



**Mwangangi v County Government of Makeni & another (Environment & Land Case E006 of 2020) [2022] KEELC 12756 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12756 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE E006 OF 2020  
TW MURIGI, J  
SEPTEMBER 28, 2022**

**BETWEEN**

**BONIFACE KITHOME MWANGANGI ..... PLAINTIFF**

**AND**

**COUNTY GOVERNMENT OF MAKUENI ..... 1<sup>ST</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR MAKUENI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated November 2, 2020, the plaintiff herein seeks for the following orders: -
  - i. A declaration that land parcel No Kisau/Mangani/235 is the sole property of the plaintiff and that no road passes across the aforesaid land.
  - ii. An order directing the 2<sup>nd</sup> defendant to close the so opened road cutting across the plaintiff's land to be supervised by the OCS Mbumbuni police station.
  - iii. General damages for trespass and inconvenience caused to the plaintiff.
  - iv. An order of permanent injunction restraining the 1<sup>st</sup> defendant their agents, servants or employees from encroaching, trespassing or creating an access road or in any other manner whatsoever from interfering with land parcel number Kisau/Mangani/235.
  - v. Costs and interest of the suit.
  - vi. Any other relief that this honourable court deems fit to grant.
2. The 1<sup>st</sup> defendant filed its statement of defence on December 2, 2020 and denied the plaintiff's claim. The 2<sup>nd</sup> defendant stated that the court lacks the requisite jurisdiction to determine the matter.
3. The 2<sup>nd</sup> defendant did not enter appearance or file a defence.



### **The Plaintiff's Case**

4. The plaintiff adopted his statement dated November 2, 2020 as his evidence in chief and produced the documents in the list of documents dated November 2, 2020 as exhibit 1 to 6 respectively. The plaintiff testified that he was the registered owner of the suit property. It was his testimony that the county government of Makueni using a tractor created a road in the middle of his land yet there was no public access road on the suit property. He went on to state that upon a ground visit, the land registrar and the district land surveyor established that no public access road existed on his land.
5. On cross examination, he stated that he did not know the names of the officers from the county government of Makueni who created the road on his land. He stated that he saw the truck belonging to the county government of Makueni when it came there for the second time to create the road on his land. He stated that he reported the matter to the police where he was issued with an occurrence book. He further testified that he did not know the registration number and neither did he take the photographs of the tractor while creating the road on his land. He stated that although he did not write to the district surveyor, he wrote a letter to the chief officer complaining of the actions by the county government officials.
6. In re-examination he stated that through his advocate, he wrote a letter of complaint to the county government of Makueni. He went on to state that after he wrote the complaint, a surveyor from Mbooni sub county visited the suit property and prepared a report which confirmed that no public access road existed on the suit property.

### **The 1st Defendant's Case**

7. DW1 Peter Mwanja Ndonge a surveyor from the county government of Makueni adopted his statement dated May 5, 2020 as his evidence in chief. He stated that the county survey office was mandated to carry out survey, establish beacons and roads as the function of survey had been devolved to the county government. In his statement, he stated that the county government of Makueni had never received any request from the plaintiff to have the county surveyor visit the suit property. He further stated that the plaintiff did not specify whether the vehicles used in creating the road on the suit property belonged to the county assembly or the county executive or the names of the officials who opened the road on the suit property.
8. In cross examination he stated that he became aware of the illegal road created on the suit property in June 2020 through the Mbooni sub county office which received the complaint from the plaintiff. It was his evidence that a surveyor visited the suit premises and prepared a report which established that the road was not created at the correct position. He stated that although he did not visit the site, he was aware of the findings of the report. That according to the map, the road was supposed to be created at the hedge between parcel No 375, 238, 234 and 197 and not across the suit property. He stated that he was not aware of the person who created the road or whether the trucks belonging to the county government of Makueni were used to create the road on the suit property. He went on to state the road should have been closed a long time ago.
9. On re-examination, he stated that the complaints received did not indicate that it was the county government of Makueni that opened the road on the suit property. He went on to state that the complaint ought to have been addressed to the chief officer of lands who would then assign officers to visit the ground to get the details. It was his testimony that the process of making the complaint was done after the matter was already in court.
10. After the trial, the parties proposed to tender written submissions.



