



**Block v Kenya Forest Service; Chief Land Registrar & 3 others (Interested Parties) (Environment & Land Petition 1396 of 2014) [2023] KEELC 17993 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 17993 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION 1396 OF 2014**

**MD MWANGI, J**

**JUNE 15, 2023**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010**

**-AND-**

**IN THE MATTER OF THE FORESTS ACT, CHAPTER 385, LAWS OF KENYA**

**-AND-**

**IN THE MATTER OF THE SURVEY ACT, CHAPTER 299, LAWS OF KENYA**

**-AND-**

**IN THE MATTER OF THE BOUNDARY BETWEEN THE  
KARURA FOREST AND LR NO 214/432, MUTHAIGA**

**BETWEEN**

**JEREMY MARK BLOCK ..... PETITIONER**

**AND**

**KENYA FOREST SERVICE ..... RESPONDENT**

**AND**

**CHIEF LAND REGISTRAR ..... INTERESTED PARTY**

**ATTORNEY GENERAL ..... INTERESTED PARTY**

**DENNIS AWORI ..... INTERESTED PARTY**

**DIRECTOR OF SURVEYS ..... INTERESTED PARTY**

*(Formerly Nairobi Constitutional Petition No 481 OF 2014)*



## RULING

### Basis of the Ruling.

1. This case closed on May 16, 2022 after the testimony of the Respondent's witness. The 1<sup>st</sup>, 2<sup>nd</sup> & 4<sup>th</sup> Interested parties who were all represented by the office of the Attorney General did not present any witness before the court. Ms. Fatuma, State Counsel who was present for the 3 parties informed court that she did not intend to call a witness and proceeded to close their case.
2. On March 22, 2023, this court set the date for judgment after confirming filing of submissions by the parties. Interestingly, the Office of the Attorney General filed submissions for the 1<sup>st</sup> & 2<sup>nd</sup> Interested Parties leaving out the 4<sup>th</sup> Interested Party, the Director of Surveys.
3. The only issue for determination in this matter as correctly captured by the Petitioner in his submissions is whether the boundary between the Petitioner's property, LR No 214/432, Muthaiga and that of Karura Forest is the current canalized course of Gitathuru river or otherwise.
4. One of the Interested parties who was named by the Petitioner as such is the Director of Surveys who as I have already pointed out did not present any evidence before the court. Under section 30 of the Survey Act, Cap 299, Laws of Kenya, the Director of Surveys is the custodian of all survey plans and records. The section requires every surveyor who executes any survey in accordance with the Act or any regulations made thereunder to send the Director all plans, field notes and computations relating thereto and all the said plans, field notes and computations shall be deposited in the survey office.
5. The Director of Surveys is therefore not only a necessary party but a critical witness to such a dispute, as the one before the court, to enable the determination of the dispute with finality.

### Court's decision.

6. This court having considered the pleadings and evidence adduced in this matter finds it necessary to vacate the orders as to the delivery of the judgement, re-open the case, and call the Director of Surveys to testify and shed light on the issue in dispute in this matter, before rendering a judgment.
7. The law allows the court to, on its own motion and at any stage, call any witness. This, I must however point out is only where it is absolutely necessary for the just determination of the case. The parties in this case will definitely have a right to cross-examine the witness so called by the court in this manner, and file further submissions thereafter, if they deem it necessary.
8. Section 22(b) of the Civil Procedure Act empowers the court either on its own motion or on an application by any party to issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid.
9. The Evidence Act, on the other hand at section 173 empowers a Judge or a Magistrate, in order to obtain proper evidence, to ask any question, in any form, at any time, of any witness, or of the parties about any fact and to order the production of any document or thing.
10. Sir Barclay Nihill, P in the case of *Jashbbhai C Patel Vs BD Joshi* (1952) 19 EACA 42, observed that if, "the hands of the court were tied by some rule that the case should remain entirely in the hands of the parties, the trial of such cases might present great difficulty and the end of justice might be perverted."



11. Sir Barclay Nihil, P, however, warned that,

“ A trial judge should be careful not to descend into the arena where his vision may become clouded by the dust of the conflict”.

12. This discretion must be exercised only in exceptional circumstances and with great caution. I consider this an exceptional case that justifies the exercise of the said court’s discretion in order to do justice between the parties, to secure a fair trial and determine the dispute with finality.

13. Therefore, for purposes of the just and conclusive determination of this matter, the court vacates its order on delivery of a judgment earlier given and re-opens the case to enable the Director of Surveys appear as a witness. The court will issue appropriate summonses to the Director of Surveys to testify before the court on an appropriate date.

14. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF JUNE 2023.**

**M.D. MWANGI**

**JUDGE**

**In the virtual presence of:**

Mr. Muchiri with M/s Lucy Mwaura for the Petitioner and 3<sup>rd</sup> Interested Party.

No appearance for the Respondent and Interested Parties.

Court Assistant – Yvette.

**M.D. MWANGI**

**JUDGE**

