



**Mwangi v Njoroge & 4 others (Environment & Land Case E11 of 2023)
[2023] KEELC 19976 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19976 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E11 OF 2023
FM NJOROGE, J
SEPTEMBER 22, 2023**

BETWEEN

SUSAN WANJIRU MWANGI PLAINTIFF

AND

STEPHEN KIMANI NJOROGE 1ST DEFENDANT

JOSEPH WAGEMMA 2ND DEFENDANT

DIRECTOR OF SURVEYS 3RD DEFENDANT

NAIVASHA DISTRICT LAND REGISTRAR 4TH DEFENDANT

**SUB-COUNTY LAND ADJUDICATION AND SETTLEMENT OFFICER,
NAIVASHA 5TH DEFENDANT**

RULING

1. This ruling is in respect to the plaintiff/applicant's Notice of Motion application dated May 10, 2023 which is expressed to be brought under Order 45 Rules 1, 2, 3 & 5, Order 22 Rule 22 of the [Civil Procedure Rules](#) and section 3A & 63 (e) of the [Civil Procedure Act](#) which sought the following orders:
 - a. Spent
 - b. Spent
 - c. That this honorable court be pleased to review or set aside its orders issued on May 5, 2023 in so far as terming the matter as a boundary dispute and directing the Nakuru County Surveyor to visit the subject parcels and file a report on encroachment within 30 days.
 - d. That the costs of this application be provided for.



2. The application was supported by the affidavit of the plaintiff sworn on May 10, 2023. The grounds on the face of the application and the supporting affidavit were that on May 5, 2023 this Court delivered a ruling directing the Nakuru County surveyor to visit land parcel No's. Naivasha/Kiambogo Scheme 623 and Naivasha/Kiambogo Scheme 597 and file a report on any encroachment within 30 days; that the court in its ruling indicated that the issue before it was a boundary dispute; that as per the plaintiff's pleadings the issue was not a boundary dispute but rather an issue of trespass and fraudulent alteration of Registry Index maps to create a non-existent plot on her land; that from the map issued by the director of survey, plot No 623 and 597 don't share a boundary as plot No 623 only shares boundaries with plot nos. 601,602,603, 622 and 624; that Plot No 597 shares boundaries with plot No 596 and 598; that the defendants fraudulently altered the map by moving plot No 597 from its position and created a new plot No 597 on the plaintiff's land necessitating this suit; that if the Nakuru County Surveyor is to proceed as directed by court then he is likely to use the altered map that is subject to this suit and which is to the plaintiff's prejudice; that if the court is to also to proceed with the matter as a boundary dispute then it shall mean that the court acknowledges the altered map which shall occasion the plaintiff great injustice as she shall be condemned unheard; that no defence had been filed to date in response to the plaintiff's suit explaining how the map was altered moving plot No 597 from its original location to the plaintiff's land; that further on March 6, 2023, the 1st and 2nd defendants' Advocates sent a letter to the plaintiff's Advocates alluding that the matter before Court was a boundary dispute which letter was responded to by the plaintiff's Advocates who informed them that the issue was not a boundary dispute but rather an issue of trespass; that the 1st and 2nd defendants filed a Notice of Motion application dated March 30, 2023 seeking the orders sought which application the plaintiff never responded to as no directions were taken on it; that no proof of ownership of plot No Naivasha/Kiambogo Settlement Scheme/597 has been provided by the defendants; that as such it is only fair that the Court reviews and sets aside its orders issued on May 5, 2023 in so far as terming the issue as a boundary dispute and directing the Nakuru County Surveyor to visit the parcels and file a report on the encroachment and that Lawrence Karuingi Njoroge ought to be joined in this matter as a defendant by his own admission as per the affidavit dated March 30, 2023 where he purports to have been allotted plot No 597 in December,2022.
3. In response to the application, the 1st defendant filed a replying affidavit sworn on May 18, 2023 on May 19, 2023. He deposed that it was common ground that land parcel No Naivasha/Kiambogo Settlement Scheme/623 and Naivasha/Kiambogo /Scheme/597 share a common boundary; that the Plaintiff was alleging that the users of Naivasha/Kiambogo /Scheme/597 have gone beyond their boundary limit with Naivasha/Kiambogo Settlement Scheme/623 and as a result they were trespassing on the plaintiff's parcel of land; that the users of land parcel No Naivasha/Kiambogo /Scheme/597 on the other hand were arguing that they have restricted their farming activities within the boundary limits of their parcel of land and that they have not crossed over the common boundary into parcel No Naivasha/Kiambogo Settlement Scheme/623; that the court, after carefully considering the above scenario arrived at a correct view that the only way to get to the bottom of this would be to have the Regional Surveyor visit the two parcels of land and to take the area of each land, consider the boundary line between the two parcels of land and clearly mark the extent of trespass/encroachment by the 1st and 2nd defendants if any into the plaintiff's parcel of land and make a report to court; that the issues of trespass and boundary disputes and inter-twined; that the plaintiff alleged that they had trespassed onto her property and that trespass connotes encroachment; that once the surveyor visits the two parcels of land, he will be able to indicate if there is any trespass; that the plaintiff will not suffer any prejudice if the county surveyor goes to the ground; that the plaintiff's property is still located where it has always been located and had not been moved to any other place; that the defendants have not been served with summons to enter appearance and that is why they have not entered appearance.