### **The Plaintiff's Submissions**

11. The plaintiff's submissions were filed on June 6, 2022.
12. Counsel for the plaintiff raised the following issues for the court's determination: -
  - i. Whether land parcel No Kisau/Mangani/235 is the sole property of the plaintiff.
  - ii. Whether the 1<sup>st</sup> defendant was justified in creating a public access road on land parcel No Kisau/Mangani/235.
  - iii. Whether the 1<sup>st</sup> defendant trespassed onto land parcel No Kisau/Mangani/235 without the authority of the plaintiff.
13. With regards to the issue whether the plaintiff is the sole proprietor of the suit property, counsel submitted that the plaintiff is the registered owner of the suit property as evidenced by a copy of the certificate of title. Counsel submitted that the plaintiff's title had not been challenged or revoked hence he was the absolute proprietor of the suit property. To support his submissions on this point, reliance was placed in the case of *Kiplangat Shelisheli Murtarakwa v Joseph Rotich Kones* (2018) eKLR.
14. With regards the issue whether the 1<sup>st</sup> defendant was justified in creating a public access road on the suit property, counsel submitted that it was evident from the letter by the Mbooni sub county surveyor that no public access road existed across the suit property. That the report in its findings stated that the road ought to have been closed as it was illegally created.
15. Counsel went on to submit that the 1<sup>st</sup> defendant's action of creating a road on the suit property was illegal and contrary to the provisions of article 40 of the *Constitution*.
16. With regards to the issue whether the 1<sup>st</sup> defendant had trespassed on the suit property without the authority of the plaintiff, counsel submitted that the plaintiff who is the absolute owner of the suit property never authorised the 1<sup>st</sup> defendant to create a public road on his property. Counsel submitted that in the course of trespassing on the suit property, the 1<sup>st</sup> defendant destroyed the barbed wire, fencing posts, garden and trees planted in the area where the public access road was created. Counsel maintains that the plaintiff is entitled to damages. Reliance was placed on the case of *Park Towers Ltd v John Mithamo Njika* (2014) eKLR.

### **The 1<sup>st</sup> Defendant's Submissions**

17. The 1<sup>st</sup> defendant's submissions were filed on July 1, 2022.
18. Counsel for the 1<sup>st</sup> defendant raised the following issues for the court's determination: -
  - i. Whether the plaintiff's suit was filed prematurely before this court.
  - ii. Whether the plaintiff established his case against the 1<sup>st</sup> defendant on a balance of probabilities.
19. With regards to the issue whether the plaintiff's suit was filed prematurely, Counsel submitted that section 18(2) of the *Land Registration Act* provides in mandatory terms that boundary disputes should first be submitted to the land registrar before approaching the court. That in the present case, the plaintiff did not submit the dispute to the land registrar before approaching the court. Counsel further submitted that the court does not have jurisdiction to hear and determine a boundary dispute before the dispute is determined by the land registrar. To buttress his submissions on this point reliance was placed on the following authorities: -
  1. *Willis Ochola v Mary Ndege* (2016) eKLR.



2. [George Kamau Macharia v Dexka Ltd](#) (2019) eKLR.
20. Counsel contends that the suit was prematurely before the court as the plaintiff had not exhausted the legally set mechanisms that deal such matters.
21. As regards the issue whether the plaintiff has established his case against the 1<sup>st</sup> defendant on a balance of probabilities, counsel submitted that the plaintiff did not adduce any evidence to demonstrate that the defendants had caused the road to pass through the suit land. He went on to submit that the plaintiff did not adduce any photographic evidence to demonstrate that 1<sup>st</sup> defendant tractors were involved in the creation of the public access road on the suit property.
22. To buttress his submissions on this point, counsel placed reliance in the case of [Kenya National Highway Authorities v Ahmednasir Maalim Abdullahi](#) (2020) eKLR.
23. The counsel went on to submit that the plaintiff did not produce any search from NTSA to prove that the 1<sup>st</sup> defendant was the owner of the motor vehicles used in creating the public access road on the suit property. Reliance was placed on the case of [Daniel Torotich Arap Moi & another v Mwangi Stepphen Murithi and another](#) (2014) eKLR.
24. Counsel argued that the plaintiff had failed to prove his case against the 1<sup>st</sup> defendant and urged the court to dismiss the plaintiff's suit with costs.

### **Analysis And Determination**

25. Having carefully considered the pleadings, the evidence on record and the submissions by the parties herein, I find that the following issues arise for determination: -
  - i. Whether the plaintiff is the registered owner of the suit property.
  - ii. Whether a public access road exists on the suit property.
  - iii. Whether the 1<sup>st</sup> defendant created a public access road on the suit property.
  - iv. Whether the plaintiff is entitled to an order for general damages for trespass.
  - v. Whether the plaintiff's suit is prematurely before the court.

