Gekonge v Mochoge (Environment and Land Appeal 20 of 2021)
[2023] KEELC 108 (KLR) (18 January 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT AND LAND APPEAL 20 OF 2021

M SILA, J

JANUARY 18, 2023

BETWEEN

KENNEDY MAKWAYE GEKONGE ..... APPELLANT

AND

ZAKIES MOCHOGE ..... RESPONDENT

(Being an appeal against the judgment of Hon. E.A Obina, Principal Magistrate, delivered on 22 June 2021 in the suit Kisii CMCC, ELC Case No. 187 of 2018)

JUDGMENT

(Appellant having been plaintiff before the suit at the Magistrate's Court; no defence filed by the respondent; no pre-trial conducted under Order 11; within the suit, Plaintiff not testifying but calling a witness; defendant, despite not filing defence, proceeding to give evidence and also calling a witness; suit heard and dismissed hence this appeal; appellant raising various procedural and substantive issues; whether Magistrate erred by proceeding with the case without conducting pre-trial; pretrial under Order 11 should not cause a mistrial of suit so long as opportunity is given to all parties to appreciate the case of the other; no bar to the matter proceeding without the evidence of the plaintiff; a party has the option to either testify or prove his case by other evidence; Whether party who has not filed defence is at liberty to testify and avail evidence; Magistrate erred in allowing respondent, who had not filed defence to testify and present evidence; boundary dispute; whether courts have jurisdiction to hear such disputes or whether the Land Registrar has the monopoly of hearing such disputes; Sections 18 and 19 of the *Land Registration Act*; no bar to courts hearing such disputes where boundaries are determined; whether opinion of Land Registrar is binding to the Court; Section 86 *Land Registration Act*; determinations of Land Registrars subject to review by the courts; appeal allowed and court directing that the matter be heard afresh as court misdirected itself by admitting the evidence of the respondent; no orders as to costs)

1. This suit was commenced by the appellant through a plaint filed on 19 October 2011 before the High Court at Kisii, which suit was registered as Kisii HCCC No. 25 of 2012. In his plaint, the appellant pleaded to be the registered proprietor of the land parcel No. West Kitutu/Bogeka/1544 measuring 0.3 Ha. He averred that the defendant/respondent had purchased the neighboring land parcel No. West Kitutu/Bogeka/2306 registered in name of one Makori Teya. He complained that the respondent had encroached into part of his land and occupied an area measuring approximately 6 metres by 9 metres. In the suit, he asked for an order of eviction of the respondent from his parcel of land and costs of the suit. There does not appear to have been any defence filed by the respondent. After the creation of the Environment and Land Court, the suit was transferred to this court and registered as Kisii ELC No. 1155 of 2016. It appeared to the court that what was before it was a boundary dispute and the court made orders for the District Land Registrar and District Land Surveyor to visit the site and make a report. The site was visited twice and reports made, but the same were disputed, meaning that the matter now needed to be heard. On 31 July 2015, Mutungi J, ordered the matter to be transferred to the Magistrates' Court at Kisii for disposal, given the value of the subject matter, with further directions that any party could rely on the Land Registrar's reports on record. Thereafter the suit was heard by Hon. Obina, Principal Magistrate.

2. The appellant (as plaintiff) did not testify, but called Prescot Nyakano, a retired Surveyor, as his witness. He testified that he was requested by the Appellant to prepare a survey report over the land parcel West Kitutu/Bogeka/1544. He stated that he confirmed encroachment of the Appellant's land who had lost a portion measuring 8.5 metres. He produced his report showing the encroached zone. He refuted the Land Registrar's report (which had determined the boundary to be along a live fence only with a disparity of 1 metre which could be ignored in general boundary survey). The respondent (as defendant) testified that the land parcel Kitutu/Bogeka/2306 was subdivided and he now owns the land parcel Kitutu/Bogeka/4312. He bought the land in the year 1991. He testified that the land parcel West Kitutu/Bogeka/1544 was initially owned by one Francis Amenya before the appellant acquired it in the year 2007. He testified that he had no problem with Mr. Amenya between the years 1991 to 2007 and that there was a fence (meaning the live fence) separating the two parcels of land which was still intact. He denied trespassing into the appellant's land. He added that he was not present when the Appellant engaged his private surveyor.