Submissions

4. The application was canvassed by way of written submissions. The plaintiff filed her submissions dated May 23, 2023 on the same day while the 1st and 2nd defendants opted to rely on their replying affidavit.
5. The plaintiff in her submissions relied on Article 50 of the Constitution of Kenya, Section 80 of the Civil Procedure Act, Order 45 Rule 1 of the Civil Procedure Rules and submitted that she has been peacefully living on her property for over thirty years before the 1st and 2nd defendants entered a portion of the suit property and claimed that it belonged to them. The plaintiff reiterated that the Registry Index Map had been altered to move plot 597 from its original position to her land to create a non-existent parcel of land for the 1st and 2nd defendants. That the 1st and 2nd defendants introduced the boundary dispute issue which was not true as according to the plaintiff, the main issue for determination was trespass and alteration of maps. The plaintiff then relied on the case of M. Mwenesi v Shirley Luchburst & another Civil Application No Nairobi 170 of 2000 and sought that her application be allowed as prayed.

Analysis and Determination

6. After considering the application, the response thereto and the submissions, the only issue that arises for determination is whether the court should review its orders issued on May 5, 2023.
7. Section 80 of the Civil Procedure Act provides as follows:
 - “ Any person who considers himself aggrieved—
 - a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
8. Order 45 Rule 1 of the Civil Procedure Rules provides as follows:
 - (1) 1) Any person considering himself aggrieved;
 - a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is hereby allowed...
 - (2) A party who is not appealing from a decree or order may apply for review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate Court the case on which he applies for the review.”
9. The court in the case of Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR held as follows:
 - “Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not



be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

10. The plaintiff is seeking that the court reviews its ruling delivered on May 5, 2023 which ordered the Nakuru County Surveyor to go to Naivasha/Kiambogo Scheme 623 and Naivasha/Kiambogo Settlement Scheme/597 and establish the boundary between the two plots and indicate if there is any encroachment on the ground that the dispute herein is not a boundary dispute but an issue of trespass and alteration of maps. That if the Nakuru County Surveyor goes to the ground, he will most likely use the falsified map in making his findings.
11. The 1st and 2nd defendants opposed the said application and argued that the plaintiff claims that they have trespassed on her land and yet they have restricted their farming activities within the boundary limits of their parcel of land. The 1st and 2nd defendants also argue that the issues of trespass and encroachment are intertwined and so they are in agreement with the orders of the court that the Nakuru County Surveyor should go to the ground.
12. As was held in the case of *Republic v Public Procurement Administrative Review Board & 2 others (supra)*, the court can only review its orders upon discovery of new and important evidence which after the exercise of due diligence could not be adduced at the time the decree was issued, on account of mistake or error apparent on the face of the record and any other sufficient reason.
13. As aforementioned, the plaintiff is seeking that the court sets aside its orders issued on May 5, 2023 that ordered the Nakuru County Surveyor to go to the ground and establish the boundaries between the two parcels of land on the ground that the main issue raised in her pleadings was that of trespass and alteration of the maps and it was therefore not a boundary dispute. It is my view that the grounds upon which the plaintiff is seeking that the court reviews its orders issued on May 5, 2023 do not fall within the parameters set out by Order 45 Rule 1 as there is no discovery of new evidence and neither is there an error apparent on the face of the record.
14. Be that as it may, a perusal of the plaintiff's plaint does not contain the claim that there was an alteration of maps and only seeks that a permanent injunction be issued against the 4th defendant restraining it from making any alterations on the records with regard to the plaintiff's property which included the Registry Index Map. Further, a visit by the Nakuru County Surveyor to the suit properties will assist this court in determining the issue of whether there was trespass or not which will not prejudice the plaintiff in any way. Consequently, the plaintiff's application dated May 10, 202 lacks merit and it is hereby dismissed with no orders as to costs.

Dated, signed and delivered at Nakuru via electronic mail on this 22nd day of September 2023.



MWANGI NJOROGE
JUDGE, ELC, NAKURU



