



Lewa (Suing as the Legal Representative and Administrator of the Estate of Frederick Katana Mwangome (Deceased)) v Board of Management Katikirieni Primary School (Environment and Land Appeal E010 of 2023) [2024] KEELC 7217 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7217 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL E010 OF 2023
FM NJOROGE, J
OCTOBER 31, 2024

BETWEEN

FRANCIS RUNYAH LEWA APPELLANT
SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE
ESTATE OF FREDERICK KATANA MWANGOME (DECEASED)

AND

THE BOARD OF MANAGEMENT KATIKIRIENI PRIMARY
SCHOOL DEFENDANT

JUDGMENT

1. This appeal arises from the decision of the Land Registration Officer Kilifi County (herein also referred to as “the Land Registrar”) issued on 21/8/2023. The background to the appeal is that the land Registrar was sought to resolve a boundary dispute regarding Plot No Chonyi /Banda Ra Salama/95. She summoned all the neighbours through the area chief for a site visit on 28/4/2023. According to the report that has been filed in this appeal she granted all the parties present the opportunity to show the external boundaries of their respective parcels of land as they know them. The points shown were picked by a surveyor for comparison with the boundaries on the RIM. A surveyor’s report was then generated which it is claimed formed part of the Land Registration Officer’s report. According to the Land Registration Officer’s report the appellant had complained of a long standing dispute with the respondent school herein over the exact position of the boundary between the subject plot and plot no 149 which is occupied by the school. Her findings in this case were that map boundaries differed from the ground boundaries; the ground acreage for plots nos 95 and 149 were 14.44 and 3.64 Ha respectively while the title acreage was 14.4 and 3.8 Ha respectively. She stated that she had relied on the survey report that showed that the road position had shifted. She then adopted the position shown by the representatives of the school as the correct boundary between the two plots and gave leave to appeal within 30 days of the date of her report hence the present appeal.



2. According to the filings herein the appellant's belief is that the suit land measures 14.4 ha. He refers to the area indicated on the title. He applied for ascertainment of the boundaries of the suit land. He agrees with the Land Registration Officer's account to the effect that summons were issued to all affected persons neighbouring his land. However, he disagrees that the land was visited on 26/4/2023 and avers that the visit took place on 28/4/2024 and that a decision was rendered. He also avers that he only came to know of that decision on 11/11/2023. He complained that the Land Registration Officer's decision gives away 0.468 Ha of the suit parcel to the respondent.
3. In the appeal the applicant sets out the following grounds for appeal, namely, that the Land Registration Officer erred in law and in fact:
 - a. in her decision by condemning him without giving him an opportunity of being heard;
 - b. by determining the dispute outside of the statutory time limits of 6 months from when the application was made;
 - c. in holding that the surveyor's report indicated that the shifting in position of the road next to plot 149 affected the boundary between it and the suit land;
 - d. by condemning the appellant for the misfortunes of the respondent whose parcel of land was affected by the shifting of the road into it;
 - e. by relying on word of mouth of the representative of the respondent to determine the dispute instead of relying on the recommendation by a surveyor;
 - f. by purporting to give away 0.468 of the appellant's land to the respondent;
 - g. by arriving at a decision in total contravention of mandatory provisions of the law.
4. The appellant seeks orders that:
 - a. the present appeal be allowed and that the decision of the Land Registration Officer Kilifi and all consequential orders be set aside;
 - b. that the map boundary of plot no 95 be adopted as the correct common boundary between it and plot no 149;
 - c. in the alternative that the dispute be heard afresh;
 - d. that the costs of the appeal be borne by the respondent.