### **Whether The Plaintiff Is The Registered Owner Of The Suit Land**

26. The plaintiff stated that he is the registered owner of the suit property. In that regard, he produced a copy of the certificate of title for land parcel number Kisau/Mangani/235 (exhibit 1) and a letter by the land adjudication and settlement officer Makuani area dated April 23, 2014 (exhibit 3) which indicated that the suit property is recorded in the plaintiff's name. From the documentary evidence *vide* the copy of the certificate of title for land parcel No Kisau/Mangani/235 produced as exhibit 1, it is evident that the plaintiff was registered as the proprietor of the suit property on the January 28, 2014. The title document was issued on November 3, 2014.
27. The law is very clear on the position of a holder of a title in respect of the land.
28. Section 26(1) of the [Land Registration Act](#) provides as follows;

“The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer shall be taken by all the courts as *prima facie* evidence that the person named as the proprietor of the land is absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except;



- a. On the ground of fraud or misrepresentation to which the person is proved to be a party or;
  - b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
29. The registration of the plaintiff was a first registration. There was no evidence that he obtained the title through fraud or misrepresentation, illegally, unprocedurally or through a corrupt scheme. I therefore find that plaintiff has proved that he is the registered owner of the suit property and therefore the rightful owner.

### **Whether A Public Road Of Access Exists On The Suit Property**

30. The plaintiff testified that the sometime in 2020 the defendants created a road measuring six meters in the middle of his land and that as a consequence, his land was spilt into two. He went on to state that according to the registry index map, no public access road existed on the suit land. It was his testimony that the Mbooni sub county surveyor visited the suit land and established that no public access road existed on his land. In that regard, he produced the surveyor’s report as (exhibit 2). Benson Kisyula the Mbooni sub-county surveyor stated in his report dated June 3, 2020 that he visited the suit property and he made the following findings;

“There is no way through parcel No Kisau/Mangani/235, the road in question passes through one edge of parcel No 235, near boundary of 197, 234 and 238. The main purpose of the road was to serve parcel No 235 and 197.”

31. In cross examination DW1 confirmed that the road that was created on the suit property was illegal and that it ought to have been closed.
32. It is crystal clear from the surveyor’s report and the evidence of the plaintiff and DW1 that no public access road exists on the suit property. This court finds and holds that no public access road exists on the suit property

### **Whether The Defendant Created The Public Access Road On The Suit Property**

33. It was the plaintiff’s testimony that the 1<sup>st</sup> defendant created a public access road on the suit property. He went on to state that he did not take photographs of the motor vehicles nor did he know the names of the officers who created the public access road on his land. The 1st defendant on the other hand stated that the plaintiff did not demonstrate that the its motor vehicles were used to create the public access road on the suit property.
34. In civil cases, the standard of proof is on a balance of probabilities. Section 107 (1) and (2) of the *Evidence Act* provides as follows: -

107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.

(2) when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

According to *Halsbury’s Laws of England* 4<sup>th</sup> Edition volume 17 paras 13 and 14:-

The legal burden is the burden of proof which remains constant throughout a trial: it is the burden of establishing the facts and contentions which will support a party’s case. If at the



conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests on a party desiring the court to take action, thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues.

35. It is clear from the above provisions that the burden of proof is on the party alleging the existence of a fact which he wants the court to believe.
36. The plaintiff did not discharge the burden of proving that the 1<sup>st</sup> defendant created a public road of access on the suit property. The plaintiff did not tender any evidence in support of the assertions made therein.
37. The plaintiff sought for an order directing the 2<sup>nd</sup> defendant to close the road opened on the suit land under the supervision of the OCS Mbumbuni police station. Having failed to prove that the 1<sup>st</sup> defendant created the public access road on his land, this court cannot therefore issue an order directing the 1<sup>st</sup> defendant to close what it has not created.

