



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ngungu v Kisilu & another (Appeal E009 of 2023)  
[2024] KEELC 6956 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6956 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
APPEAL E009 OF 2023  
JM MUTUNGI, J  
OCTOBER 24, 2024**

**BETWEEN**

**LYDIA WANJIKU NGUNGU ..... APPELLANT**

**AND**

**JOSEPH BUNDI KISILU ..... 1<sup>ST</sup> RESPONDENT**

**NANCY MUGO ..... 2<sup>ND</sup> RESPONDENT**

*(An Appeal arising from the Judgment of the Honourable P.M Mugure- PM delivered on 30th January 2023 in Civil Suit No. E048 OF 2021 in the Magistrate's Court at Wang'uru))*

**JUDGMENT**

1. This appeal arises from the Judgment of the Hon. Mugure (PM) where she held that land parcel Mwea Tebere/B/1130 and parcels Mwea/Teber/B/1128 and 1129 owned by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents respectively shared common boundaries with land parcels Mwea/Teber/B/3054 owned by the Appellant and land parcel Mwea/Teber/B/3037 owned by Beth Njeru (1<sup>st</sup> Defendant) who is not named as a party in this appeal and that the respective boundaries were in dispute and needed to be established and rectified by the Land Registrar and the Surveyor.
2. According to the evidence presented in the lower court, the four parties were neighbours whose properties shared borderlines. The Respondents alleged that the Appellant had unlawfully encroached upon their properties, specifically land parcels numbered Mwea/Teber/B/1128, 1129, and 1130. To resolve the dispute, the Respondents had sought an order for the Land Registrar Kirinyaga and the District Surveyor Kirinyaga County to conduct a reevaluation and correction of the boundary lines separating the Respondents/Plaintiffs land from that of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Additionally, the Respondents/Plaintiffs had sought a permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from interfering with their peaceful possession, utilization, and occupation of the land.



3. In response to the allegations made by the Respondents, the appellant filed her Memorandum of Appearance and statement of defence on 14<sup>th</sup> June, 2021 and firmly denied her land shared a boundary with the Respondents land. Additionally, the Appellant refuted the claims of trespassing, illegal encroachment, and interference with the Respondents' quiet possession. The Appellant also stated that she had never been summoned to settle any boundary dispute at the Land Registrar's Office. Furthermore, she emphasized that the 1<sup>st</sup> Respondent purchased the land after the establishment of the boundary in 1997 and further averred that the Lower Court lacked jurisdiction to hear the matter as it related to a boundary dispute and claimed that the Respondents had no valid claim against her.
4. As per the record, on 7<sup>th</sup> July, 2021 the Lower Court issued directions approving the Respondents' request for an interlocutory Judgment and directed the case be fixed for formal proof. The directions were made because the Defendants had failed to enter appearance within the stipulated time, despite being served by the Respondents/Plaintiffs. The matter was subsequently scheduled for formal proof hearing on 18<sup>th</sup> October, 2021. On this day, the 2<sup>nd</sup> Defendant appeared in person before the Lower Court and Counsel for the Respondents informed the trial court that the Appellant had filed her pleadings on 14<sup>th</sup> June, 2021. But that notwithstanding the trial Court stuck to its earlier directions and fixed the case for formal proof hearing on 31<sup>st</sup> October, 2022.
5. In its Judgment dated 30<sup>th</sup> January 2023, the Trial Court allowed the Respondents' case as prayed and ordered the Defendants to pay the Respondents' costs of the suit.
6. Aggrieved and dissatisfied with the Court's decision, the Appellant appealed to this Court and filed a Memorandum and Record of Appeal dated 11<sup>th</sup> March, 2023 and 29<sup>th</sup> September, 2023, respectively.
7. The Appellant's Memorandum of Appeal set out 6 grounds of Appeal. The grounds are as follows: -
  - a. The Learned Magistrate erred in law and fact by holding that, the Respondents had proved their case against the Appellant which finding was contrary to the documentary evidence adduced before the Court and hence entered a Judgment based on insufficient and uncorroborated evidence.
  - b. The Learned Magistrate erred in law and fact by awarding Judgment in favour of the Respondents yet no sufficient documentary evidence was tabled to prove that L.R MWEA/TEBERE/B/1130, 1128, 1129, 3037, and 3054 shared a common boundary or even that such boundary if any had been interfered with.
  - c. The Learned Magistrate erred in law and fact by entering interlocutory Judgment in favour of the Respondents on 22<sup>nd</sup> July 2022 and ordering the matter to proceed for formal proof notwithstanding that, the claim was unliquidated and further that, the Appellant had already filed her Memorandum of Appearance and statement of defence dated 24<sup>th</sup> May 2022 and filed on 14<sup>th</sup> June 2022 long before the Respondents filed a request for judgment dated 24<sup>th</sup> June 2022 hence entered an irregular interlocutory Judgment in favour of the Respondents and shut out the Appellant from seat of justice effectively denying the Appellant the right to be heard in her defence to the case resulting to injustice.
  - d. The Learned Magistrate erred in law and fact by not considering the Appellant's defence as filed, and not allowing her to ventilate the said defence having entered an irregular interlocutory Judgment contrary to relevant provisions of the Civil Procedure Rules 2010 hence arrived at unconsidered Judgment.