Submissions

5. The appellant filed submissions on 12/4/2024 and addressed grounds No 1,2,5 and 7 together and grounds 3,4 and 6 together. He submitted that as per his letter dated 11/1/2023 to the Land Registration Officer, he had sought that the boundaries of the suit parcel be ascertained and fixed as per Section 19 of the [Land Registration Act 2012](#) and Regulation 41 of the [Land Registration \(General\) Regulations 2017](#), but that is not the exercise that the Land Registration Officer conducted. He asserts that his request should have prompted the Land Registration Officer to implement Section 19(2) of the [LRA](#) with respect to ascertaining and fixing of boundaries. Instead she conducted the exercise as if it was a boundary dispute and thus her acts are a total nullity. He further submits that neither he nor the beneficiaries of the estate he represents were granted an opportunity of being heard before he was condemned. He asserts that upon requesting for proceedings, none were provided by the Land Registration Officer hence that is evidence that there was no hearing, which position is contrary to Section 40 which provides for the taking of evidence in any proceedings other than that relating to



- a plot with fixed boundaries. He asserts that Regulation 40 provides for giving of concerned persons who have appeared at the hearing an opportunity to be heard. Violation of the right to be heard went against the decision in *Said Juma Chitembwe v Edward Muriu Kamau & 4 others* 2011 eKLR, he stated. He submitted that the decision was also delivered outside the statutory 6-month period from date of the application and thus liable to setting aside, the last day of that period being 24/7/2023 yet the decision does not give any justification for being issued out of time in its body. Further, the Land Registrar was not guided by the recommendation of the surveyor in her decision as required by the mandatory provisions in Regulation 40(4) but adopted the boundary shown to her by the respondent.
6. Regarding grounds 3 4 and 6 the appellant stated that the surveyor's report does not state that the road has shifted as alleged by the impugned report; further, that even going by the surveyor's report, any such shift would not affect the common boundary and in any event there is no evidence, if at all the shift had indeed occurred, that the appellant was responsible.
 7. The respondent filed submissions dated 5/6/2024. The respondent submitted that the issues arising for determination in the present appeal were as follows:
 - a. Whether the matter amounted to a boundary dispute;
 - b. Whether the appellant was accorded an opportunity to be heard;
 - c. Whether the decision by the Land Registration Officer was unlawful;
 - d. Whether the reliefs sought can be granted.
 8. Citing *Kisumu Yacht Club Registered Trustees v County Government of Kisumu & another* 2021 eKLR the State Counsel, Mr Munga, submitted that a boundary dispute can be defined as any dispute in relation to a parcel of land whose boundaries have not been fixed; that the Land Registrar's report had noted that the appellant had complained of a long standing dispute with the respondent over the exact boundary position, and that the matter fell within the mandate of the Land Registrar to resolve it. as to whether the appellant was accorded a hearing the state counsel submitted that Section 87 of the *Land Registration Act* provides the definition of an opportunity to be heard.
 9. I have had consideration of the above submissions in preparing this judgment.

Determination.

10. The issues arising for determination in the opinion of this court are as follows:
 - a. Was the issue before the Land Registration Officer a boundary dispute?
 - b. Was the appellant accorded a hearing before the decision was made?
 - c. Did the Land Registration Officer err by not relying on the recommendations of the surveyor and relying on the evidence of the respondent?
 - d. Was the decision of the Land Registration Officer otherwise illegal for being issued after the expiry of 6 months?
 - e. What orders should issue?
 - f. Who ought to bear the costs of this appeal?

The issues are dealt with as hereunder:



a. Was the issue brought before the Land Registration Officer a boundary dispute?

11. Issues revolving around boundaries and the resolution of boundary disputes are addressed by Sections 18, 19 and 20 of the LRA. Those provisions read as follows:
 18. Boundaries
 - (1) 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:
 12. 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).
 19. Fixed boundaries
 - (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.
 20. Maintenance of boundaries
 - (1) Every proprietor of land shall maintain in good order the fences, hedges, stones, pillars, beacons, walls and other features that demarcate the boundaries, pursuant to the requirements of any written law.
 - (2) The Registrar may in writing, order the demarcation within a specified time of any boundary mark, and any person who fails to comply with such an order commits an offence and is liable on conviction to a fine not exceeding two hundred thousand shillings.



