



**Nguma & 77 others v Katelembo Athiani Muputi Farming & Ranching
Co-operative Society & 5 others (Environment & Land Petition
76 of 2017) [2022] KEELC 3614 (KLR) (30 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3614 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND PETITION 76 OF 2017
CA OCHIENG, J
MAY 30, 2022**

BETWEEN

ONESMUS NTHANGA NGUMA & 77 OTHERS PETITIONER

AND

**KATELEMBO ATHIANI MUPUTI FARMING & RANCHING CO-OPERATIVE
SOCIETY 1ST RESPONDENT
LAND REGISTRAR, MACHAKOS 2ND RESPONDENT
MINISTRY OF INTERIOR 3RD RESPONDENT
NATIONAL POLICE SERVICE 4TH RESPONDENT
DIRECTOR OF PUBLIC PROSECUTION 5TH RESPONDENT
ATTORNEY GENERAL 6TH RESPONDENT**

RULING

1. What is before court for determination is the petitioners' notice of motion application dated the March 8, 2021 brought pursuant to order 51 rule 1 of the *Civil Procedure Rules* as well as sections 1A, 1B, 3A and 63 of the *Civil Procedure Act*. The petitioners seek the following orders:
 1. That this honorable court be pleased to order the county surveyor or any other government surveyor to survey all the parcels of lands where the applicants are currently settled in to establish the boundaries and file a report on their acreage and relation with the alleged respondent's parcel of land.
 2. That parties herein be at liberty to engage an independent surveyor to be present during the exercise.
 3. That the costs of this application be borne in the cause.



2. The application is premised on the grounds that this suit is one that involves trespass and it is therefore necessary to determine the boundaries of the land in dispute. further, it is important then that the county surveyor or any other government surveyor visits the site to determine the boundaries. They contend that the said surveyor should then compile a report and file it in court so that this matter can be concluded as soon as possible. further, that the respondents will not suffer any prejudice as they will be present during the exercise and can even hire an independent surveyor if they so wish. They reiterate that once the boundaries are defined, the ongoing dispute regarding the parcel of land will be resolved. The application was further supported by the affidavit of Onesmus Nthanga Nguma who reiterated their averments above.
3. The application was opposed by the 1st respondent that filed a replying affidavit sworn by its Chairman Wilson Masila Muema who avers that it lacks merit, is frivolous and an abuse of the court process. He denies the existence of a boundary dispute between the applicants and the 1st respondent. He contends that the land in dispute also known as Katelembo Ranch was acquired by 3525 members of the 1st respondent who came together in 1971. Further, that in 1988, 1996 and 2018, the land was subdivided into plots measuring 2.04 acres comprising of ½ acre and 50 feet by 100 feet respectively and allocated to members. He confirms the applicants herein already benefited as members or family members of members of the 1st respondent. He proceeds to highlight that apart from the 4th, 7th, 8th, 10th, 11th, 12th, 16th, 20th, 21st, 22nd, 23rd, 25th, 26th, 27th, 29th, 37th, 45th, 46th, 47th, 58th and 72nd applicants, all applicants are members or family members of members who were already allocated their plots. Further, that some members are trying to grab land belonging to others and seek to benefit twice. He states that the 1st respondent's land had already been surveyed and plot numbers having been allocated, to bring in a government surveyor will amount to bringing a stranger to interfere with the boundaries including beacons that are already in place. Further, the right of the applicants to occupy the 1st respondent's land is yet to be determined and therefore the court should not allow the applicants to interfere with the survey which had already been undertaken. He reaffirms that currently, the occupation of the suit property remains contested and the court should not allow any interference with the beacons and boundaries as set by the 1st respondent's surveyors. Further, that the application amounts to a fishing expedition which this court ought to disapprove.
4. The application was canvassed by way of written submissions.

Analysis and Determination

5. Upon consideration of the instant notice of motion application including the respective affidavits, annexures and rivalling submissions, the only issue for determination is whether the court should order the County Surveyor or any other government surveyor to survey all the parcels of lands where the petitioners are currently settled in, to establish the boundaries and file a report.
6. The petitioners in their submissions contend that the survey would suffice and insist they have been in occupation of the suit land before the 1st respondent acquired it. Further, that the alleged survey altered the petitioners' land. They argue that the respondents will not suffer any prejudice if the survey is conducted. To support their arguments, they have relied on the following decisions: *Albert Boyo Kirui V Benjamin Kiprotich & 5 Others* (2019) eKLR and *Cosmas N. E Kathungu V Njue Kiarie & Another* (2017) eKLR.
7. The 1st respondent in its submissions contend that the instant application is not properly before court as the Petitioners have invoked the wrong provisions of the law. It insists the petitioners are attempting to use the court to enable them build a nonexistent case and are hence on a fishing expedition. To



support its averments, it has relied on the case of *Okiya Omtatab Okoiti V Communications Authority of Kenya & 12 others* (2016) eKLR.

8. The petitioners have sought for the court to order the County Surveyor or any other government surveyor to survey all the parcels of lands where they are currently settled in, to establish the boundaries and file a report as to the portions they occupy. From a perusal of the petition, I note the fulcrum of the dispute revolves around proprietary rights including claim for ancestral land, overriding interest on disputed land and permanent injunction, which in essence means that the petitioners own as well as know the extent of the land they occupy.

9. In relation to determination of a dispute touching on boundaries, Section 18 of the *Land Registration Act* provides that:

(1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel. (2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section. (3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary: Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the *Survey Act*, (cap 299).”

10. From a reading of these provisions, it is clear that it is the Land Registrar who is legally mandated to deal with the boundary dispute in the first instance before the matter can be handled by the court. From the averments in the supporting affidavit, it is my considered view that the petitioners filed the instant petition before the dispute was handled by the Land Registrar and now seek to collect evidence. Further, it has emerged that the suit land had already been surveyed and subdivided into smaller portions. The petitioners have not controverted the averments of the 1st respondent that most of them seek to benefit twice as they have already been allocated land.

11. In the case of *Okiya Omtatab Okoiti V Communications Authority of Kenya & 12 others (2016) eKLR*, the court held that:

In matters where the *Constitution* confers rights and fundamental freedoms, it is not enough to question the same based on speculation and conjectures. A party intending to question the same ought to adduce positive evidence on the basis of which the court can be expected to make a finding in favour of the objector. I must say that to allow the application in the manner sought would amount to proceeding on a fishing expedition and that is not the role of the court more so where there is material placed before the court which tend to show *prima facie* that the advocate on record was properly appointed or retained.”

12. Based on the facts as presented while relying on the legal provisions I have cited as well as associating myself with the quoted decision, it is my considered view that the petitioners are actually engaged on a fishing expedition as in the petition they were claiming proprietary rights and yet in the instant application they seek to obtain evidence to prove their claim. Insofar as they claim their rights have been violated, however the law is very clear that before a claim involving a boundary dispute is filed in court; the Land Registrar ought to have been involved in its determination in the first instance. Further, the onus is upon them to prove to court their proprietary rights which have been violated by the respondents.



13. In the circumstance, I find the notice of motion application dated the March 8, 2021 unmerited and will disallow it.

14. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 30TH DAY OF MAY, 2022

CHRISTINE OCHIENG

JUDGE

