



REPUBLIC OF KENYA



KENYA LAW
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**Nzau v Nzuve & another (Environment & Land Case 91 of 2018)
[2025] KEELC 248 (KLR) (29 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 248 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 91 OF 2018
TW MURIGI, J
JANUARY 29, 2025**

BETWEEN

FLORENCE MASWILI NZAU PLAINTIFF

AND

ONESMUS KITHUKA NZUVE 1ST DEFENDANT

PHILIP LOKI MUTISYA 2ND DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit against the Defendants vide a Plaint dated 12th September, 2018, seeking the following orders: -
 - i) An order of permanent injunction restraining the Defendants, their agents, employees or anybody claiming an interest through them from entering, working on, cultivating, destroying, uprooting or in any other manner interfering with the boundary between their parcels and the Plaintiff's parcel number 2421.
 - ii) The 1st Defendant do pay the Plaintiffs damages for trespass.
 - iii) This court do order that the boundary be restored at their own costs in default the Plaintiff to restore at his cost which shall be recoverable as a civil debt.
 - v) The OCS Mtito Andei Police Station do supervise the implementation of this court's orders to avoid a breach of peace.
 - vii) Costs be provided for.
2. The Defendants filed a statement of Defence dated 29th October, 2018 in which they denied the Plaintiff's claim. They urged the court to dismiss the Plaintiff's suit with costs.



The Plaintiff's Case

3. The Plaintiff Florence Maswili Nzau called two witnesses in support of her case. She adopted her witness statement filed on 21st February 2019 as her evidence in chief. She also produced the Surveyor's report dated 05/05/2021.
4. The Plaintiff testified that she is the registered proprietor of Plot No. 2421 Mangelete Adjudication Section having purchased the same from one Mulatya Mulee in the year 1978. She further testified that a dispute over the boundary between Plot No. 2421 and Plot No. and Plot Nos. 2420, 2422 and 2292 was determined on 13/10/2006 and that no appeal was lodged against the decision. That after the decision was implemented on 17/11/2011, the Defendants destroyed the boundaries prompting her to report the matter at Mtitio Andei Police Station. That consequently, the Defendants were charged with the offence of interfering with the boundary but were later acquitted. She contended that she is satisfied with the Surveyor's report dated 05/05/2021 and urged the court to restore the boundary as placed by the Surveyor. Concluding her evidence, she urged the court to grant the orders sought in the Plaintiff.
5. On cross examination by Mrs Isika, she testified that she purchased the suit property from Kalondu Kaniwa in the year 1979 before the commencement of the land demarcation exercise. She further testified that the boundary was marked with sisal plants after the demarcation exercise was concluded. She testified that the Defendants were present when the boundary was marked by beacons in the year 2011 in the presence of the chief, the District Officer, the head man and Survey officials. She denied the allegations that she destroyed the boundary features and insisted that the 2nd Defendant destroyed the same.
6. PW1 Serah Mueni Kamau, a Land Adjudication Officer and Settlement Officer based at Kibwezi produced the documents in the Plaintiff's list of documents dated 12th September 2018 and her further list dated 8th November 2019.
7. On cross examination. she testified that the decision of the Land Adjudication Office contained in PEX 7 and 8 was implemented during the demarcation period. She further testified that the boundaries were fixed by December 2006.
8. PW2 Hillary Kipkoech Rany Moi the Sub County Surveyor Kibwezi testified that the Settlement Officer in the company of Surveyors visited the suit property upon the request of the District Land Adjudication and Settlement Officer. He further testified that they relied on unverified ariel photos since they had not printed hard copy maps because Mangelete Settlement Scheme was still in the process of finalization. That when the team visited the suit property, they extracted coordinates from the soft copy map that they had generated and tried placing the boundaries using the coordinates but the boundary was abnormal.
9. He further testified that the Settlement Officer pointed out to the team where he had initially marked the boundaries. That the points identified by the demarcation officer tallied with the boundaries that were in the PID and on that basis, the boundary was adopted. He testified that the new points were picked, rectified and forwarded to the Director of Survey for publication. He confirmed that the boundary in their PID is what was placed on the ground and on the map that was forwarded to the Director of Survey for publication.
10. On cross examination he testified that the Survey report was jointly prepared by the Survey and Settlement office and signed by the District Land Adjudication and Settlement Officer. He further



testified that Mangelete Settlement Scheme has a general boundary scheme and that natural features are usually adopted to mark the boundaries.