- (3) The Registrar may in writing, order which of adjoining proprietors shall be responsible for the care and maintenance of any feature demarcating a common boundary, and any proprietor so ordered to be responsible for the care and maintenance of the boundary feature who allows the boundary feature or any part of it to fall into disrepair, be destroyed or removed commits an offence and is liable on conviction to a fine not exceeding two hundred thousand shillings.”
13. What was lodged before the Land Registration Officer was a request vide a letter dated 11/1/2023. The definitive part of that letter requests a land survey to establish the physical limits and boundaries of parcel no Kilifi/ Bandarasalama/95 as follows:
- Re: survey to establish the physical boundaries of parcel no Kilifi/Bandarasalama/95.
- A. We are writing to request for an expeditious conduct of a land survey to establish the physical limits and boundaries of parcel number Kilifi/Bandarasalama/95....”
14. No other parcel is mentioned in that letter. No boundary dispute is referred to.
15. Regulation 40 provides for an application for re-establishing a missing boundary or ascertainment of a boundary in dispute while Regulation 41 provides for an application for ascertaining and fixing boundaries.
16. By no stretch of imagination can the appellant’s letter dated 11/1/2023 be deemed to be raising a boundary dispute. In this court’s view, the appellant, at least by the contents of that letter, only wanted to have the correct boundaries of the suit land ascertained hence the request. This court is of the considered view that the request in that letter must be deemed to have been made under Regulation 41 as an application for ascertaining and fixing boundaries.

b. Was the appellant accorded a hearing before the decision was made?

17. Hearings before non-court bodies, authorities and officials are sometimes handled informally to the extent of prejudicing some parties who later on raise either at the review or appellate level as has been done herein, the complaint that they were not accorded a hearing. Natural justice demands the implementation of the audi alteram partem rule in that no case should be decided on the basis of only the evidence or input of one side to the dispute to the exclusion of the other. It is hearing of both sides in a dispute that first, portrays a court or other arbiter as impartial, and, second, enables it to competently assess the merits of both claims equally. The basic ingredients of natural justice are envisaged in the Constitution of Kenya 2020. Article 50 (1) of the Constitution provides as follows:
- (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or if appropriate another independent and impartial tribunal or body.”
18. That notwithstanding the question as to whether or not proceedings are properly conducted with scrupulous observance to the rules of natural justice before officers statutory tribunals or other bodies continues to rear its head in many appeals and review applications. Often the record, just like that in the present appeal, is not very elaborate in a manner that shows the sequence of events at the hearing of any has been undertaken. In some cases some arbiters rely on their own summary without having any transcripts of the evidence of the parties hence doubts as to whether a proper hearing was conducted at all. This court has realized that it is not necessarily correct that in all cases where a transcript of the proceedings is not available, no hearing was conducted according to law; each such case must be



comprehensively assessed on its own merits so as to arrive at a reasonable conclusion. In the case of *Zebedayo Atonga Mukonambi v Amos Alumada Keya* [2017] eKLR the court stated as follows:

14. In a Tribunal like the one whose decision is appealed though a good record of the proceedings may be desired, it is good to realize that the Tribunal works in an environment different from a formal court of law and the recording skills available may differ from one Tribunal to another. This court is not inclined to demand any formulaic recording of the proceedings or to place a premium on such mode of recording over the substance of the dispute when that substance is clear. Where a summary shows that the case of complainant was heard and noted down just as the case of the respondent was, there is good reason to believe that the parties were both granted a proper hearing. In this particular case the narrative in the Tribunal's record shows that both parties were heard and the particulars of their case were taken down and a decision given on the issues arising therefrom. Therefore, the allegation that the appellant was not given a fair hearing or that he was denied, natural justice at the tribunal hearing has no basis, whatsoever and I would dismiss the same."
19. In the present case, the procedure for ascertainment of missing boundaries or boundaries in dispute as well as that of fixing of boundaries is the same. It is provided for under Section 18(3) *LRA* (supra), and Regulations 40 and 41. The regulations provide as follows:
 40. Application for re-establishing a missing boundary or ascertainment of a boundary in dispute
 - (1) An interested person may apply to the Registrar for the ascertaining of a missing boundary or a boundary in dispute under section 18(3) of the Act in Form *LRA* 23 set out in the Sixth Schedule.
 - (2) The Registrar shall issue a notice in Form LRA 24 set out in the Sixth Schedule to all persons appearing in the register that may be affected or such other persons as the Registrar may deem necessary for resolution of the dispute if a person has complied with paragraph (1).
 - (3) The Registrar shall notify the office responsible for survey of land of the intended hearing of a boundary dispute and require their attendance if a person has complied with paragraph (1).
 - (4) In determining a boundary dispute lodged in accordance with paragraph (1), the Registrar shall be guided by the recommendation of the office responsible for survey of land.
 - (5) The Registrar shall, after giving all persons appearing for the hearing in accordance with the notifications sent under paragraphs (1) and (2) an opportunity to be heard, make a determination of the dispute and inform the parties accordingly.
 - (6) Any party aggrieved by the decision of the Registrar made under paragraph (5) may, within thirty days of the date of notification, appeal the decision to the Court.
 - (7) Upon expiry of thirty days, the Registrar shall—
 - (a) cause to be defined by survey the precise position of the boundaries in question;
 - (b) file a plan approved by the authority responsible for survey of land containing the necessary particulars; and



