



**Kaleli v Matheka & 2 others (Environment & Land Case 79 of 2017)
[2022] KEELC 12670 (KLR) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12670 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 79 OF 2017
CG MBOGO, J
SEPTEMBER 30, 2022**

BETWEEN

NZOMO KALELI PLAINTIFF

AND

KAWEU MATHEKA & 2 OTHERS DEFENDANT

JUDGMENT

1. On July 27, 2016, the plaintiff, *vide* a plaint of even date, filed suit against the defendants wherein he sought judgment against the defendants for: -
 - a) A permanent injunction restraining the 1st, 2nd and 3rd defendants whether by himself or through their servants, agents and/or employees or any other person whomsoever claiming under them from encroaching into the upper and lower part of parcel of land No Nzaiu/kilili/20 measuring 17 Hectares and from doing any other prejudicial act thereon;
 - b) An order affirming that the portion encroached upon belongs to the plaintiff herein and requiring the Makueni district surveyor to mark the boundaries as ascertained on survey; and
 - c) Costs of this suit.
2. The plaintiff averred that at all material times since 1970s, he has been the legal registered owner of the parcel of land known as Nzaiu/kilili/20 (hereinafter referred to as the “suit property”) measuring 17 hectares. According to the plaintiff, the defendants have been trespassing on the suit property by cultivating, gazing animals and cutting trees planted thereon. In spite severally warning the defendants from trespassing on the suit property, the plaintiff averred that the defendants have defied his warnings and have thus continued to trespass on the suit property.



3. It was the plaintiff's case that the upper and lower parts of the suit property are the precise points that have suffered encroachment by the defendants. According to the plaintiff, no reasonable explanation was given by the defendants on why they were trespassing on the suit property. He further stated that he contracted the Makueni District Surveyor to resolve the boundary dispute and ascertain the boundaries of the suit property. On June 23, 2016, and in the presence of the defendants, the plaintiff averred that it was established that the defendants had encroached into the plaintiff's portion of land.
4. The plaintiff further contended that in spite numerous pleas, demands and notices of intention to sue, the defendants have refused, failed and/or neglected to stop interfering with the suit property.
5. To prove his case and discharge his evidentiary burden, the plaintiff called two (2) witnesses. Peter Mutua Kinyili(PW1) testified that he is a surveyor based at Wote, Makueni, and that he holds a diploma in land surveying from Kenya Institute of Survey and Mapping. He stated that he is a government surveyor. He averred that he had a registry Index Map of Nzau/Kilili/20,14 and 22. In his evidence, PW1 relied on surveyor's report dated June 28, 2016.
6. According to PW1, he together with Mr Gabriel Maingi, and the Land Registrar Joel Atuti Ongise, visited the site in company of security officers and area administration on June 23, 2016. It was his evidence that they carried out measurements on parcels number 20 and 14 so as to determine its boundary. By using a measuring tape and GPS machine, they found that plot number 22 had a linear shape along the road.
7. On conducting the exercise, their remarks were that plot No. 22 encroaches onto plot No 20 by a distance of 60 metres in width and 300 metres in length. This is equivalent to approximately, 2 ½ acres. On the opposite of side of the land there is parcel number 14. Encroachment starts from point C and the real point of the end of the boundary is point F which according to their diagram was to measure 255 metres ie the distance "DF" on the ground as their measurement, what exists on the ground for plot 20 is 123 metres shown by distance "DE".
8. According to PW1, encroachment on parcel 20 by parcel 14 occurred from point D to point C which is a common boundary between parcels number 14 and 20 which had an encroachment of 8 metres along the line "DC". Their conclusion therefore was that parcel 20 has been encroached by parcel 22 and 14 and the public road does not exist and is not in use or it could be used by either party. He further averred that the Land Registrar remarked that the issue was not a boundary dispute but a land claim.
9. All the parties were said to have been present during the exercise. Further, PW1 stated that sisal plants were missing from the initial boundary between parcels No. 20 and 22. As for parcel No 14 along ping BC there were some trees which had been cut along the boundary. He produced the surveyor's report dated June 28, 2016 – PExh6.
10. On cross-examination, PW1 stated that the acreage of plot No 20 is 17 hectares, and that the said information is not in his report. He confirmed that he did not ascertain the acreage of plots number 14 and 22, and that they relied on measurements and distances. He maintained that this is a land claim and not a boundary dispute, and that his report is on the boundary and not land claim. On further cross-examination, PW1 averred that for them to establish the land claim, they needed the acreage of the 3 plots.
11. In re-exam, PW1 stated that they visited the site on a boundary dispute and not a land claim, and that they established that there was encroachment. The actual boundaries had been tampered with and did not conform with their map.



