



REPUBLIC OF KENYA



**Kuria v Gikonyo (Environment and Land Miscellaneous Application
E002 of 2023) [2024] KEELC 13597 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13597 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E002 OF 2023**

AK BOR, J

NOVEMBER 14, 2024

BETWEEN

JOHN KINUTHIA KURIA APPLICANT

AND

ARTHUR KOMU GIKONYO RESPONDENT

RULING

1. The Applicant brought the application dated 29/9/2023 seeking to have the decision of the Land Registrar, Laikipia West Sub County dated 2/2/2023, adopted as an order of this court and for the relevant registry index map (RIM) to be amended to reflect the true sizes of parcel numbers Laikipia/Nyahururu/2959 and Laikipia/Nyahururu/2960 in terms of the Land Registrar's report. Further, the Applicant sought to have the beacons erected by the Sub-County Surveyor. He also seeks to be authorised to erect his perimeter fence on parcel no. 2960 in accordance with the Land Registrar's report and for the Officer Commanding the Nyahururu Police Station to provide security during the exercise.
2. The application was made on the grounds that the Applicant reported a boundary dispute between parcel no. 2960 belonging to him and parcel no. 2959 belonging to the Respondent to the Land Registrar, Laikipia. The Registrar visited the suit properties and after taking the measurements, he identified the correct positions of their respective boundaries but found that the ground position and the relevant RIM was erroneous. The Registrar gave a written report over the dispute which the Applicant seeks to have implemented.
3. The Applicant swore the affidavit in support of the application and annexed a copy of the title deed issued to him on 7/5/1998 for parcel number 2960 measuring 0.91 ha. He averred that the dispute between him and the Respondent was occasioned by an erroneous amendment of the RIM since the ground area of his parcel number 2960 was smaller than what is reflected in the mutation while parcel number 2959 belonging to the Respondent was larger than what was reflected in the same mutation



- form. He exhibited a copy of the mutation form as well as the sale agreement which he entered into with the original proprietor of the land. He also attached a copy of the report prepared by the Land Registrar and the recommendation to have the RIM amended to reflect the true sizes of the land parcels in accordance with the mutation.
4. He also averred that the Land Registrar and the surveyor postponed the marking of the boundary positions with beacons until the RIM is amended through an order of this court to enable the Applicant erect his perimeter fence in line with the report.
 5. The Respondent swore the replying affidavit in opposition to the application and attached a copy of the title deed issued to him on 20/6/1990 for parcel no. 959 measuring 1.21 ha and parcel no. 2959 measuring 1.21 ha issued on 13/3/1998. He averred that parcel number 2959 was adjacent to the Applicant's land known as parcel no. 2960. He stated that he purchased parcel no. 2959 in 1992 and placed beacons using wooden posts and a live hedge as he had been shown by the previous owner, Augustine Chara Waweru and that the posts were still there. After purchasing the parcel of land, there was no boundary dispute until the Applicant started claiming that he had encroached onto his land. The Applicant reported the boundary dispute to the Land Registrar who visited the land with the surveyor. They inspected the boundaries and made a finding that the Eastern edge boundary on the ground where the hedge had been erected had deviated by 9.5 meters from the scaled position towards his parcel no. 2959. He interpreted this to mean that his parcel of land would be reduced by the same area with a difference of 9.5 meters and urged that a simple comparison between the survey plan and the Land Registrar's report of 17/5/2023 did not tally. He concluded that the Land Registrar's report was misleading and erroneous where it stated that the ground area of parcel number 2960 was smaller than what was intended from the mutation sketch while parcel no. 2959 was larger than what was intended in the same mutation.
 6. He averred that the Applicant had restricted the access road to the two parcels of land claiming that he purchased it as private property and had been using it for farming purposes, that that was where he had planted maize. Further, that he had erected a gate which he locked up since he uses the access road adjacent to parcel no. 959. He annexed photographs showing the maize crop on the land and a locked wooden gate. He added that the entire stretch of the 6 meters' access road belongs to the Applicant and he was not contesting that fact which meant that the Applicant's parcel of land should not be smaller on the ground. Additionally, that the Applicant had an alternative access road to his parcel of land through his other parcel of land which he uses to access his home on the disputed parcel. The Respondent relied on the sketch of the map attached to his affidavit and stated that at the time he purchased his two parcels of land, he called a private surveyor to confirm the measurements of the land. He went on to add that if the deviation of 9.5m ought to be where the land surveyor marked then he was ready and willing to adjust his boundary to include the lost area to his parcel no. 2959. He maintained that the application was brought in bad faith since the Applicant wanted to unjustly enrich himself. He was of the view that adopting the report of the Land Registrar without analysing and comparing it with the survey plan attached to the surveyor's report dated 15/6/2023 would lead him to suffer great prejudice and actual loss.
 7. The court directed parties to file written submissions which it has considered. The Applicant submitted that Section 18(2) of the *Land Registration Act* provided that the court should not entertain proceedings relating to a dispute over boundaries of registered land unless the boundaries had been determined in accordance with that section. Section 18(3) goes on to provide that except where it was noted in the register that the boundaries of a parcel had been fixed, the Registrar could in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary. The Applicant contended that after the Land Registrar invoked this mandate and held a



