



**Muiruri v Kanyagia (Environment and Land Appeal E080 of 2022)  
[2023] KEELC 17992 (KLR) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 17992 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E080 OF 2022**

**JG KEMEI, J  
JUNE 15, 2023**

**BETWEEN**

**PETER NJOROGE MUIRURI ..... APPELLANT**

**AND**

**SAM THIGA KANYAGIA ..... RESPONDENT**

*(Being an appeal against the Judgment and Order issued on the  
8/9/2022 by the Chief Magistrate's Court at Thika by Hon Moses  
Wanjala Wanyonyi (Mr) in CM ELC Case No. E050 of 2021)*

**JUDGMENT**

1. The Appellant was the Defendant in the CMCC No. 50 of 2021, before trial Court in Thika. Vide a Plaintiff filed on 2/6/2021 the Appellant/Defendant was sued by the Plaintiff/Respondent seeking the following orders:
  - a. A mandatory injunction be issued restraining the Defendant by himself, agent, servant and/ or anybody claiming through him from selling, charging, disposing off, developing, occupying and/or interfering in any other manner with all that plot known as Plot Number LR Number 4953/4043 held at Thika Garissa Road Development Limited.
  - b. In the alternative of (a) this Honourable Court do issue an order of eviction against the Defendant.
  - c. Cost of this suit.
2. It was the Plaintiff's averment that he was the registered owner of LR 4953/4043 having acquired through purchase from Thika Garissa Development Ltd, the previous owner.
3. That the Defendant had trespassed onto the property and constructed a house without the consent and knowledge of the Plaintiff.



4. The Defendant in his defence and counterclaim contended that he purchased the property from Felix Nduati Kiarie t/a Promised Investments Ltd, took possession and developed rental units and rented out to third parties. He averred that there could be a possibility that the Plaintiff has not adequately identified his plot. That he stands to lose close to over Kshs. 3 Million being the purchase price, construction costs and expected rental income.
5. In his counterclaim he averred that he is a bonafide purchaser for value of the property and is entitled to peaceful possession occupation and use of the same. That the Plaintiff has not shown evidence of ownership of the property. He urged the Court to dismiss the Plaintiff's claim and allow the counterclaim.
6. In reply to defence and defence to counterclaim dated 13/8/2021 the Plaintiff reiterated that he purchased the land LR No. 4953/4043 from Thika Garissa Road Development Ltd. He put the Defendant to strict proof in the acquisition of the property. He urged the Court to dismiss the counterclaim and allow his claim.
7. Upon hearing and determining the suit the trial Court held as follows:-
  - a. The Plaintiff's case succeeds in terms of prayer (h) of the Plaint.
  - b. The Defendant to, within 30 days from the date hereof remove/demolish the part of his building encroaching on the Plaintiff's parcel number 4043 as demarcated by the survey plan co-ordinates shown at finding € above. Should the Defendant fail to comply within the stated period, eviction to issue. Either party is at liberty to engage the services of the District Surveyor – Thika for purposes of establishing the extent of the encroachment by pointing out where the said survey plan co-ordinates / beacons are.
  - c. The Plaintiff's claim for damages is dismissed.
  - d. Costs of the suit awarded to the Plaintiff.
8. Aggrieved by the Judgment of the Hon. Trial Court, the Appellant has proffered the appeal on the grounds set out as:-
  - a. That the Learned Trial Magistrate erred in law and fact when he failed and/or refused to appreciate and/or analyse evidence before him thus arriving at a wrong decision.
  - b. That the Learned Trial Magistrate erred in law and fact when he failed to appreciate the fact that there was a discrepancy and contradiction in the two (2) reports from the Thika Kiambu Sub-County Surveyors and evaluate the whole case in its totality and therefore arrived at a wrong decision.
  - c. That the Learned Trial Magistrate erred in law and fact when he failed to analyse and/or appreciate the claim and the evidence submitted before him thus arriving at a wrong decision.
  - d. That the Learned Trial Magistrate erred in law and fact when he failed to take into consideration the Defendant's written submissions both on the law and facts thus arriving at a wrong decision.
  - e. That the Learned Trial Magistrate erred in law and fact when he misdirected himself by wrongly drawing issues before him thus arriving at a wrong decision.
  - f. That the Learned Trial Magistrate erred in law and fact when he did not and/or totally ignored the Appellant's counterclaim thereby arriving at the wrong decision.



9. The Appellant prays for orders as follows:-
  - a. The suit in the Lower Court be allowed to proceed on its merit.
  - b. The Appellant be awarded costs both in this Court and the Lower Court.