3. The Appellant called one Joseph Ombongi Muronga as his witnesss. His evidence was that the respondent had purchased his land from one Kennedy who is his grandchild. He used to take care of the land for an Assistant Chief, Mr. Amenya, who later transferred the land to the appellant. He testified that the Respondent had purchased his land earlier (than the appellant) and there was no problem with the boundary which remained intact. He stated that he was born there and he is aware of the matter.

4. The trial Magistrate identified the major issue in the suit being whether the appellant had proved that the Respondent is in occupation of part of his land parcel, West Kitutu/Bogeka/1544, measuring 6 metres by 9 metres. This was in accordance with the pleading of the Appellant in his plaint. On the report of the Appellant's witness (the private Surveyor), he found that it was not clear whether the Respondent was present, and was of opinion that it would have been more credible if there was a Surveyor also present for the Respondent, or if he was assisted by the (District) Land Registrar and (District) Land Surveyor. He held that a private Surveyor cannot say that the Land Registrar's report is not reliable without assigning any proper reasons backed by evidence. He referred to the respondent's evidence that he had been in occupation from the year 1991 and had no problems with Mr. Amenya, the previous owner of the neighbouring land, now owned by the appellant, and that the boundary features were intact. He referred to the District Land Registrar's report which recorded that there exists a live fence separating the two parcels of land though the ground measurement had a disparity

of one metre which was within allowable limits of error in general boundary survey. He found that the appellant had failed to prove his case that the respondent was in occupation of a portion measuring 6 metres by 9 metres of his land and dismissed his case with costs.

5. Aggrieved, the appellant filed a Memorandum of Appeal on 22 July 2021 which appears to have been amended when the record of appeal was filed on 13 May 2022. The grounds raised in the Amended Memorandum of Appeal are as follows: -

1. The learned Magistrate erred in law and fact by failing to allow the claim in favour of the Plaintiff having made a finding that the respondent never filed any defence in opposition of the appellant's claim hence the suit filed was uncontroverted.

1A. That the learned Magistrate erred in law and fact by proceeding with the hearing knowing that the defendant had not complied with Order 7 Rule 1 and Order 11 of the *Civil Procedure Act* and more so being with full knowledge that no defence had neither been filed nor served upon the plaintiff without any reasons advanced still proceeded to hear and determine the same in favour of the defendant (sic).

2. The learned Magistrate erred in law and fact by failing to make a finding that the portion claimed by the appellant was actual, clear, and open and exclusively part of the appellant's land.

3. The learned Magistrate failed to take into recognition that the surveyors (sic) reports filed specifically confirmed that the respondent was truly in occupation of the suit portion as claimed by the appellant.

3B. The learned Magistrate erred in law and fact by disregarding and deliberately failing to consider at all the cogent and unshaken evidence of the private surveyor whose evidence was crucial and necessary pursuant to the court order dated 4th April 2018.

4. The learned Magistrate erred in law and fact by failing to appreciate the position that the respondent is not registered in any land specifically the suit portion he illegally occupies that makes part of the appellant's land.

5. The learned Magistrate erred in law and fact by failing to appreciate that the Respondent only asserted that the suit portion belonged to him without any iota of evidence or at all.

5A. the learned Magistrate erred in law and fact by considering and admitting the oral evidence of the Defendant without filing and serving a substantive defence in accordance with the civil procedure rules.

6. The learned Magistrate miserably failed to disregard the Respondent's unsupported evidence.

7. The learned Magistrate failed to appreciate the fact that the Respondent was a trespasser illegally in occupation of the portion of land rightfully belonging to the Applicant.

8. The learned trial Magistrate miserably failed in recognition of the doctrine of substantive justice by denying the appellant the orders sought.

8A. The learned Magistrate erred in law and fact by hearing and determining the matter without the testimony of the Plaintiff and hence his rights to be heard in a fair trial and to give his evidence were violated.