- e. The Learned Magistrate erred in law and fact by not finding that, the Respondents' suit against the Appellant was purely an issue of boundary dispute and which dispute the Respondents had earlier rightly instituted before the Land Registrar Kirinyaga County and hence entertained a matter in which had no requisite jurisdiction in breach of the relevant provisions of the [Land Registration Act](#) No. 3 of 2012 which donates such powers to the Land Registrars.
  - f. The Learned Magistrate erred in law and fact by delivering a Judgment in favour of the Respondents against the Appellant against the weight of evidence tendered in Court.
8. The Appellant prayed that the appeal be allowed and the Judgment in Wang'uru CMCC Case No. E048 of 2021 be set aside and be substituted with an order entering Judgment in favour of the Appellants and dismissing the Respondents' suit in the Lower Court with costs.
  9. The Appeal was canvassed by way of Written Submissions. The Appellant argued in her submissions that she filed a Memorandum of appearance in Court on 14<sup>th</sup> June 2021 along with their Statement of Defence. She stated that the Respondents filed a request for Judgment dated 24<sup>th</sup> June 2021, and the Lower Court entered an interlocutory Judgment on 22<sup>nd</sup> July 2021. The Appellant asserted that the Trial Court entered Judgment without taking into consideration that she had filed her pleadings. In effect the Appellant argued she was denied the right of being heard and access to Justice.
  10. The Appellant contended that the suit before the Lower Court having been one that related to a boundary dispute, the Court did not have any jurisdiction to entertain the matter and relied on the provisions of Section 18(1) and (2) of the [Land Registration Act](#), 2012 which provides as follows:-
    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.
  11. Further the Appellant relied on the Case of Owners of Motor Vessel "Lillian S" –vs- Caltex Oil (Kenya) Ltd (1989) eKLR where the Court stated that where a Court has no jurisdiction it had no basis to proceed with the proceedings and must down its tools the moment it holds the opinion it had no jurisdiction otherwise the proceedings and decision will be a nullity.
  12. The Respondents filed their written submissions dated 10<sup>th</sup> July 2024, and submitted that the Appellant was served with the pleadings, but she failed to appear or file her defense in time and this led to an Interlocutory Judgment being entered against her, and the matter proceeded to a formal proof hearing, after which the Judgment was delivered.
  13. The Respondents argued that the appeal was not merited because the Appellant had the opportunity to present her case in the Lower Court but failed to do so. The Respondents submitted the Appellant's application to have her name struck out from the pleadings was dismissed on 7<sup>th</sup> March, 2022 and she did not appeal against the Ruling. The Appellant further never applied to set aside the exparte Interlocutory Judgment that was entered against her.
  14. The Respondents further contended that the Trial Court's orders were valid, as only a re-survey could determine the true situation on the ground and establish whether there had been any encroachment. The Respondents asserted that they were the rightful owners of their parcels of land in respect of which



they held valid titles which have never been challenged and hence contended the appeal amounted to an attempt to deny them the benefits of their success as per the Judgment.