The Defence Case

11. On 31/10/2023, Mrs Isika Counsel on record for the Defendants, informed the court that the 1st Defendant had lost interest in this matter.
12. The second Defendant Philip Loki Mutisya testified as DW1 and called one witness in support of his case.
13. He adopted his witness statement dated 03/06/2019 as his evidence in chief. He also produced the documents in his list dated 03/06/2019 as DEX 1-3 and his further list dated 31/08/2020 as DEX 4A and 4B. He informed the court that he is the owner of land parcel No 2420 located within Mangelete Settlement Scheme having purchased the same from one Francis Mutia John who pointed out the boundaries of the land. He further testified that the Plaintiff uprooted the sisal plants demarcating the boundary between the two parcels of land. He admitted that he was jointly charged with the 1st Defendant in Criminal Case No. PMCRC 1210 of 2011 and they were later acquitted. He contended that the Plaintiff is out to frustrate them from enjoying their land peacefully.
14. On cross examination by the Plaintiff, he testified that he did not witness the Plaintiff uprooting the sisal plants marking the boundary between the two parcels of land. He denied having seen any court official or surveyor visiting the disputed parcels. He also denied the allegations that the boundary between the two parcels was marked by government officials.
15. DW2 Francis Mutia John adopted his witness statement dated 2/12/2019 as his evidence in chief. It was his testimony that he sold land parcel No, 2420 to the 2nd Defendant and pointed out the boundaries of the said land. He confirmed that the 2nd Defendant had settled on the land earlier than the Plaintiff. He also confirmed that he was present when the surveyors marked the boundary between the two parcels of land.
16. On cross examination he testified that the boundary dispute is between the Plaintiff and the 2nd Defendant.
17. After the close of the hearing parties agreed to file and exchange their written submissions.

The Plaintiff's Submissions

18. The Plaintiff filed her submissions on 21st November 2024. In her submissions, the Plaintiff reiterated her evidence contained in her witness statement and the documents she exhibited in support of her evidence.

The Defendants' submission

19. The Defendants filed their submissions dated 22nd October 2022.
20. On their behalf, Counsel identified the following issues for the court's determination:-
 - a) Whether the Court has jurisdiction to handle this matter.
 - b) Mode of establishing general versus fixed boundary.
 - c) Whether the boundary was lawfully fixed by the exercise carried out during the hearing of the suit.



- d) Whether or not an order of injunction is available to the Plaintiff against the Defendants.
21. On the first issue, Counsel submitted that the Plaintiff's suit is premature as she has not exhausted the dispute resolution mechanism established under Section 18 and 19 of the [Land Registration Act](#)
 22. Counsel further submitted that the court lacks jurisdiction to entertain disputes concerning registered land. Counsel submitted that the court directed the Land Registrar to visit the disputed parcels and prepare report which shows that the Defendant parcel has overlapped on some portion of land belonging to the Plaintiff. Counsel maintained that the Plaintiff did not adduce any evidence to show that the boundaries between the two parcels was ever marked as it was not noted in the register.
 23. On the second issue, Counsel submitted that the disputed boundary between the two parcels falls within a general boundary as the boundary has never been marked by the sSurveyors.
 24. On the third issue, Counsel submitted that the court directed the Land Adjudication and Settlement Officer Kibwezi Sub County and Surveyors under the office to visit the locus quo and place the removed beacons at their rightful place in the presence of the parties and the Deputy Registrar. Counsel submitted that the Survey report is contrary to the provisions of Section 18(1) of the [Land Registration Act](#) as it does not indicate the boundary in the map and on the ground.
 25. On the fourth issue Counsel submitted that the Plaintiff did not adduce any evidence to show that the Defendants have encroached on her land or uprooted the boundary features between the two parcels of land.