9. The learned Magistrate erred in law and fact by considering and admitting the contentious Land Registrar and Surveyor's Report without tendering evidence in support of the same

although the Land Registrar was summoned severally by the court to present the same and in contempt of the court order dated 4th April 2018.

10. The learned Magistrate erred in law and fact by interpreting the Land Registrar and Surveyor's Report on his own without calling the (sic) as they were experts under the *evidence act* and admission of the same without the consent and knowledge of the Plaintiff was unprocedural and unlawful and in violation of the court order dated 4th April 2018.

In the appeal, the appellant seeks the following:-

SUBPARA a.

That the appeal be allowed with costs.

SUBPARA b.

That the judgment of the subordinate court be varied and/or reviewed and specifically allow the same as per the Appellant's claim.

SUBPARA c.

That the judgment of the subordinate court be set aside and the suit be set down for a retrial before a court of competent jurisdiction.

SUBPARA d.

Any further relief the Honourable Court may deem fit to grant.

6. I invited both counsel for the Appellant and counsel for the Respondent to file written submissions which they both did. In his submissions, Mr. M.W. Magara, learned counsel for the appellant, inter alia submitted that the whole trial was a mistrial due to the fact that the Respondent did not file a defence as stipulated under Order 7 Rule 1. He also submitted that it was imprudent for the Magistrate to set down the suit for hearing without subjecting the suit to compliance with Order 11 (dealing with pretrial directions) which left the Plaintiff to be in the dark as to the defence the respondent was going to put forward. He submitted that the trial Magistrate erred by neglecting and/or refusing to be guided by the provisions of the Civil Procedure Rules. He added that the Appellant did not testify during trial and this led to a miscarriage of justice. He continued that the learned magistrate did not inquire as to why the appellant did not testify yet the respondent was allowed to testify without having a substantive defence which points to an unfair trial. On the Land Registrar and District Surveyor's report, he submitted that they were summoned to court to be cross-examined on the same but they failed to appear despite several court summons. He submitted that failure to have the Land Registrar examined, denied the appellant the right to contest the report. He referred me to the case of James Anali Alary vs John A. Ikokonyi, Busia ELC Case No. 172 of 2016. He submitted that Land Registrars are experts pursuant to Section 48 of the *Evidence Act*, Cap 80, Laws of Kenya, and the section contemplates that the expert must testify and his evidence evaluated in the context of other evidence. On this point, he referred me to the case of Gladys Wambui Kagiri (suing as the administrator of the estate of the late Kagiri) vs Samuel Njoroge Kamau & 2 Others, Thika ELC Case No. 506 of 2017, Mutonyi vs Republic (1982) 203 and Shah & Another vs Shah & Others (2003) EA 290. However, none of these decisions were annexed to his submissions and I am unable to vouch what they determined. In fact, what I see annexed to Mr. Magara's submissions are completely different authorities which unfortunately have not been explained in his submissions.

7. On his part, Mr. G.J.M Masese, learned counsel for the respondent, submitted that the suit was originally Kisii HCCC No. 25 of 2012 and all relevant papers pertaining to defence and defendant's statements were filed and are on record. He submitted that the submissions relating to want of

compliance with Order 11 are misplaced and that if the magistrate did not see what was on record then this is unfortunate. He submitted that the Land Registrar's report was adopted before the case was transferred to the subordinate court and that the Land Registrar and Surveyor had determined the boundaries. He submitted that under Section 18 of the *Land Registration Act*, 2012, it is the Land Registrar who is mandated to establish and fix boundaries and the court would have no jurisdiction unless the dispute has been determined in accordance with Section 18. He submitted that the report which the court adopted was conclusive, and an attempt to set it aside was dismissed, hence the lower court was bound by the report which had been adopted by the Superior court. He referred to the report of the Land Registrar which mentioned that there was a live kei apple fence, which had existed as a boundary for years. He concluded by submitting that the boundary is fixed and the court has no power to alter that position and the appeal should be dismissed.

