



**Mutiso v Njamwea (Environment & Land Case 100 of 2003)  
[2023] KEELC 16205 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16205 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 100 OF 2003  
CA OCHIENG, J  
MARCH 16, 2023**

**BETWEEN**

**FLORENCE KATHAMBI MUTISO ..... PLAINTIFF**

**AND**

**MERCY NJAMWEA ..... DEFENDANT**

**JUDGMENT**

1. By a Plaint dated the 2<sup>nd</sup> December, 2003, the Plaintiff prays for Judgment against the Defendant for:
  - a. A declaration that the Plaintiff is the lawful owner and entitled to possession of all that piece of land situate in Mavoko Municipality in the Machakos District containing by measurement 0.1368Ha or thereabout and being L.R. No. 337/1682.
  - b. A declaration that the Defendant is a trespasser in a portion containing by measurement 0.0141Ha or thereabouts excised from L.R. No. 337/1682.
  - c. An injunction to restrain the Defendant whether by herself, her servants, agents or otherwise howsoever from remaining on or continuing in occupation of a portion containing by measurement 0.0141Ha or thereabouts excised from L.R. No. 337/1682.
  - d. Costs of this suit.
2. The Defendant filed a Statement of Defence including Counter-claim dated the 17<sup>th</sup> December, 2003 which was amended on 10<sup>th</sup> December, 2021 where she sought for Judgment against the Plaintiff for:
  - a. A declaration that the Defendant is the lawful owner and entitled to possession of that piece of land situated in Mavoko Municipality in Machakos



County containing by measurement 0.0450Ha or thereabouts being L.R. No. 337/1683 as pointed to her on purchase.

- b. Special Damages of Kshs. 3,584,610 being the expenses incurred in putting up and demolishing the stalled structure.
  - c. Loss of user of Kshs. 6,175,000 being the cost of renting accommodation in Nairobi from January 2005 to February 2021 plus Kshs. 45,000 monthly from March 2021 till the final determination of this suit.
  - d. General Damages for loss of comfort of staying in her own house, inconvenience, psychological and mental distress of Kshs. 2,000,000.
  - e. Interest on 2, 3 and 4 at commercial rates from the time of filing the suit till full and final payment of the same.
  - f. Costs of the suit.
3. The matter proceeded for hearing where Plaintiff had two witnesses while the Defendant had one witness.

### **Evidence of the Plaintiff**

4. The Plaintiff as PW1 testified that she is a neighbour to the Defendant herein. She confirmed being the owner of parcel of land known as Plot No. 337/1682 hereinafter referred to as the 'suit land' while the Defendant owns Plot No. 337/1683. It was her testimony that on 28<sup>th</sup> August, 2003 the Defendant herein wrote to the Town Clerk in Mavoko Municipality complaining that she had shifted boundaries marking out their two plots and one beacon was missing. Further, she responded to the complaint and expressed her willingness to have a surveyor rectify the problems. She explained that she engaged the services of a Private Surveyor who confirmed that the Defendant had encroached on 0.0141 acres of her land. She further testified that after receiving the Private Surveyor's report, she wrote to the Defendant through the letter dated October 28, 2003 in which she requested her to stop construction on the part of the land she had encroached upon failure to which she would seek legal redress but the Defendant in response insisted that she was building on her plot. Further, she proposed to the Plaintiff to maintain the boundaries as they were. It was her testimony that the Town Clerk also advised the Defendant to stop construction. The Plaintiff further testified that the parties bought their respective parcels of land from the same vendor. On cross-examination, the Plaintiff confirmed that they both bought their plots from the same vendor one Mr. Kamau of Chal Developers Limited. The size of her plot was 0.1368 Acres. She stated that the Defendant was present when the Private Surveyor visited the site. The Surveyors pointed to them where the actual beacons were to be and confirmed that the Defendant had encroached on 0.0141 acre of her plot. On re-examination the Plaintiff referred to a report by the government surveyor which showed that the Defendant had encroached onto her plot.
5. PW2 Rosana Ngina Kitusa who was Surveyor confirmed that she visited LR L.R No. 337/1682 and L.R. 337/1683 under the instructions of the Plaintiff. She explained that the beacons for L.R. 337/1682 were intact. Further, there was a fence which had encroached from Plot No. 1683 onto Plot No. 1682 which was about 9.4 metres, with the encroachment area measuring 0.0141 Ha. She testified that both the Plaintiff and the Defendant were present during the survey exercise. On cross-examination, she confirmed working for Arch Surveyors who did the initial survey for Chal Developers Limited who were the original owners of the subject two parcels of land. She clarified that the Plaintiff wanted the area surveyed so that the exact boundaries of the two parcels of land could be established and the dispute on boundary settled once and forever.