12. Mutindi Nzomo (PW2) adopted her witness statement dated December 7, 2016 wherein she averred that the plaintiff purchased the suit property from Ngesya Nzile and Nzioka Mbidyo in 1970s, and that she was present when the plaintiff purchased the suit property. It was her evidence that the boundaries of the suit property were shown to the plaintiff. It was her evidence that the plaintiff allowed her to utilize the suit property for grazing which she did until one day the 1st defendant asked her to stopping grazing there since the land belonged to him.
13. She further testified that after a while, one Onesmus Mutisya asked her if the plaintiff had sold the suit property since the 1st defendant and other persons were removing the sisal plantation used to mark boundaries and were also ploughing the suit property. It was also her evidence that the 2nd and 3rd defendants were cutting the indigenous trees on the suit property and using them to burn charcoal. According to PW2, the suit property belongs to the plaintiff.
14. On cross-examination, PW2 confirmed that she was the plaintiff's wife, although she could not remember the year when she married him. It was her evidence that the plaintiff bought the suit property after he married her. She also stated that she had forgotten the name of the seller of the land. It was her testimony that Nzyoka was in plot No 14 which she stated she was aware the same had been subdivided and sold.
15. According to PW2, there used to be a boundary which the 1st defendant damaged when he moved in. The boundary was marked by sisal plants which were said to have been uprooted by the 1st defendant and are not as they were when the 1st defendant moved in.
16. Further, PW2 testified that she was present when the boundaries were fixed, and that the land that is on the upper side of the suit property belongs to one Mativo Ngolya but has since been taken over by the 3rd defendant who is the current owner. She maintained that the defendants have now encroached into the suit property.
17. On re-examination, PW2, stated that there were sisal plants along the common boundary, and that no new boundaries features were fixed when the plaintiff moved in. She averred that the boundary that existed during Mativo's and Ngesa's time is no longer there since the plaintiff's suit land has now been encroached into.
18. The plaintiff then closed his case after calling his two (2) witnesses.
19. The defendants opposed the plaintiff's suit *vide* their defence dated October 28, 2016 wherein they generally denied the plaintiff's case against them and hence put the plaintiff to strict proof his allegation against them.
20. The defendants thus prayed that the suit be dismissed with costs.
21. To prove their case and discharge their evidentiary burden to rebut the plaintiff's case against them, the defendants called five (5) witnesses. The 3rd defendant - Titus Mutisya Mativo adopted his witness statement dated April 15, 2019 wherein he testified that he is the son of Mativo Ngolya who is the registered own of Nzai/Kilili/22. Between the 1968 and 1969, the 3rd defendant's father is said to have given out a portion of his land to Peter Ngesa Nzile who was his nephew, and that indigenous trees were planted to mark boundaries of the lands. Muia Maingi is said to have been instructed by the 3rd defendant's father to put up a fence between the 3rd defendant's land and the portion sold to Peter Ngesa Nzile.
22. Further, the 3rd defendant testified that Peter Ngesa Nzile sold his said portion to the plaintiff. The 3rd defendant accused the plaintiff whom he said altered the initial boundary with the help of the surveyor