8. I have considered all the above.

9. It will be observed that this appeal raises both procedural and substantive issues. The following, are in my view, the procedural issues raised.

    i. Proceeding with the case without there being a defence pursuant to Order 1 Rule 7.

    ii. Allowing the respondent to testify without having a defence

    iii. Proceeding with the case without taking the evidence of the appellant (as plaintiff)

    iv. Proceeding with the case without adherence to the provisions of Order 11.

10. I will address these procedural issues first before going to some substantial issues regarding determination of boundary disputes.

i. Whether the Magistrate erred by proceeding with the case when no defence was filed.

11. I will start by pointing out that a suit is commenced, ordinarily, by way of plaint, as outlined in Order 4 of the Civil Procedure Rules. The plaint will set out the cause of action, the complaint of the plaintiff, and the reliefs sought. Upon service, the defendant will appear in the suit. Appearance is not the equivalent of somehow getting one's way into the court and showing up before the Magistrate or Judge. The mode of appearance is explained in Order 6 Rule 2 and this is done by filing a document titled 'Memorandum of Appearance', though, pursuant to Order 6 Rule 2(4), one may straight away file a statement of defence so long as the address of service is stated in it. The consequences of failing to file appearance or defence are spelt out in Order 10. Under Rule 4, if the plaint is for a liquidated demand only, the plaintiff is at liberty to request for judgment. Rule 5 applies where the suit is for a liquidated demand with another claim where there are several defendants. A request for judgment may be made for the defendant/s who have failed to enter appearance. Rule 6 applies where the claim is for pecuniary damages or for detention of goods. The court can enter interlocutory judgment and set the suit down for assessment of damages. Rule 7 applies where there are several defendants on the nature of claim in Rule 6. Rule 8 provides that no judgment in default of defence and appearance may be entered against the Government without leave of court. For other types of suits, Rule 9 and 10 are operative and they provide 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.

    10. The provisions of rules 4 to 9 inclusive shall apply with any necessary modifications where any defendant has failed to file a defence.

12. The nature of the case before the trial court was one in which Rules 9 and 10 would be operative, for it was neither a liquidated claim, nor a claim for pecuniary damages, or detention of goods, and the plaintiff could not have applied for interlocutory judgment. What the plaintiff needed to do was simply set down the suit for hearing as provided under Rule 9 and 10 above.

13. The appellant herein faults the magistrate for proceeding with the suit without there being a defence. That is a wrong proposition. The filing of a defence is optional. One can opt to file a defence or opt not to. The fact that no defence is filed does not mean that the case cannot proceed. It can proceed as stipulated under the provisions of Order 10 which I have explained above. There is no bar to a matter proceeding merely because no defence has been filed. But then, how should such a case proceed? Is the defendant at liberty to testify?

ii. Whether the Magistrate erred by allowing the defendant to testify when he had no defence on record

14. I do not think that a defendant who has not filed a defence can be allowed to testify or produce evidence. The basis of my reasoning is found in Order 7 of the Civil Procedure Rules which addresses defences and counterclaims. A defence is the document that a defendant files if he wishes to dispute the case of the plaintiff. Under Rule 1 a defendant is at liberty to file defence within fourteen days of entering an appearance. Under Rule 5 the defence is to be accompanied inter alia by a list of witnesses, written statements of witnesses, and copies of documents to be relied upon by the defendant during trial. Without filing a defence, the defendant has no basis upon which to file any witness statements or documents and without filing these documents he cannot therefore be allowed to present witnesses during the hearing of the case after the plaintiff has set it down for hearing pursuant to Order 10 Rule 9. My reasoning is similar to that of Sergon J, in the case of Julius Kabui Mwangi & Another (Suing as heirs and legal representatives of the estate of Mwangi Gichuka (deceased)) vs Wangui Gatundu & 13 Others, Nairobi HCCC No. 853 of 1999 (2018) eKLR. In the said suit, no defence was filed by the 5th defendant. It was urged however that he still has a constitutional right to be heard and should not be shut out. It was further argued that since he had filed an appearance, he had a right to testify in defence. This argument was dismissed. Sergon J was of opinion "that a party who has failed to file a defence in an action which requires the filing of a defence has no right to file a witness statement nor a right to be heard in defence but still retains the right to participate in the cross-examination of witnesses and the right too to file and present final submissions." The context of the case was that an appearance had been filed but no defence was on record. In such case, the defendant can cross-examine and file submissions but will not be at liberty to present his own witnesses or evidence for failure to comply with the provisions of Order 7 Rule 5.