15. According to the Respondents, the Trial Court's records show that the Appellant was properly served with the Court documents and even filed an application on 29<sup>th</sup> October 2021 where she sought to have her name struck out from the suit. They stated that the Appellant has not contested the summons to enter appearance and the affidavit of service to date.
16. In support of their position, the Respondents relied on the Cases of *George Mike Wanjohi v Stephen Kariuki & 2 Others SC (2014)eKLR*, *Dennis Mogambi Mongare v Attorney General & 3 Others (2014)eKLR*, and *Mwangi v Nyali Golf & Country Club (Civil Application E080 of 2021)(2022) KECA 455 (KLR)*.
17. I have considered the record of the appeal and the submissions of the parties, and the issues that arise for determination in the appeal can be summed up as follows:-
  1. Whether the trial court had the requisite jurisdiction to entertain the dispute?
  2. Whether the Appellant was accorded an opportunity to be heard?
18. This Court being a Court of Appeal 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.”

### **Whether the Trial Court had the requisite jurisdiction to entertain the dispute**

19. The Appellant contends that the trial court overstepped its mandate by determining a boundary dispute case. She argues that the lower court did not have jurisdiction to adjudicate issues relating to boundary dispute and did not in exercise of its inherent jurisdiction see it fit to summon the County Surveyor to furnish a Survey report relating to the affected properties before rendering its Judgment.
20. Section 18(2) of the *Land Registration Act*, 2012 unequivocally provides that the Court shall not entertain a dispute relating to boundary unless boundary has been fixed.

#### QUOTE

18.(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.

21. The procedure for fixing boundaries is provided under Section 19 of the *Land Registration Act* 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.
22. From the evidence that was presented in the Trial Court, there is no evidence that the boundaries of the subject parcels of land had been fixed. It follows that the Trial Court did not have jurisdiction to hear and determine the suit, as the boundaries of the said parcels of land had not been established and fixed.
23. In the Case of Paul Muraya Kaguri vs Simon Mbaria Muchuna (2015) eKLR, the Court held:
- “it is trite that where a statute establishes resolution mechanism, that mechanism must be followed. where a party fails to follow the established dispute mechanism, they cannot be heard to say her/his rights were denied.”
24. In the Case of Samson Chembe Vuko vs Nelson Kilumo & 2 Others (2016) eKLR it was stated as follows:
- “It has been said time without number, that whenever an Act of Parliament provides for a clear procedure or mechanism of redress, the same ought to be strictly followed.”
25. If a suit is filed in a Court that lacks jurisdiction, the only remedy is to withdraw the case and file it in the Court that has jurisdiction. A suit filed in a Court without jurisdiction is invalid and cannot be sustained. A Court cannot grant itself jurisdiction if it does not have it to begin with.
26. The dispute in the suit in the Lower Court concerned the boundaries of the suit parcels of land. The provisions of Section 18 of the *Land Registration Act, 2012*, oust the Court's jurisdiction and preclude it from entertaining any proceedings touching on a dispute on a boundary of registered land; such a dispute has to be determined by the Land Registrar.
27. In the Case of Willis Ocholla vs Mary Ndege (2016) eKLR Justice S.M. Kibunja held that:
- “That in terms of Section 18 (2) of the *Land Registration Act*, proprietors of registered land with a boundary dispute are obligated to first seek redress or solution from the Land Registrar before moving or escalating the dispute to this Court. That where such a party fails to do so, and comes to court without first seeking redress from the Land Registrar, the Court being a Court of Law, has to remind such a party that he/she has moved the Court prematurely. That the provisions of Section 18 (2) of the *Land Registration Act* shows clearly that the Court is without jurisdiction on boundary disputes of registered land until after the land Registrar's determination on the same has been rendered.