5. She reiterated that Plan reference No. RINSA 37/9 depicted the real situation on the ground and this is what was used in preparation of Title Deeds. Further, upon completion, the plan was forwarded to the Director of Survey for authentication and once it was authenticated the plan was given to the clients who were to present it to the Commissioner of Lands for preparation of Title Deeds. The Plaintiff produced the following documents as her exhibits: Certificate of Title No. I.R. 64954 for land Ref. No. 337/1682 Mavoko Municipality together with Deed Plan No. 179576; Letter dated 27<sup>th</sup> November, 2003 from Arch Surveys together with sketch map showing extent of encroachment into land Ref. No. 337/1682 Mavoko Municipality.

### **Evidence of the Defendant**

6. The Defendant as DW1 confirmed being the lawful owner of land known as L.R. No. 337/1683 which she purchased from Chal Developers Limited. She explained that before buying the parcel of land she visited the ground with a Mr. Kamau from the seller's company who pointed out to her the position of the beacons and boundaries. It was her testimony that L.R. 337/1682 borders L.R. No. 337/1683 which is owned by the Plaintiff. She claimed in the year 2002, her groundskeeper informed her that the Plaintiff herein had moved one of the beacons on one side of the common boundary they shared and placed it into the subject land and also moved the fence. She testified that she started construction on the parcel of land and wrote to the Town Clerk on 29<sup>th</sup> August, 2003 requesting for re-establishment of the boundaries. Further, that the Town Clerk sent a surveyor who visited the site but did not carry out the survey. She denied trespassing on the Plaintiff's land and contended that in case of any problems the Plaintiff ought to have sought redress from the seller. She confirmed she did not have a Surveyor to survey their plots to establish their boundary but there was a survey carried out by a government surveyor through orders of the court. Further, that the report of the government surveyor supported her case. She argued that the acreage of land indicated in the Certificate of Title for Plaintiff's parcel of land is double the one on the ground. She clarified that she was also shown the boundaries of the plots by one Mr. Mutiso who also assisted with water from his tank when she was constructing her permanent structure. The Defendant produced the following documents as her exhibits: Letter dated 29<sup>th</sup> August, 2003; Letter dated 30<sup>th</sup> October, 2013 by the Defendant; Defendant's copy of Certificate of Title; Letter by Chal Developers Limited dated 6<sup>th</sup> May, 2004 part of this Court's record. Survey Plan receipt; Approval of building plan receipt; Invoice from Briqs & Associates dated 18<sup>th</sup> March, 2021 and Rent payment schedule and receipts for Komarock Block 134/859 from January, 2005 to February, 2021.

### **Submissions**

#### **Plaintiff's Submissions**

7. The Plaintiff in her submissions reiterated her evidence as presented. She argued that the Land Registrar through a Surveyor from her office is the one with the original jurisdiction on boundary disputes. She referred to Section 18 of the [Land Registration Act](#), and insisted that the report by the government surveyor which confirmed encroachment and the one by the private surveyor which supported the findings by the government surveyor are the documents which will lead this Honourable Court to reach a just decision in this matter. To buttress her averments, she relied on the following decisions: [Keiyian Group Ranch v Samuel Oruta & 9 others](#) [2021] eKLR and [Frankline Ngira Osenoh v Elphas Barasa Okhonjo](#) [2022] eKLR.



## Defendant's Submissions

8. The Defendant in her submissions relied on the evidence she presented including her exhibits. She argued that by the time she was purchasing the suit lands Mr. Mutiso's fence was there and visible and she bought the parcels as they were. She submitted that for close to six (6) years, both Mr. Mutiso and the Plaintiff had no issues with the boundaries as they were. Further, it is only after she left the country and kept off the land that the Plaintiff encroached on it, after her husband died. She insisted that the parties identified their respective general boundaries to their parcels using physical features including the beacons as they were during the purchase. She reiterates that the Plaintiff is barred by the doctrine of waiver and acquiesces if at all. Further, that the Plaintiff cannot be seen to take an adverse position with regard to the boundaries that were already established with the knowledge and concurrence of the purchasers. She reaffirms that neither the Plaintiff, a Surveyor nor the court has jurisdiction to change, vary or alter the general boundaries of the parcels of land as the function lies with the Registrar of Lands under the repealed Registered Lands Act. She reaffirms that, from the evidence tendered in court, there was a disparity between the acreage indicated on the Plaintiff's land, the size indicated on the survey map and the actual size on the ground. Further, that this anomaly did not only affect her land, the Plaintiff's land but ran through all over the scheme by Chal Developers Ltd as there was a general overlap on multiple parcels of land. She avers that she is hence entitled to the orders as sought in the Counter-claim. To support her arguments, she relied on the following decisions: Samuel Wangau vs. AG & 2 others (2009) eKLR; Azzuri Limited v Pink Properties Limited [2018] eKLR; *Jane Njeri Arthur v Joseph Mwaura Njoroge* [2019] eKLR; *Rajnikantkhetshi Shah v Habib Bank A.G. Zurich* [2016] eKLR; Smith vs Clay [1767] EngR 55, (1767) 3 Bro CC 646, (1767) 29 ER 743 and *Azzuri Limited v Pink Properties Limited* [2017] eKLR.