15. But what if not even an appearance is filed? In such a case, I would suggest that there is no right at all to participate in the trial in any manner. At best, the defendant can only physically appear in court and observe the proceedings and can neither cross-examine the plaintiff's witnesses, present any witnesses, nor file any documents. It is the filing of an appearance which allows one to participate in a trial. If appearance is through counsel, then it is that counsel who is allowed to participate in the case. If appearance is in person, then it is only the individual defendant who will participate in the case without assistance of an advocate. An advocate cannot be allowed to make statements and participate in a trial without having filed an appearance; bar filing an appearance or a notice demonstrating that he has been appointed by the defendant, he remains a total stranger to the proceedings. It is the filing of an appearance, or a notice of appointment by counsel, which affirms that such counsel is the recognized agent of the defendant as addressed by Order 9 of the Civil Procedure Rules. If no appearance is filed,

either in person or through counsel, then I do not see how a defendant can be allowed to participate in the proceedings. As I have said, at best, he can only be an observer.

16. So what happened in our case? I have taken the trouble to peruse the original file and I have come across a memorandum of appearance filed on 8 January 2013 by the law firm of M/s G.J.M Masese Esq, Advocate. The record also shows that there was filed a list of witnesses and list of documents together with "agreed issues" through the same law firm. I have not seen any defence on record. If Mr. Masese thought that a defence was actually filed, it was his duty to raise the issue when the record of appeal was filed and served. He ought to have pointed out to court, when the appeal came up for directions, that the record of appeal is not complete as it is missing a defence. I am in fact fairly perturbed that Mr. Masese did not even raise issue about the record of appeal missing the memorandum of appearance and the list of documents and list of witnesses that he had filed. I have seen no defence in the original file, and if one was ever filed, then it was the duty of Mr. Masese to point this out to the court, so that the record of appeal can be complete. The only reasonable conclusion I can reach is that there was an appearance filed but there was no defence filed. It would mean therefore that the respondent had no right to avail witnesses or documents during trial. His counsel could however cross-examine the plaintiff and his witnesses and file submissions, but that would have been just about all that the defendant was at liberty to do in the circumstances of the case. I agree that the trial magistrate erred in allowing the respondent to testify and produce evidence without having filed a defence.

iii. Whether the Magistrate erred in proceeding without the evidence of the plaintiff

17. I however do not agree with the appellant's position that the trial magistrate erred in allowing the case to proceed, without him (as plaintiff) giving evidence. The fact that one is plaintiff does not mean that he must testify. I am not aware of any rule that prescribes that the plaintiff (or indeed any party to a suit) must testify. It is the prerogative of the plaintiff (or such other party to the suit) to either testify or refuse to testify. A party can indeed prove a case through the testimony of other witnesses, and it is not a requirement that before a case can be considered as proved, then the plaintiff must testify. In our case, the plaintiff did not testify. But I see nothing on record which stopped him from testifying. It must therefore be considered that it was his strategy not to testify. He was in fact represented by the same counsel who is urging this appeal. Counsel did not raise, within the hearing of the case, that he wished to have the appellant testify. The appellant never offered himself as a witness and he cannot now complain that there was any infringement of his right to be heard. Nobody stopped him from giving evidence and I therefore find no merit in this ground of appeal.

iv. Whether the Magistrate erred in proceeding with the case without compliance with Order 11 of the Civil Procedure Rules.

18. The other procedural issue is a complaint that there was non-compliance with the pre-trial directions outlined in Order 11. Order 11 addresses pre-trial directions and conferences. Generally, the rules prescribe that there be a trial conference before the case is set down for hearing. The purpose of the trial conference is laid out in Rule 7 which provides that the purpose is inter alia to plan for trial time, explore the most expeditious way to introduce evidence and define issues, order admission of statements without calling the makers, give orders relating to expert reports or explore alternative dispute resolution. It is good to go through the pre-trial directions in Order 11 but I do not think that failure to strictly prescribe to Order 11 would vitiate a trial.