boundary dispute hearing, the Land Registrar determined the proper boundaries and prepared the report in which he found that the Respondent's land was larger on the ground while the Applicant's land was smaller than what is reflected in the mutation form. The Applicant emphasised that he was seeking to give effect to the findings of the Land Registrar and that the Respondent did not deny the existence of the dispute and the findings of the Land Registrar while pointing out that the Respondent had not lodged an appeal.

8. The Applicant relied on *Azzuri Limited v Pink Properties Limited* [2018] eKLR where the Court of Appeal interpreted Section 18 of the [Land Registration Act](#) to mean that boundary disputes pertaining to land falling within general boundary areas must be referred to the Land Registrar for resolution while disputes pertaining to land with fixed boundaries could be investigated and possibly resolved through a surveyor. The Applicant submitted that the suit properties fell within general boundary areas and that the dispute was rightly referred to the Land Registrar for resolution while urging the court to adopt the recommendations of the Land Registrar.
9. The Respondent submitted that when the Applicant raised the boundary dispute and reported it to the Land Registrar who visited the suit parcels with the Laikipia Surveyor and found that where the Respondent had erected his hedge there was a deviation of 9.5 meters towards his parcel number 2959, he was not present during the exercise. He added that the Applicant had closed off the access road which he occupied and was using it as private property and that that part of the land was omitted from the measurements given in the surveyor's report dated 15/6/2023.
10. He submitted that going by the surveyor's measurements, both parcels of land were smaller on the ground than what appears in the mutation forms. He referred to the statement in the Land Registrar's report that parcel no. 2959 belonging to him measured 1.19 ha on the ground yet the registered area was 1.21 ha while on the other hand, parcel no. 2960 belonging to the Applicant measured 0.58 ha as opposed to the registered area of 0.9 ha. The Respondent submitted that the access from the main road was purchased by the Applicant as private land and should therefore be tallied together with his parcel no. 2960 and reflected as such in the RIM since he had an alternative access road to his parcel of land through the other parcel adjacent to the disputed parcel that he had been using to access his home.
11. The Respondent maintained that the Applicant had failed to bring the Land Registrar and the surveyor who allegedly went to the ground to explain the contradictory reports which he maintained were not in consonant with [Land Registration Act](#) in relation to boundary dispute resolution. He went on to add that the Land Registrar's report was misleading and erroneous for stating that the ground area for parcel no. 2960 was smaller than what was intended in the mutation form while parcel no. 2959 was larger than what is reflected on the mutation form.
12. The Respondent relied on *Nyahururu ELC Misc. Application No. 5 of 2020 – Isaac Njenga Njoroge vs Javerson Macharia and 2 Others* where the court held that the issues raised in the miscellaneous application were convoluted and would require a substantive suit to be filed to determine the dispute. The Respondent emphasised that there were contested issues of fact which can only be determined in a substantive suit.
13. Further, he submitted that owing to the errors on the reports of the surveyor and the Land Registrar, it would serve justice for both parties if the survey exercise was done afresh for proper and correct measurements and findings to be made. In addition, that erecting beacons and amending the RIM using the Land Registrar's report would create more errors in the records of the two parcels of land.
14. The court directed parties to file supplementary submissions regarding the issue whether it had been moved in the proper manner. The Applicant filed supplementary submissions emphasising that Section 18 of the [Land Registration Act](#) was silent on the procedure to be adopted when approaching