### **The Written Submissions**

10. The firm of Dola, Magani & Co. Advocates filed written submissions on behalf of the Appellant.
11. It was submitted that the main issue for determination is whether the Appellant has built on the Respondent's land. It was submitted that the surveyor did not establish ownership of Parcel 4041 on the ground. That she found out that the parcel 4041 encroaches on the power line but was unable to show the extent because she did not get the survey plan indicating the power line to be able to prepare a comprehensive report. That they found that the ground position of the suit parcels differ with existing survey records. That the report indicated that LR No. 4043 is not developed. That the second report contradicts the earlier report carried out by the second surveyor. That the report of the second surveyor was prepared without going to the ground and without any input from Mr. Koech and the parties with the consequence that the report totally contradicted the earlier survey report. That his plea to the Court to have the Director of Surveyors to visit the area and resurvey the plots was not granted hence the confusion on the encroachment and its extent. It was submitted that the trial Court erred in failing to appreciate the discrepancy and contradiction in the two reports of the surveyors. That the Judgment was based on an inconclusive and contradictory reports. That the extent of encroachment was not determined. Finally, that the Judgment is not capable of enforcement in its current state.
12. The firm of Njeri Kuria & Co. Advocates filed written submissions on behalf of the Respondent.
13. It was submitted that the Appellant has disputed the Judgment citing various grounds with the main reason being that the trial Court failed to take notice of varying reports by the surveyors in arriving at its decision.
14. It was submitted that the Court needed to determine the issue of ownership of parcel 4041 as currently, it is vague. That it is a question that remains to be determined.
15. As to whether the Appellant has encroached on to the Respondent's plot LR No. 4953/4053, the Respondent answered this in the negative. He is of the firm view that the Appellant has not proved ownership of the land. That the land LR No. 4953/4041 is on a power line and that is why the Appellant failed to present any ownership documents before the Court.
16. On the variances in the survey reports the Respondent submitted that the difference is minor and the same was well explained in the 2<sup>nd</sup> surveyors report. That the 2 reports agree that there is encroachment on the Respondent's plot. Consequently, the trial Court did not err in determining that the Appellant's building encroached onto the Respondent's plot as the report indicates that it is the only developed plot on the ground.
17. Further the Respondent termed the appeal as an abuse of the Court process as what the Appellant is seeking can be confirmed by the District Surveyor on the extent of the encroachment.
18. Finally, on demand it was submitted that the Respondent was duly served with a demand letter on 13/3/2021 as shown on page 35 of the Record of Appeal.



## Analysis and Determination

19. Having read and considered the record of appeal, the written submissions of the parties, evaluation of the evidence led at the trial and all the material placed before this Court the following issues fall for determination;
- a. Whether there are discrepancies in the two survey reports and whether on the face of the said reports the Court reached the correct verdict.
  - b. What orders should the Court grant?
  - c. Who meets the costs of the appeal?
20. The duty of this Court is set out in Section 78 of the *Civil Procedure Act* which espouses the role of a first appellate Court to include the re-evaluation, reassessment and reanalyse of the record and draw its own conclusions. As a first appellate Court, this Court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing its own conclusions from the analysis. The Court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This duty has been affirmed in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, as thus:
- “... 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 ...”
21. The case of the Respondent in the trial Court was that of encroachment of his property LR No. 4953/4043 by the owner of parcel LR No. 4953/4041 who constructed a house thereon. The Applicant on the other hand has denied the Respondent’s claim and averred that he is the owner of parcel LR No. 4953/4041 having purchased it from one Felix Nduati Kiarie and that the Respondent is interfering with his quiet possession and occupation and use of his parcel of land.
22. Evidence was led by Bernard Koech and Ann Mwangi, both surveyors, who informed the Court that they prepared each a report on the two parcels of land. The report prepared by Mr Koech dated the 10/11/2021 made the following findings;
- “From plotting it was noticed and realised that the ground position of the suit parcels of land differ from existing survey records as graphically presented on the attached sketch maps;
- a. The land reference number 4953/4041 on the survey plans is represented by RP4, NG4, KH41 and KH40 while the ground it appears as 480, 483, 474 and 482.
  - b. The LR No 4953/4043 on the survey plans is represented by KH43, KH42, RP10 and KH44 while on the ground it appears as 471, 486, 485 and 487.”
23. The report prepared by Ms Ann Mwangi dated the 1/2/2022 made the following findings.
- “The claimant of parcel LR No. 4953/4041 is currently developed on the ground as at the time of survey but the building encroaches on parcel LR No. 4953/4043 and parcel LR No.



4953/4042 as diagrammatically represented on sketch map 1. The position of parcel LR No. 4953/4041 as represented on FR 380/37 would coincide with the existing power line as diagrammatically represented on sketch map 2.”