- with the intention to hive off his father's portion of land. He insisted that the boundary between his father's land and the plaintiff's land has always been on a straight land and not curved as highlighted on the map. He denied the assertion that they had encroached on the suit property and that he cut the sisal plantations as alleged by the plaintiff.
23. On cross-examination, the 3rd defendant stated that his father gave the land to his nephew, Peter Ngesa Nzile, and that there was fixed boundaries between Nzai/Kilili/22 and Nzai/Kilili/20. He confirmed that he was not present when the boundary was fixed, and that surveying in the area was done between 1969 and 1973. On further cross-examination, the 3rd Accused stated that his evidence is based on the recording of his dad, and that he had not produced any surveyor's report. He confirmed that there is no road between Nzai/Kilili/22 and Nzai/Kilili/20 in spite the same being there in the map. He denied destroying the boundary between the two parcels of land.
 24. The 1st defendant, Charles Kaweu Matheka also adopted his witness statement dated April 15, 2019 wherein he testified that he is the registered owner of the parcel of land known as Nzai/Kilili/14 having purchased it from Nzioka Mbidyo in the year 1982, and that it borders the suit property belonging to the plaintiff. He averred that by the time he purchased his aforesaid land, the plaintiff had earlier purchased the suit property.
 25. According to the 1st defendant, when he purchased his portion of land, the plaintiff was called together with the area elders to confirm the boundaries of lands. He asserted that the plaintiff did not raise any issues concerning the boundaries which were established in the year 1956 and marked by sisal plantations.
 26. In the year 1999 the 1st defendant averred that the plaintiff accused him of encroaching into his land and when surveyors visited the land, they confirmed that the boundaries were in their correct position. On June 23, 2016, the 1st defendant averred that surveyors went to the scene and made findings that the plaintiff had interfered with the original boundaries. The 1st defendant further stated that he did not agree with the conclusion made in the surveyor's report to the effect that he had encroached into the plaintiff's suit land.
 27. According to the 1st defendant, the suit is aimed at dispossessing him of his land.
 28. On cross-examination, the 1st defendant stated that he bought the land in the year 1982, and that the adjudication process had already been done. On the size of his land, the 1st defendant stated that it is about 11 acres, and that he bought it from Nzioka Mbindyo. He confirmed that there was no title deed when he bought the land, and that there was no boundary. The land boundary dispute, he averred, began in the year 1999 and the same was solved back then. The 1st defendant also confirmed that a survey was done in the year 2016 and that it was found that he had encroached into the plaintiff's suit land by 123 metres. He however denied encroaching into the plaintiff's suit land as alleged.
 29. The 2nd defendant - Esther Kamene Mativo adopted her witness statement dated April 15, 2019 wherein she testified that she was the second wife to the late Mativo Ngolya who is the registered owner of Nzai/Kilili/22. She testified that her late husband gave out a portion of his land to Peter Ngesa Nzile who later sold the said portion to the plaintiff. She denied the allegation that they had encroached into the plaintiff's suit property and accused the plaintiff through the surveyor of altering the original boundary.
 30. On cross-examination, the 2nd defendant stated that she had resided on the parcel of land for many years, and confirmed that she was neither present when adjudication process commenced nor when Ngesa Nzile sold the suit property to the plaintiff. She averred that she was aware of the surveyor's report although she denied encroaching onto the plaintiff's suit land.