- the court under that provision. Additionally, that Section 101 of that Act provided that the ELC had jurisdiction to hear and determine disputes, actions and proceedings concerning land under the Act. The Applicant also relied on Section 3(1) of the Environment and [Land Act](#) on the overriding objectives of the court being to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by the ELC Act. In addition, the Applicant relied on Section 3(A) of the [Civil Procedure Act](#) on the inherent powers of the court as well as Sections 1A and 1B of the [Civil Procedure Act](#) and Article 159(d) of [the Constitution](#) which requires justice to be administered without undue regard to procedural technicalities.
15. The Applicant relied on *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 6 others (IEBC)* [2013] eKLR where the court stated that deviations from and lapses in form and procedures which did not go to the jurisdiction of the court or to the root of the dispute or which did not occasion prejudice or miscarriage of justice to the opposite party should not be elevated to the level of a criminal offence attracting a heavy punishment to the offending party. The court observed that following the enactment of Sections 1(A) and 1(B) of the [Civil Procedure Act](#) as well as Article 159 of [the Constitution](#), courts nowadays strive to sustain rather than strike out pleadings on technical grounds.
 16. The issue for determination is whether the court should adopt the decision of the Land Registrar, Laikipia West Sub-County dated 2/2/2023 and give directions for the amendment of the RIM and erection of beacons on parcel numbers 2959 and 2960 as sought in the application dated 29/9/2023.
 17. The Applicant also seeks to be authorised to erect his perimeter fence on parcel no. 2960 in accordance with the Land Registrar's report and for the OCS Nyahururu Police Station to provide security during the exercise. The Respondent opposed the application while setting out what he believed were anomalies and contradictions in the report of the Land Registrar.
 18. Although Section 101 of the [Land Registration Act](#) grants the ELC jurisdiction to hear and determine disputes, actions and proceedings concerning land under that Act, the court can only exercise this jurisdiction in line with the other legal provisions including Section 18 which grants the Land Registrar powers to first determine boundaries before courts can proceed to deal with such disputes.
 19. The miscellaneous application is premised on Section 18 of the [Land Registration Act](#) which at subsection 2 prohibits the court from entertaining proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with that section. Subsection 3 empowers the Registrar to receive evidence as to any boundaries and situation in any proceedings concerning the parcel except where it is noted in the register that the boundaries of the parcel have been fixed. Where all the boundaries are defined under Section 19(3) which deals with instances where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the survey office or authority responsible for the survey of land, the determination of the position of any uncertain boundary is to be done in accordance with the [Survey Act](#).
 20. Section 18 of the [Land Registration Act](#) therefore mandates the Land Registrar to determine disputes relating to boundaries and prohibits the court from entertaining proceedings relating to boundary disputes unless the boundaries have been determined in accordance with that section.
 21. This provision does not envisage a scenario where the court plays a role in the determination of the boundary dispute by giving orders for the amendment of the RIM to reflect the true sizes of the two adjoining parcels of land or directing how beacons are to be erected on the land. The section bars the court from entertaining proceedings until the Land Registrar has determined the boundaries of the parcels of land in question.



22. It is apparent from the application before the court that the sizes of the land differ on the ground and are smaller than the sizes indicated on the mutation forms. Granting the orders sought in the application will not resolve the boundary dispute or the disparity in the sizes of Laikipia/Nyahururu/2959 and 2960 shown in the mutation forms, title deeds and on the ground.
23. The Land Registrar ought to proceed to determine the boundaries of Laikipia/Nyahururu/2959 and 2960 in accordance with the [Land Registration Act](#). Once this is done, any party aggrieved by Registrar's determination may move the court to challenge the determination.
24. The court declines to grant the orders sought in the application dated 29/9/2023.

Each party will bear its costs.

DELIVERED VIRTUALLY AT NAIVASHA THIS 14TH DAY OF NOVEMBER 2024.

K. BOR

JUDGE

In the presence of: -

Ms. Eunice Ndegwa for the Applicant

Ms. Gladys Wanjiru for the Respondent