28. In the instant case, it is evident that the Respondents acknowledged and admitted there was a boundary dispute. In the Plaintiff paragraphs 5 to 8, it is clear that the Respondents were contesting the positioning of the parcels boundaries as between themselves and the Appellant with others. This is borne out by the prayers that the Respondents prayed for. Under prayer (a) in the Plaintiff the Respondents were seeking an order for the re-survey and correction of boundaries in regard to land parcels Mwea/Tebere/B/1130, Mwea/Tebere/B/1128 and Mwea/Tebere/B/1129 belonging to the Respondents and land parcels Mwea/Tebere/B/3037 and Mwea/Tebere/B/3054 which belonged to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Without any doubt the issue for determination before the Lower Court was one that related to boundary dispute which the Court under Section 18(2) of the [Land Registration Act, 2012](#) had no jurisdiction to entertain.
29. The Learned Trial Magistrate ought to have acknowledged that she lacked the jurisdiction to deal with the matter, and could perhaps in exercise of the Court's inherent jurisdiction and so as to do Justice, have referred the matter to the Land Registrar and the County Surveyor to carry out a ground inspection and to establish the parcel boundaries and to file a report in Court which the Court could have adopted and directed implementation thereof. If the Learned Trial Magistrate adopted the latter option she would not have acted contrary to Section 18(2) of the [Land Registration Act, 2012](#) since the boundaries would have been established and she would merely have been adopting the Land Registrar's report and directing implementation of the same.
30. Section 18(2) of the [Land Registration Act, 2012](#) ousts the jurisdiction of Courts to deal with disputes relating to boundaries unless the same have been fixed in accordance with Section 19 of the Act. To the extent therefore, that the Learned Trial Magistrate went ahead to adjudicate the matter, when there was no compliance with Section 18 and 19 of the [Land Registration Act, 2012](#), she acted without jurisdiction and her decision and proceedings were a nullity.
31. Having held that the Learned Trial Magistrate had no jurisdiction to deal with the matter before her, that should be sufficient to dispose this appeal. However, I wish to comment on the issue of entry of interlocutory Judgment against the Appellant and the 1<sup>st</sup> Defendant who has not appealed. Order 10 Rules 4 to 9 of the Civil Procedure Rules illustrate the instances when interlocutory Judgment maybe entered against a Defendant. My understanding of Rules 4, 5, 6 and 7 of Order 10 is that an interlocutory Judgment may only be entered where the claim is liquidated and/or part of the claim is liquidated and/or the claim is for damages. The general rule as spelt out under Rule 9 of Order 10 is that where the claim is not liquidated and any party served does not appear the Plaintiff is required to set down the suit for hearing. Rule 9 provides as follows:-
9. Subject to Rule 4, in all suits not otherwise provided for by this Order, where any party served does not appear the Plaintiff may set down the suit for hearing.
32. In the present matter the Respondents claim was not liquidated and nor was the claim for damages. The request made by the Respondents for entry of Judgment dated 24<sup>th</sup> June, 2021 was misplaced as no interlocutory Judgment could be entered in the instant matter. The Respondents could only have sought directions for the matter to be given a hearing date. As per the record the Appellant filed her Memorandum of Appearance dated 24<sup>th</sup> May, 2021 on 14<sup>th</sup> June, 2021 and a statement of defence on the same date. The appearance and statement of defence were filed before the interlocutory Judgment was minuted on 7<sup>th</sup> July, 2021 and endorsed on 22<sup>nd</sup> July, 2021.
33. The Appellant was entitled to file appearance and defence at any time before the suit was heard. The Learned Trial Magistrate in her Judgment did not consider that the Appellant had filed a defence that was on record and which she ought to have considered. The Learned Trial Magistrate appears to have



taken the position that since interlocutory Judgment had been entered against the Defendants, she could not consider the defence the Appellant had filed. This was a misdirection since the defence was on record having been filed before the entry of the interlocutory Judgment.

34. For the reasons that I have advanced herein above it is my determination that the appeal has merit and I allow the same. The net result is that the Judgment of the Lower Court is hereby set aside and is substituted with an order dismissing the Respondents suit before the Lower Court. The Respondents shall bear the Appellants costs of the Appeal and the costs of the Court below.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA**

**THIS 24<sup>TH</sup> DAY OF OCTOBER 2024.**

**J. M. MUTUNGI**

**ELC - JUDGE**

