against discharging his statutory mandate. An examination of the 1st respondent's pleadings reveals that, in all its facets, the 1st respondent's claim was a boundary dispute between the 1st respondent and the appellant. The 1st respondent's denial of this fact cannot stand. That is the finding of this court on the second issue.
30. Did the lower court have the requisite jurisdiction to entertain the dispute at that point? The framework in Sections 18 and 19 of the [Land Registration Act](#) have been reproduced in one of the preceding paragraphs of this Judgment. Suffice it to state that, unless the parties initiating a suit before a court of law demonstrate that the boundaries of the suit land have been determined and noted in the land register in accordance with the provisions of Sections 18 and 19 of the [Land Registration Act](#), primary jurisdiction to determine disputes relating to boundaries of registered land are exclusively vested in the Land Registrar.
31. Not too long ago, the Court of Appeal rendered itself on this legal position in [Azzuri Limited v Pink Properties Limited](#) [2018]eKLR in the following words:-

“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; while disputes pertaining to lands with fixed boundaries may be investigated and possibly resolved simply through a surveyor.”
32. The Court of Appeal reiterated similar position in [Estate Sonrisa Ltd & another v Samuel Kamau Macharia & 2 Others](#) [2020]eKLR in the following words:-

“We ourselves find nothing untoward with the first sentence of that order. The ascertainment and fixing of boundary in dispute involve three parties, the owners of the affected parcels, the surveyor and the Registrar. Reference to the *Land Act* must have been a mistake. 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.”
33. The 1st respondent contended that the boundaries of the two abutting parcels had been fixed. He pleaded in paragraphs 14 and 15 thus:-



14. That contrary to what is stated in paragraph 10 and 11 of the supporting affidavits, the boundaries have for the longest time been there, the respondent moved the boundary marks and encroached on my land. I was forced to put up a boundary wall on my side to stop him from continues encroachment on my parcel of land.[sic] This has however not stopped him from interfering with the boundary. The averment on the said paragraph is misleading and I invite the court to visit the suit land to ascertain the truth.
15. That it has been difficult to solve the issue herein with the applicant continues frustration and always changing the narrative as to the boundary and not complying with the directions given by the relevant offices. [sic] Contrary to what he states in paragraph 12,13,14 and 15 of the supporting affidavits, the applicant is not willing to have this dispute resolved by the Land Registrar Kiambu and only states so in the said paragraph to paint a bad image of me and appear good before this court. The applicant is hail bent to make sure the 2nd and 3rd respondent never execute their mandate to resolve the boundary dispute herein.
34. However, the 1st respondent did not present any evidence to demonstrate that the boundaries of the two parcels had been determined in the manner contemplated under Sections 16 to 19 of the Land Registration Act. For the above reasons, it is clear the requirements of Section 18(2) and (3) of the Land Registration Act had not been satisfied, hence the lower court had no jurisdiction to entertain the dispute in the suit at that point. In tandem with the principle in Owners of the Motor Vessel Lilian 'S' V Caltex Oil (k) Ltd [1989] 1 KLR, the lower court was obliged to down its tools by upholding the appellants' preliminary objection, to allow the Land Registrar the opportunity to determine the boundaries of the two abutting parcels. That is my finding on the third issue.
35. In the absence of jurisdiction on part of the lower court, the suit was a nullity and the question of satisfying the criteria for an interlocutory injunction would not arise.
36. While contending that the lower court had jurisdiction, the 1st respondent relied on the plea for an order vacating what he called "the order of mandamus" issued in Miscellaneous Application Number 17 of 2019 on 20/6/2020 This plea was misplaced because a plea of this nature can only be ventilated in two ways: (i) as a review motion within the cause in which the order was issued; or (ii) as an appeal in the superior court. It cannot be entertained as a plea in a fresh cause in the same court.
37. For the above reasons, this appeal succeeds in the following terms:-
 - a. Githunguri SPMC Civil (E & L) Case No. E42 of 2022 is struck out on the ground that the dispute therein is a boundary dispute which should first be determined within the framework of Sections 16 to 19 of the Land Registration Act.
 - b. Owing to the fact that the error in entertaining the dispute was that of the lower court, parties shall bear their respective costs of this appeal and costs of the ill-fated suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 10TH DAY OF JUNE 2024.

B M EBOSO

JUDGE

In the Presence of: -

Mr Mulinge for the Appellant

Mr Githae for the 1st Respondents



Court Assistant: Hinga