24. I have also keenly perused the RIM which shows the two plots adjacent to each other but separated by a power trace. It is clear from the two reports read together with the sketch maps that there is encroachment of parcel LR No. 4953/4043 by parcel LR No. 4953/4042 by parcel LR No. 4953/4041. Parcel LR No. 4953/4043 is not developed while parcel LR No. 4953/4041 is developed. That the building on parcel LR No. 4953/4041 encroaches on to the power trace, parcel No. LR No. 4953/4043 and parcel LR No. 4953/4042. The surveyor also informed the Court that the extent of the power trace was not determined for lack of the relevant survey plan.

25. The Court also noted the contradiction by Ms Ann Mwangi when she testified that;-

“We did not mark plot No 4041 on the ground. We did not locate it. We did not locate its beacons. We need another plan for the power line but did not get it..... I will have to seek from Mr Koech in order to establish the extent of the encroachment of the building on 4043..... if there is a variance between our two reports parties can engage private independent surveyors. We were not able to mark the beacons of parcel 4041.”

26. Upon assessing the evidence the Learned Hon Magistrate made the following findings;

- “ 15. Having reviewed the said reports and the annexed sketch maps as well as the conclusions therein and the submissions of the two surveyors and the parties, the Court reached the following findings:-
- a. That the dispute herein is not one of ownership but which involves an alleged encroachment.
  - b. The ground position of parcels 4043 and 4041 differ with existing survey records.
  - c. The surveyors were unable to mark parcel number 4041 on the ground since the same encroached on a power line.
  - d. The extent of the power line was not clarified for lack of the requisite survey plan.
  - e. The correct position of parcel numbers 4041 and 4043 should be as represented by the survey plans and records; and which are RP4, NG4, KH41, KH40 and KH43, KH42, RP10, KH44 respectively and as per the sketch plan attached to the report dated November 10, 2021. It should not be as per the ground position which erroneously indicate the two parcels as 480, 483, 474, 482 and 471, 486, 485, 487 respectively.
  - f. There is a permanent building on parcel No. 4041 which encroaches on parcels 4042 and 4043.
  - g. Neither Kenya Power & Lighting Company nor the proprietor of parcel number 4042 have lodged any complaint regarding the encroachment of parcel No. 4041.



- h. The Plaintiff did not tender any evidence to prove or quantify his claim for general damages.
- i. The Plaintiff proved his case to the required standards as regards the encroachment onto his parcel by the permanent building erected on the Defendant's parcel No. 4041.

27. In the final disposition the Court pronounced itself as follows;

- a. The Plaintiff's case succeeds in terms of prayer (b) of the Plaintiff.
- b. The Defendant to, within 30 days from the date hereof remove/demolish the part of his building encroaching on the Plaintiff's parcel number 4043 as demarcated by the survey plan co-ordinates shown at finding (e) above. Should the Defendant fail to comply within the stated period, eviction to issue. Either party is at liberty to engage the services of the District Surveyor – Thika, for purposes of establishing the extent of the encroachment by pointing out where the said survey plan co-ordinates/beacons are.
- c. The Plaintiff's claim for damages is dismissed.
- d. Costs of the suit awarded to the Plaintiff."

28. Whilst the Hon trial Court may have made the correct findings based on the documents and evidence laid before it, I must add that none of the findings assisted the Court to answer the critical question of the extent of the encroachment which was the gravamen of the suit before the Court.

### **The Need for Retrial**

29. In the case of *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] EA the Court held that;

"... The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

30. Section 78 of the *Civil Procedure Act* provides as follows:-

"Powers of Appellate Court-

- "(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power –
  - (a) To determine a case finally;
  - (b) To frame issues and refer them to trial;
  - (c) To take additional evidence or to require the evidence to be taken;
  - (d) 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.”

31. The Court finds that the trial Court did not arrive at a final verdict in this case. It allowed the parties to engage the surveyors for purposes of establishing the extent of the encroachment and by so doing did reopen the case for further litigation.

### **Final Orders for Disposal**

32. To allow the dispute to be heard and determined in finality, I order a retrial and make the following orders;

- a. The Judgement be and is hereby set aside in its entirety.
- b. The suit be and is hereby referred for retrial before another judicial officer other than Hon. M. W. Wanjala, SRM.
- c. The survey reports be and are hereby rendered incomplete and are struck out.
- d. Fresh surveyors reports to be prepared in accordance with Section 18 and 19 of the [Land Registration Act](#) showing the extent of the encroachment and any other significant feature(s) on the ground.
- e. Thereafter the Court to hear and determine the suit on priority basis.
- f. No orders as to costs.

33. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 15<sup>TH</sup> DAY OF JUNE, 2023  
VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of

Dola for Appellant

Ochieng for Respondent

Court Assistants – Kevin & Lilian