19. What is important in a hearing is that all parties are aware of the other's position in the case, which is discernible through the pleadings, witness statements and filed documents, and they are given an opportunity to present their respective cases. Failure to adhere to Order 11 would in my view only be a lapse in following technicalities of procedure which is curable pursuant to Article 159 (2)(d) of *the*

Constitution. So long as a party who has filed his pleadings and documents is allowed to participate in trial a failure to strictly adhere to Order 11 would not be fatal to the proceedings. In our case, there were several mentions of the case before the trial proceeded for hearing. If the appellant thought that it was very critical for the procedure in Order 11 to be followed to the letter, he ought to have pointed this out to court. He never did, meaning that he was comfortable with the case proceeding, for hearing, without a trial conference being held. In essence, he waived the right for the procedure in Order 11 to be strictly adhered to and he cannot now be heard to complain. This ground of appeal is dismissed.

20. I believe that I have dealt with the four procedural issues which I earlier identified. I have found that the trial court erred in allowing the defendant to testify and call witnesses when he had no defence on record. The fact that the defendant was allowed to testify and call witness in my opinion vitiated the trial. It is difficult to discern how the trial would have proceeded and what conclusion the court would have reached if the evidence of the defendant had not been taken in. I think, in light of that, the substantive question, that is, whether there was encroachment by the respondent, was not properly determined within the context of the pleadings and evidence that was admitted but ought not to have been admitted.

21. The options that this court has when hearing an appeal are set out in Section 78 of the *Civil Procedure Act*. It provides as follows: -

> 78. Powers of appellate court
>
> (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
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> (a) to determine a case finally;
>
> (b) to remand a case;
>
> (c) to frame issues and refer them for trial;
>
> (d) to take additional evidence or to require the evidence to be taken;
>
> (e) to order a new trial.
>
> (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

22. I have the option, as an appellate court, to determine the case pursuant to Section 78 (1) (a), but I think my mind will also be affected by the evidence on record that was adduced by the respondent but which ought not to have been on record. In light of this, I am of opinion that the best order to make is that in Section 78 (1) (e), that is to order a new trial. I will remit back the matter for hearing before another magistrate with direction to hear the case, on the basis only of the plaintiff's witnesses and documents, and such documents that the court on its own motion may proceed to admit, and upon hearing the case, proceed to make judgment based on that evidence. This, of course, is without prejudice to the right of the respondent to apply within the remitted case to file defence out of time and also be heard on merits.

23. That should be the end of the matter but I feel the need to address two issues raised regarding the Land Registrar's report. The first was raised by Mr. Masese, that the boundary was fixed by the Land Registrar, after the court asked for a report, and that should have been the end of the dispute as the

court had no jurisdiction, and the second is that raised by Mr. Magara, that the Land Registrar's report must be submitted by the Land Registrar and the Registrar be subjected to cross-examination before the report can be relied on by the court.

v. Whether the court had no jurisdiction to hear the boundary dispute and whether the court was bound by the Land Registrar's Report

24. On this point, I have, within my experience, heard arguments that the court has no jurisdiction to hear a case concerning a boundary dispute and that this is strictly the purview of the Land Registrar. Mr. Masese indeed presented this same argument, and referred me to Section 18 of the *Land Registration Act*, and proceeded to submit that the boundary was fixed by the Land Registrar and the court has no power to alter that position. I respectfully do not agree.

25. It is critically important to understand the role of the Land Registrar vis-à-vis the role of the court when it comes to boundary disputes. One needs to appreciate the wording and context of Section 18 of the *Land Registration Act*, which cannot be read in isolation, but must be read with Section 19 thereof. They provide 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:
>
> 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.