## Analysis and Determination

8. Upon consideration of the Plaintiff, Amended Defence including Counter-claim, witnesses' testimonies, exhibits and rivalling submissions, the following are the issues for determination: Whether the Defendant has trespassed on the Plaintiff's land being L.R. No. 337/1682. Whether the Plaintiff is entitled to the orders sought in the Plaintiff. Whether the Defendant is entitled to orders sought in the Counter-claim. Who should bear the costs of the suit.

### **As to whether the Defendant has trespassed on the Plaintiff's land being L.R. No. 337/1682.**

9. It is not in dispute that the Plaintiff's and Defendant's parcels of land being LR Nos. 337/1682 and 337/1683 neighbor each other. It is further not in dispute that both the Plaintiff and Defendant purchased their respective parcels of land from the same vendor Chal Developers Limited. The Plaintiff claims the Defendant trespassed on a portion of her land and commenced constructing thereon, which fact is disputed by the Defendant. PW1 in her testimony stated that she had been peacefully residing on her Plot No. 337/1682 until 28<sup>th</sup> August, 2003 when the Defendant wrote to the Town Clerk Mavoko Municipality complaining that she had shifted the boundaries. Further, that she responded to the said letter denying the allegation. PW2 confirmed that their company Arch Surveys proceeded to the suit lands, undertook measurements and found that the Defendant had indeed encroached on the Plaintiff's land. In cross-examination PW2 admitted that several parcels of land overlapped on each other. PW1 in her testimony confirmed engaging a private surveyor to confirm the boundaries between the Defendant's land and hers. Further, the said Surveyor found that the Defendant had indeed encroached on her land and produced a Letter dated 27<sup>th</sup> November, 2003 from Arch Surveys. PW1 during cross-examination stated that in 2003, the Private Surveyors used the Deed Plan to come up with actual acreages of the land and confirmed that the area encroached upon was 0.0141 acre. DW1



in her testimony contended that she found the Plaintiff already occupying her portion of land when she took occupation of her land. She however admitted having called the first Surveyor from Mavoko Municipality to resolve the boundary dispute between the Plaintiff and herself. She confirmed that the first Surveyor was unable to resolve the boundary dispute due to discrepancies on the ground against the survey plan. She further confirmed that the Government Surveyor whom the court ordered to identify the boundaries found that the position of the plots as occupied was different from the way the survey plan was identifying them. She admitted putting up a structure on the dispute portion of land.

10. I note on the 2<sup>nd</sup> December, 2004, the Court ordered that the Government Surveyor was to carry out survey of the plots and work on the boundaries as per original records held by the seller. I wish to highlight some excerpt from the report by the District Surveyor Machakos, dated the 16<sup>th</sup> February, 2005 which was filed in court on 17<sup>th</sup> February, 2005, as per the Order issued on 2<sup>nd</sup> December, 2004, where the following observations were made:
  1. That the disputants fenced their boundaries and started their developments as pointed out by the seller.  
His boundaries made parcel 337/1683 to encroach into parcel 337/1682 see fencing on attached sketch.
  2. The seller's shown boundary do not conform with the surveyed boundaries shown in black on attached sketch.
  3. Fences exist on the ground as shown by seller who confirmed he pointed out the boundaries as fenced.
11. From his observations including perusing the map he attached to the report it is evident that indeed the Defendant had encroached on the Plaintiff's land. In conclusion the Surveyor stated that parties may restrict themselves to their surveyed boundaries as pointed out by the Surveyor or seek for relevant authority to amend the surveyed layout to conform with the ground occupation layout. I note from the observations of the government surveyor, it confirms the findings of PW2 that indeed the Defendant had encroached into the Plaintiff's land.
12. I note the dispute herein arose during the regime of the Registration of Titles Act. Further, the titles to the Plaintiff and Defendant's plots were issued under the now repealed, Registration of Titles Act. It is trite that for titles issued under the Registration of Titles Act (repealed), boundaries were fixed and defined as opposed to the ones issued under the repealed Registered Land Act Cap 300. Therefore, I opine that the dispute herein is exempt from the provisions of the repealed Registered Land Act and Section 18 of the Land Registration Act where the Land Registrar is mandated to only deal with general boundaries but not fixed ones.
13. In the current scenario, the Plaintiff and Defendant hold respective titles to their land. Further, the boundaries were designated by beacons and there were Deed Plans clearly delineating the boundaries. The parties herein involved surveyors to identify the beacons and the Court further ordered for a Government Surveyor to proceed and confirm the boundaries. The said government surveyor prepared a report in respect to his findings whose excerpt I have cited above.
14. In the case of *Azzuri Limited v Pink Properties Limited* [2018] eKLR, the Court of Appeal while dealing with an Appeal emanating from a boundary dispute observed that:

“...This means that under the aforesaid provisions, boundary disputes pertaining to lands falling within general boundary areas must be referred to the Land Registrar for



resolution; while disputes pertaining to lands with fixed boundaries may be investigated and possibly resolved simply through a surveyor.” Emphasis mine

15. While in the case of *Ali Mohamed Salim vs Faisal Hassan Ali* (2014) eKLR it was held as follows:

“...land registered under the Registration of Titles Act required a cadastral survey to be prepared, which is based on a fixed boundary principle. Such a survey has an accurate linear and angular measurements to aid the registration of a title of a plot. The boundaries of land registered under the Registration of Titles Act can easily be identified by any surveyor because of the fixed nature of its beacons.” Emphasis mine

See also the decision in *Aden Abdullahi Mohamed v George Dominic Otieno & 2 others* [2021] eKLR.

16. Based on the evidence before me while relying on the legal provisions I have referred to including associating myself with the quoted decisions, I find that since the boundaries to the two plots were fixed, the Defendant ought to have confirmed her proper beacons before proceeding to construct on the disputed portion of land. I hence find that the Defendant indeed encroached on the Plaintiff’s land. Since both the Plaintiff and Defendant both have titles to their respective parcels of land including Deed Plans, it would only be proper if each one retains the portion of land they purchased as per the title. Further, any anomaly on the ground be rectified to conform to the fixed boundary as per the Deed Plans. In the circumstance, I find that the Plaintiff is indeed entitled to the orders as sought in the Plaintiff.

**As to whether the Defendant is entitled to the orders as sought in the Counter-claim.**

17. The Defendant sought for various orders which are enumerated above. DW1 however admitted that she constructed on the disputed portion of land. Further, that the Town Clerk had advised her to stop construction but she proceeded to do so. The Defendant insists that she proceeded to fence the land as pointed to her at the point of purchase by the Vendor, and it was the Plaintiff’s problem that she did not fence her whole parcel of land. However, I note she admitted that there were beacons on the ground. To my mind I wonder why she never stuck to the beacons which fixed the boundary instead on relying on the barbed wire fence. It emerged in evidence that it is actually the Defendant who commenced complaining that the Plaintiff had encroached on her portion of land and brought in a Surveyor from Mavoko Town Council whom she says never wrote a report. I opine that if indeed there was a challenge before she commenced construction, then she ought to have had a hindsight and ceased developing her land until the issue of the boundaries was resolved. Since the government surveyor already made a finding that indeed the Defendant had encroached onto the Plaintiff’s parcel of land, I find that the Plaintiff cannot be blamed for the challenges the Defendant experienced nor damages suffered but the vendor who was not a party to the dispute herein is responsible for it. I opine that the damages sought by the Defendant should actually be channeled to the vendor who she claims pointed the boundaries to her, at the point of purchase. In the circumstances, I find that she is not entitled to the orders as sought in the Counter-claim.
18. On the issue of costs, I find that since the vendor was responsible for the dispute herein, noting that it is not a party to this suit. In the interest of justice, each party is directed to cater for their own costs.



19. It is against the foregoing that I find the Plaintiff has proved her case on a balance of probability and will enter Judgment in her favour and dismiss the Counter-claim. I will proceed to make the following final orders:
- a. A declaration be and is hereby issued that the Plaintiff is the lawful owner and entitled to possession of all that piece of land situate in Mavoko Municipality in the Machakos County containing by measurement 0.1368 Ha or thereabout and being L.R. No. 337/1682.
  - b. A declaration be and is hereby issued that the Defendant is a trespasser in a portion containing by measurement 0.0141 Ha or thereabouts excised from L.R. No. 337/1682.
  - c. The Defendant whether by herself, her servants, agents or otherwise be and are hereby restrained from remaining on or continuing in occupation of a portion containing by measurement 0.0141 Ha or thereabouts excised from L.R. No. 337/1682.
  - d. Each party do bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 16<sup>TH</sup> DAY OF MARCH, 2023**

**CHRISTINE OCHIENG**

**JUDGE**