31. Muia Maingi (DW1) adopted his witness statement dated October 28, 2016 wherein he gave evidence that sometime in the 1970s, he was contracted by Mativo Ngolya to install a fence between his land and that of his nephew Ngesa Nzile. He averred that the fence was installed along a boundary after Mativo Ngolya gave a part of his land to Ngesa Nzile.
32. According to Muia Maingi (DW1), there were trees to mark the boundaries which trees are still around to date. He stated that he repaired the fence whenever it got damaged, and that as far as he is concerned, the boundaries have never changed and he has never been made aware of any boundary dispute.
33. On cross-examination, Muia Maingi (DW1) stated that he was neither present when Ngesa Nzile sold the land to the plaintiff nor was he present when Ngesa Nzile and Mativo subdivided their parcels of land between themselves. He asserted that he was the one who was hired to fix the boundary features, and that he did not know if a surveyor ever visited the suit land. He confirmed that he still lives in the area. He also confirmed that he planted sisal plants along the boundary, which sisal plants he stated are no longer in place. He also confirmed that the boundary was interfered with.
34. In re-examination, Muia Maingi (DW1) asserted that indeed the boundary was interfered with.
35. Matunoi Nzile (DW2) adopted his witness statement dated October 28, 2016 wherein he testified that he was the neighbor of the 1st defendant and that he was aware that the 1st defendant purchased his portion of land from Kimeu Nzioka in the year 1982 and that the same had no boundary dispute.
36. According to Matunoi Nzile DW2, he was present when the plaintiff purchased the suit land from Ngesa Nzile and when boundaries were fixed. He denied the allegation of encroachment by the plaintiff.
37. On cross-examination, Matunoi Nzile DW2 stated that although he was not present when Ngesa Nzile sold the suit land to the plaintiff, he was present when adjudication process commenced, and that the same was done in the year 1969. He confirmed having not seen the map of the suit land. On further cross-examination Matunoi Nzile, DW2 stated he was present when the boundaries were fixed. He stated that one Matunoi was hired to fix thorn branches on the boundary, and that the thorn branches are still on the boundary. He confirmed having heard of a boundary dispute between the plaintiff and the 3rd defendant. Although some of the thorn branches on the boundary decayed, he asserted that the boundary that was fixed is still in existence to date.
38. The defendants subsequently closed their case.
39. To buttress his case, the plaintiff filed his submissions on July 29, 2021 wherein he highlighted the evidence adduced at the trial in support of his case. The plaintiff submitted that he had proved his case by demonstrating that his suit land had been encroached on, hence, he prayed that the suit be allowed with costs. The court has considered the plaintiff's said submissions.
40. The defendants, in spite being given an opportunity to file written submissions failed to do so.
41. Having carefully studied all the materials presented in respect of the case herein, the court is of the opinion that only one issue arises for determination in this case, that is:
 - i) Whether the defendants have encroached onto land parcel number Nzai/kilili/20.
42. That the plaintiff is the registered owner of the suit property known as Nzai/kilili/20 is not disputed. The plaintiff in his bundle of documents annexed a copy of official search which showed that he was registered as owner of the suit property on August 2, 1976 and was issued with a certificate of



ownership thereof on November 3, 1981. On the other hand, the 1st defendant is the registered owner or parcel No Nzai/kilili/14 while one Mativo Ngolya is the registered owner of parcel No Nzai/kilili/22.

43. While the plaintiff accused the defendants of having trespassed into his parcel of land, the defendants denied being in trespass or having encroached onto the plaintiff's land. There is ample evidence that the defendants have indeed encroached into the suit land. This is indeed clearly shown by the survey report dated June 28, 2016 relied upon by the plaintiff. The survey report does show that the defendants have partly encroached into the plaintiff's land. This report was not invalidated by the defendants. It is also instructive to note that the defendants' own witness, Muia Maingi (DW1) asserted that indeed the boundary was interfered with.
44. Under section 18 and 19 of the Land Registration Act, 2012 the Land Registrar has the mandate to establish and fix boundaries of land registered under the act. I am satisfied the Land Registrar and the Surveyor duly exercised their mandate under the provisions of the Land Registration Act, 2012. Their report is well supported and I accept their finding that they confirmed encroachment into the plaintiff's parcel of land by the defendants.
45. Given the foregoing findings, I have no hesitation in holding that I am satisfied that the defendants have encroached onto plaintiff's land parcel number Nzai/kilili/20.
46. The upshot of the foregoing is that I find the plaintiff has proved his case against the defendants. Accordingly, I make the following orders:
 - a) A permanent injunction be and is hereby issued restraining the 1st, 2nd and 3rd defendants whether by themselves or through their servants, agents and/or employees or any other person whomsoever claiming under them from encroaching into the upper and lower part of parcel of land No Nzai/kilili/20 measuring 17 hectares and from doing any other prejudicial act thereon;
 - b) An order be and is hereby issued affirming that the portion encroached upon belongs to the plaintiff herein and the Makueni District Surveyor is hereby directed to mark the boundaries as ascertained on survey; and
 - c) The plaintiff shall have costs of this suit.

JUDGMENT SIGNED, DATED AND DELIVERED AT NAROK VIA EMAIL THIS 30TH DAY OF SEPTEMBER, 2022.

MBOGO C.G.,

JUDGE

30/9/2022