26. Starting with Section 18 (1), it will be seen that there is reference there to Section 20 of the Act. But I think this is a mistake because fixed boundaries are addressed in Section 19 of the Act and not Section 20. Section 20 actually deals with maintenance of boundary marks such as fences, hedges, stones, pillars, beacons, walls and other features that demarcate the boundaries. The Land Registrar, under Section 20, is empowered to direct a person to demarcate a boundary mark, or maintain such boundary features, and failure to do so constitutes an offence. There is nothing in Section 20 that relates to fixing of boundaries. As I have mentioned, fixed boundaries are covered in Section 19 and thus reference in Section 18 (1) to Section 20 needs to be read as being reference to Section 19. Section 18 (1) addresses two kinds of boundaries, that is the fixed boundaries (as in Section 19) and approximate boundaries (commonly referred to as "general boundaries"). Fixed boundaries are precise in location, and the best example I can give is a geo-referenced boundary, such as those found in titles with Deed Plans.

27. Let us take a closer look at Section 19 before going to Section 18. What Section 19 covers is the actual fixing of boundaries, that is, determining the precise location of a boundary. Section 19 addresses more than just determination of boundary disputes; it also advises on how to find the precise location of a parcel of land, so that the boundaries of such land can now be considered to be beyond doubt. Such fixing of a boundary of a particular parcel of land can indeed be done even without there being a dispute with the owners of abutting land. It can in fact be done suo moto at the instance of the Land Registrar if he "considers it desirable to indicate on a filed plan (of the survey office) or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof". A person interested in the land can also apply to have the boundaries of the land fixed. Fixing of boundaries means defining with precision the exact location of a parcel of land. It is not the same as determining a boundary dispute, though in the process of fixing the boundary, any pending or looming dispute may be resolved. When fixing boundaries, the Land Registrar is required to follow a certain procedure. He is to give notice to the owners of adjoining land and give them an opportunity to be heard before proceeding to fix the boundaries. This is the essence of Section 19 (2), to direct the Land Registrar on the procedure to follow. He is required to hear everybody who appears in the register of any of the parcels of land affected, which is basically hearing the owners of adjoining land, and have a survey to define the positions of the land in issue. Once this is done, he is required to file the plan containing the boundary, then make a note in the register that the boundaries of the land are now fixed. It is this plan which now fully defines the boundaries of the land with precision. The boundary is now considered a fixed boundary. Under Section 19 (3), if there is a plan from the survey office which defines the boundaries of the land, a note of the plan can be entered in the register, in which instance the boundaries of the land will also be deemed as fixed following that plan.

28. Let me now turn to Section 18. Section 18 (1) gives direction as to what the boundaries of the land are; in other words it answers the question, 'how are boundaries supposed to be determined?' and answers this by demonstrating how boundaries are supposed to be determined. If the boundaries are already fixed, in accordance with Section 19, then those are deemed to be the boundaries of the land. If the

boundary is not fixed, then it is the cadastral map and any filed plan that shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel. What section 18 (1) does is to address itself on what should be regarded as the boundaries of the land and establishes that boundaries may either be fixed or approximated. Section 18 (2) does state that 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." Now, let me be clear; this section does not say that the court is barred from hearing a boundary dispute and neither does it say that the court has no jurisdiction to hear a boundary dispute. What it says is that the court ought not to entertain a dispute "unless the boundaries have been determined in accordance with this section." Thus, if the boundaries have been determined, the court has every right and jurisdiction to hear the boundary dispute. I have already pointed out that boundaries are determined in two ways; one, by fixing them, and two by approximation, as provided for under Section 18 (1). If the boundaries are fixed, the court therefore has the onus to hear the dispute. If the boundaries are not fixed, but can be approximated, using a cadastral plan or other filed plan (such as a mutation plan), again the court can hear such dispute. I really do not know where the idea arose that the court has no jurisdiction to hear a boundary dispute and that such dispute can only be heard and determined by the Land Registrar. In fact, nowhere in the Act will you find an explicit provision stating that boundary disputes are supposed to be heard by Land Registrars. Section 18 (3) only does so by implication, and what it does is to only to give direction to the Land Registrars on what evidence to receive when dealing with proceedings (not just a boundary issue) touching on the land. It says that the Registrar may receive such evidence as to its boundaries and situation as may be necessary, except where the boundaries are already fixed, in which instance reference then must be made only to the plan providing the fixed boundary. In my humble opinion, the notion that the court has no jurisdiction to entertain a boundary dispute is therefore, with respect, misplaced. The only instance where the court needs to refer the matter to the Land Registrar is where the boundaries are not determined, i.e, not fixed and there is no cadastral map or any filed plan that can indicate the approximate boundaries. In such case, the reference to the Land Registrar will be for purposes of having him fix the boundaries, following the procedure in Section 19. If this settles the dispute, well and good, if not, then the court will need to hear the case as I will demonstrate below.

vi. Whether a determination by the Land Registrar is final and is binding on the court.