- (c) make a note in the register that the boundaries have been fixed, and thereupon the plan shall be deemed to define accurately the boundaries of the parcel.
- (8) A dispute for determination of a boundary and or parcel shall, unless in the case of special circumstances, be completed within a period not exceeding six months from the date of filing the application.
41. Application for ascertaining and fixing boundaries
- (1) An interested person may apply to the Registrar for the ascertaining and fixing of boundaries of land under section 19 (1) of the Act, in Form LRA 23 set in the Sixth Schedule.
- (2) The notice issued by the Registrar under section 19(1) of the Act shall be in Form LRA 24 set out in the Sixth Schedule.
- (3) When making a decision under section 19(1) of the Act, the Registrar shall follow the procedure outlined in regulation 40.”
20. In this court’s view it was a task purely within the expertise of the Land Registration Officer and the surveyor that was to be conducted at the site to ascertain the correct boundaries of the suit parcel in accordance with the official map and other records. This called for the according of all persons appearing for the hearing in accordance with the notifications sent under paragraphs (1) and (2) of Regulation 40 an opportunity to be heard, and giving or recording of the proceedings in general as well as the evidence of the parties. It is this record that could have exonerated the Land Registration Officer from allegations that the appellant was not accorded a hearing.
21. However, the present case is distinguishable from *Zebedayo Atonga Mukonambi* (supra) in that though it is evident that the site visit took place, the proceedings of the session at the site were not availed by any of the parties herein, even to the appellant upon his request. There is no detailed narrative of what happened. Only a brief summary of the dispute between the appellant and the respondent was made. Beyond the pointing out of boundaries by lay persons in accordance with their belief as to their position on the ground, no interrogation of such input either by the Land Registrar or by any party present appears to have been recorded. This court can not establish whether or not a hearing took place there as the hallmarks of a hearing are not evident in the Land Registrar’s summary and conclusion. There is also no indication that the appellant or any other concerned party was ever heard at any other place.
22. When the appellant alleged that he was not accorded a hearing it was upon the Land Registrar to produce a record showing that on the contrary a hearing was conducted. However, the Land Registrar never filed any reply stating that a hearing was conducted. In any event the appellant has pointed out that the visit to the site never occurred on the date that it was scheduled, but much later.
23. Both the reports of the Land Registrar and the surveyor evince the fact that some of the participants at the site visit made some comments but this court can not equate those comments with a proper hearing where one is requested to and given a chance to give evidence. During a site visit, informal questions or answers or comments per se, though they can deemed be a part of a wider hearing, can be deemed as proper hearing as there is no evidence that the parties speaking have been made aware that they are formally giving evidence that may be relied on in the determination of the dispute. It is apparent that Section 40 and Regulation 40(5) envisage the formal taking down of evidence of the parties when an issue arises. Every recording of a formal hearing provided for by statute ought to be taken down as meticulously as possible, for therein may lie the very evidence that may assist an appellate body or court



to determine whether a proper hearing took place. It is also that evidence that ought to inform the decision of the person appointed by statute to hear the matter, and further, to inform an appellate body or court as to whether the decision was in accordance or in conflict with the evidence presented. A cavalier approach to the hearing as happened at the site in the present case, at least according to the report of the Land Registration Officer, is not helpful in ensuring the dispute is settled with finality, hence this appeal.