Analysis and Determination

26. Having considered the pleadings, the evidence on record and the submissions, by the parties the only issue that arises for determination is whether the Plaintiff is entitled to the orders sought in the plaint.
27. The Plaintiff sought for a permanent injunction restraining the Defendants from entering, cultivating destroying or uprooting the boundary between their parcels and her parcels of land. It is not in dispute that the Plaintiff is owner of land Parcel No. 2421 Mangelete Settlement Scheme while the 1st and 2nd Defendants are the owners of land parcels Nos. 2420 and 2422 respectively. The record shows that there has been a long outstanding boundary dispute between the parties herein. PW1 produced the proceedings in land dispute for Plot No. 2420 (PEX 1) and for Plot No.2422 (PEX 6) in which the Plaintiff was awarded the disputed portion. The Plaintiff informed the court that after the determination of the boundary dispute between her and the 1st Defendants father, the decision was implemented on 17/11/2011. The District and Land Adjudication Settlement Officer confirmed in the letter dated 24/11/2011 (PEX 4) that the boundaries of P/NOS. 2422, 2292 and 2420 were marked on 17/11/2011. That after the decision was implemented, the Defendants uprooted the sisal plants demarcating the boundary. She went on to state that she reported the matter at Mtito Andei Police station and consequently, the Defendants were jointly charged with the offence of interfering with a demarcated boundary. It is not in dispute that the Defendants were acquitted of the charge vide the judgment delivered on 13/07/2018. The Plaintiff did not adduce any evidence to show that the Defendants had encroached on her land. From the foregoing, I find that the Plaintiff has not established a prima facie case to warrant the grant of a permanent injunction.
28. The Plaintiff also sought for damages for trespass against the 1st Defendant.
29. Black's Law Dictionary 10th Edition defines trespass to land as follows;

“ A person's unlawful entry on another's land that is visibly enclosed.”



30. In the case of Municipal Council of Eldoret Vs Titus Gatitu Njau (2020) eKLR the Court of Appeal cited the case of M’Mukanya Vs M’Mbijiwe (1984) KLR 761 where the ingredients of the tort of trespass were stated as follows;

“trespass is a violation of the right to possession and a Plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership see Thomson Vs Ward (1953) 2 QB 153.”

31. To establish trespass, the Plaintiff had to prove that she was either lawfully in possession of the property or was the owner thereof and that the 1st Defendant entered the property without any justifiable cause.

32. In the matter at hand, the Plaintiff did not adduce any evidence to show that the 1st Defendant had trespassed on her land.

33. The Plaintiff also sought for an order compelling the Defendants to restore the boundary at their costs. The Plaintiff testified that the Defendants uprooted the sisal plants demarcating the boundary. On cross examination she testified that she did not witness the Defendants uprooting the boundary. She further testified that she reported the matter to the police and the Defendants were charged with the offence of interfering with the boundary. The 2nd Defendant produced the judgment in Criminal Case No 1210 Of 2011 where he was jointly charged with the 1st Defendant with the offence of interfering with a demarcated boundary contrary to Section 4 as read together with Section 11 of the Trespass Act. Vide the judgment delivered on 13/07/2018 the Defendants were acquitted under Section 215 of the Criminal Procedure Code

34. It is not in dispute that the boundary between the two parcels of land was interfered with. The District Land Adjudication and Settlement Officer in his letter dated 24th November 2011 confirmed the Plaintiff’s allegations that the boundary between the parcels of land had been destroyed. On 10/11/2020, the parties agreed by consent to have the Land Adjudication and Settlement Officer Kibwezi Sub County and Surveyors under that office visit the locus quo and place the removed beacons at their rightful place in the presence of the parties. In that regard the officer visited the parcels on 09/04/2021 and carried out the exercise. PW3 testified that the boundary tallies on the ground and on the map which has since been forwarded to the Director of Survey for publication. The evidence on record shows that the Surveyor marked the boundary between the two parcels of land in the presence of both parties. PW3 testified that the boundary was adopted because the points identified by the demarcation officer tallied with the boundaries that were in the PID. He confirmed that the boundary in the PID was what was placed in the ground and in the map that had been forwarded for publication. The Defendants did not call any evidence to rebut the Surveyor’s report. The Defendants argued that the report is contrary to Section 18 of the Land Registration Act as there is no note in the register. The record shows that the parcels in dispute fall within an adjudication section and are yet to be registered. I therefore find that the report does not contravene the provisions of Section 18 of the Land Registration Act.

35. From the foregoing, I find that the Surveyor’s report reflects the correct boundary between the parcels of land. Accordingly, it is the finding of this court that that the boundary established on 09/04/2021 as per the report dated 5/5//2021 shall remain in place. Each party shall bear its own costs.

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HON. T. MURIGI

JUDGE



JUDGMENT SIGNED, DATED & DELIVERED VIA MICROSOFT TEAMS THIS 29TH DAY OF JANUARY 2025.

IN THE PRESENCE OF:-

The Plaintiff in person

Mwongela holding brief for Mrs Isika for the Defendants.