29. It is a misguided submission that once the Land Registrar has made a determination on a boundary, then such determination is final and is binding to the court. This in fact goes against what is provided for in Section 86 of the Act which provides for review of decisions of the Registrar. That section provides as follows:-

> 86. Review of the decision of the Registrar.
>
> (1) If any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on the Registrar by this Act, the Registrar or any aggrieved person shall state a case for the opinion of the Court, and thereupon the Court shall give its opinion, which shall be binding upon the parties.
>
> (2) The Rules Committee shall make rules on the procedures to be followed by the Registrar or an aggrieved person under subsection (1).

30. It will be seen from the above, that a party can raise question with regard to the exercise by the Registrar of the powers conferred upon him by the Act. Such person is to state a case for the opinion of the court, then the court will give its decision, which decision will then become binding on the parties. Thus, the court is at liberty to give its own opinion on the matter, and it is the decision of the court which is binding. This section covers all decisions of Registrars, and that would include any decision

by the Registrar, touching on boundaries to land. Of course Subsection (2) above contemplates that there will be a special procedure for this challenge which will be defined in Rules. So far, I have seen no special rules, and thus a party can move the court in the usual manner through the acceptable means of originating a suit as provided in the *Civil Procedure Act*. A plaint would be one of them.

31. In as much as I have demonstrated that the court has jurisdiction and mandate to hear a boundary dispute, that does not mean that the court cannot refer the matter to the Land Registrar for his opinion. This in fact is a common direction taken by courts. If the court takes this path, it does not mean that what the Land Registrar will state must be binding to the parties and to the court. If both parties are agreeable to the report, and the court has no problem with it, then it can be adopted as the judgment of the court. But if one party disputes the report, then the case needs to proceed for hearing, with each party presenting its evidence. Part of the evidence that a party may rely on is the report of the Land Registrar, which will be his opinion on the location of the boundaries, ordinarily contained in his report.

vii. Whether Report of the Land Registrar must be produced by the Land Registrar before being admitted in evidence

32. The final issue that I wish to address is whether such report of the Land Registrar can only be produced after the Land Registrar attends and is subjected to cross-examination, which issue was raised by Mr. Magara. It needs to be understood that this is a report containing documentary evidence. The rules of production of evidence as outlined in the *Evidence Act*, will apply. The general rule under Section 35 of the *Evidence Act*, is that the maker needs to produce the document but there are several instances where the court has discretion to admit the document without calling the maker. It is also open to the parties, subject to any direction of the court, to agree by consent to have a document produced without calling the maker. Thus, subject to the rules of evidence, as I have outlined above, it is not mandatory that a Land Registrar's report must be produced by the Land Registrar and it is not the position that such report cannot be relied upon because the Land Registrar did not attend court for cross-examination on the report.

33. In our case, the dispute was within the jurisdiction of the court as the boundaries are determinable partly by reference to the mutation forms. It is not a dispute that the court is barred from hearing.

34. I thought of laying clear my opinion on these questions because they are issues that this court, other courts, and litigants, continuously grapple with.

35. I had already given my view on this appeal which is that the suit between the parties be heard afresh following the directions that I have given above.

36. The only matter left is costs. I think the appellant had opportunity, within the hearing of the main suit, to point out the issues that he has referred to in this appeal. He could have raised objection that the defendant has no right to be heard for not filing a defence but he failed to do so. I think in those circumstances the appellant does not deserve the costs of this appeal. I will order each party to bear his costs of this appeal.

37. Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 18 DAY OF JANUARY 2023.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

KISII