24. In the present dispute, the Land Registration Officer identified the issue as a boundary dispute and in this court's view, if that was truly so, she was obliged to offer each party an opportunity of being heard and also substantively hear each of the parties. She did not do that and in this court's view the proceedings and the entire decision she gave was tainted by breach of the rules of natural justice.

c. Did the Land Registration Officer err by not relying on the recommendations of the surveyor and by relying on the evidence of the respondent?

25. On this issue the submission of the appellant is correct. If it was the opinion of the Land Registrar that what was before her was a boundary dispute, Regulation 40 of the regulations ought to have been complied with. It reads in mandatory terms that the Land Registrar shall be guided by the recommendation of the office responsible for the survey of land. Instead, she relied on the opinion of the respondent's representatives, and did not shy away from stating that in black and white in her report. Not that the surveyor's report is any more helpful in establishing the correct boundaries of the appellant's land on the ground; in this court's view, the surveyor's report makes no clear recommendations as would have properly guided the Land Registrar. It is no wonder that the Land Registrar relied on other evidence in compiling her report. I think the land surveyor ought to have compiled a better report with substantive recommendations as to how the appellant's boundaries ought to be established on the ground. In this court's view the framing of the appellant's request ought to have resulted in establishment of all his beacons on the ground otherwise it was a useless exercise that the officers engaged in. Instead, the surveyor never translated the map beacon position into the ground beacon positions; he only made observations as to the proper map boundaries and the de facto boundaries the parties have on the ground. This court differs and opines that he should not have approached his mandate in such oversimplified and non-committal terms.
26. Consequently, this court finds that there were serious omissions on the part of the surveyor in carrying out his duties and compiling his report and the Land Registration Officer rather than point out the omission to the surveyor, merely adopted the boundary shown by the respondent which was not the proper map boundary. The Land Registration Officer may not be blamed for not relying on the surveyor's non-existent recommendations, but she clearly erred by relying solely on the evidence of the respondent.

d. Was the decision of the Land Registration Officer otherwise illegal for being issued after the expiry of 6 months?

27. The provisions of Regulation 40(8) discriminates between the ascertainment of missing boundaries or boundaries in dispute as well as that of fixing of boundaries. It confines the six-month determination period to the "determination of boundary dispute" or "determination of a parcel" in stating that were therefore not applicable. In so far as the appellant did not file a boundary dispute before the Land Registrar, the provisions of Regulation 40(8) are not applicable to the appellant's application in the letter dated 11/1/2023 and that ground must fail.



e. What orders should issue?

28. In the circumstances of this case the court has noted that very little was achieved by the site visit of the two land officials yet from the surveyor's plan, so many parcels have overlapped physically onto the appellant's parcel. This court is not an expert at establishing boundaries. It can not grant prayer no (b) of the appeal. It can not also grant prayer no (c) as that would go contrary to its own finding and indeed the appellant's submission that what was before the Land Registration Officer was not a boundary dispute. The only recourse for this court is to grant prayer no (a) in the memorandum of appeal dated 19/9/2023 and any other prayer as it may deem just.

f. Who ought to bear the costs of this appeal?

29. The Land Registration Officer has not been joined to this appeal. this court is deciding the matter only in so far as the parties joined are concerned. I do not find any fault on the part of the respondent who was not the person tasked with establishing the boundaries at the lands office. Consequently, I find that each party ought to bear its own costs of the appeal even though the appellant has been successful.

Conclusion.

30. The upshot of the foregoing is that I allow the appellant's appeal herein and issue the only as prayed in prayer no (a) therein and I dismiss the rest of the prayers. I also order that all the owners of the parcels surrounding parcel no 95 shall be issued with the relevant notifications of the application by the appellant, and that the Land Registrar and the surveyor shall revisit the site and conduct hearings as they may find proper in accordance with their statutory mandate, and the appellant's application shall be determined within 6 months from the date of this order. All the parties summoned shall bear their own part of the Land Registrar's and the land surveyor's fees and expenses for the exercise, and in default the appellant shall be at liberty to meet such fees and expenses as may be recorded and certified by the said officers, and be refunded by each party on behalf of whom he has so paid, provided that at the end of the exercise, if he shall not have been refunded or fully refunded, the amount outstanding shall be summarily recoverable by way of normal execution of court process against the respective parties so owing as though they were debts.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 31ST DAY OF OCTOBER, 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