### **Whether The Plaintiff Is Entitled To General Damages For Trespass**

38. The plaintiff sought for general damages for trespass and inconvenience caused as a result of the creation of the public access road on the suit property.
39. Black's Law Dictionary 10<sup>th</sup> Edition defines trespass to land as follows;

“a person's unlawful entry on another's land that is visibly enclosed.”
40. In the case of Municipal Council of Eldoret v Titus Gatitu Njau (2020) eKLR the Court of Appeal cited the case of M'Mukanya v M'Mbijiwe (1984) KLR 761 where the ingredients of 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 v Ward (1953) 2 QB 153.”
41. The Court of Appeal in the case of M'Mukanya v M'Mbijiwe (1984) KLR 761 set out the ingredients of the tort of trespass as follows;

“Trespass is the 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.”
42. The plaintiff produced a copy of the certificate of title which proved that he is the registered owner of the suit property. I am satisfied with the material placed before me that the plaintiff is the registered owner of the suit property. The plaintiff has therefore proved his interest on the suit property.
43. The plaintiff asserted that the 1<sup>st</sup> defendant had trespassed on his land and created a road in the middle of his land that the defendant whilst in unlawful trespass of the suit property the 1<sup>st</sup> defendant committed wanton destruction of his garden, trees and fencing posts.
44. He produced photographs of the same as exhibit 6. The 1<sup>st</sup> defendant on the other hand testified that the plaintiff failed to prove that its officials had trespassed and created the road on the suit property.



45. From the photographic evidence, it is evident that a road has been created on the suit property. However, from the evidence on record the plaintiff failed to prove that the 1<sup>st</sup> defendant created the road on the suit property. The plaintiff has also failed to prove that the 1<sup>st</sup> defendant trespassed on the suit property and caused the wanton destructions therein. Having failed to prove that the 1<sup>st</sup> defendant trespassed on the suit property and caused the damages as pleaded, this court is unable to order the 1<sup>st</sup> defendant to pay general damages to the plaintiff.

### **Whether The Plaintiff Is Entitled To An Order Of A Permanent Injunction**

46. The plaintiff sought for a permanent injunction restraining the 1<sup>st</sup> defendant their agents, servants or employees from encroaching, trespassing, or creating an access road or in any other manner whatsoever from interfering with land parcel No Kisau/Mangani/235.
47. The plaintiff stated that he was the absolute owner of the suit property. In that regard, he produced a copy of the certificate of title to demonstrate that he is the registered owner of the suit property. The plaintiff submitted that his title had not been revoked or challenged in any way. The plaintiff went on to state that according to the registry index map no public access road existed on his parcel of land.
48. Section 24(a) of the *Land Registration Act* provides for the interest conferred by registration. It provides as follows;
- subject to this Act;
- The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.
49. Section 25 of the *Land Registration Act* provides for the rights of a proprietor. It provides as follows;
- I) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided by this Act and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject;...
50. Section 26 of the *Land Registration Act* provides that a certificate of title is the conclusive proof of ownership. These provisions vest on the registered owner of land with rights and privileges and provides for instances when the right can be taken away.
51. Having established that the plaintiff is the registered owner of the suit property, I find that he is entitled to all the rights, interest and privileges belonging or appurtenant thereto. This court therefore finds and holds that the plaintiff is entitled to an order of permanent injunction.

### **Whether The Plaintiff's Suit Is Prematurely Before The Court**

52. Learned counsel for the 1<sup>st</sup> defendant submitted that the plaintiff's suit was prematurely before the court as the dispute relates to a boundary dispute. Learned counsel went on to submit that the dispute ought to have been handled by the land registrar before it was brought to court.
53. Counsel made reference to section 18(2) of the *Land Registration Act* which provides as follows;
- 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.



54. It is clear from the above provisions that the court has no jurisdiction to determine boundary disputes. Jurisdiction is everything and without it, a court of law has no option but to down its tools. Looking at the pleadings and the evidence presented in court, it is clear that this case revolves around the issue whether a public access road had been illegally created on the suit property. This was therefore a dispute involving trespass and not a boundary dispute between the parties herein. This court therefore finds that it has requisite jurisdiction to hear and determine this matter. Section 18(2) of the [Land Registration Act](#) is therefore not applicable to this suit.
55. In the end I find that the plaintiff has proved his case on a balance of probabilities on prayer (a) and (c) of the plaint.
56. I accordingly enter judgment for the plaintiff against the defendants in the following terms: -
- a. A declaration be and is hereby issued that land parcel No Kisau/mangani/235 is the sole property of the plaintiff and no road passes across the aforesaid land.
  - b. An order of a permanent injunction be and is hereby issued restraining the 1st defendant their agents, servants or employees from encroaching, trespassing or creating an access road or in any other manner whatsoever from interfering with land parcel No Kisau/mangani/235.
  - c. Each party to bear its own costs.

.....  
**HON. T. MURIGI**

**JUDGE**

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 28TH DAY OF SEPTEMBER, 2022.**

**IN THE PRESENCE OF: --**

Court assistant – Mr. Kwemboi

Muthiani for the Plaintiff

Ms Mutuku holding brief for Nthiwa for the Defendant.

