



**Kigotho v Karuri & another (Environment and Land Appeal
18 of 2021) [2022] KEELC 14882 (KLR) (18 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14882 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND APPEAL 18 OF 2021
AK BOR, J
OCTOBER 18, 2022**

BETWEEN

WILFRED KIGOTHO APPELLANT

AND

GICHUKI KARURI 1ST RESPONDENT

MWITI GICHURU 2ND RESPONDENT

JUDGMENT

1. The appellant, who was the plaintiff in Nanyuki Chief Magistrate’s Court Environment and Land Case No 56 of 2013, filed the memorandum of appeal dated 8/11/2017 being dissatisfied with the judgment of Honourable WJ Gichimu, Principal Magistrate, delivered on 10/12/2015. The Learned Magistrate found that the Appellant had failed to prove his claim on a balance of probabilities and that he did not tender evidence to warrant the grant of an injunction against the respondents. The Learned Principal Magistrate dismissed the appellant’s suit with costs to the Respondents.
2. In the plaint filed on 18/6/2013, the appellant sought a permanent injunction to restrain the respondents from dealing with his land known as Laikipia/Daiga/Ethi Block 1/139 (Magutu) (‘the suit property’). He averred that the respondents had encroached onto the suit property, erected a bridge on the land and were in the process of selling the suit property.
3. The respondents denied the appellant’s claims and averred that they were wrongly sued and contended that the suit did not disclose any reasonable cause of action against them.
4. The appellant filed Nyeri ELC Appeal No 10 of 2017 which was transferred to Nanyuki ELC for hearing and determination. The grounds of appeal are that the Learned Principal Magistrate erred in dismissing his suit and finding that he had not proved his case on a balance of probability; and that the Magistrate failed to consider all the evidence tendered and to find that the respondents had encroached and excised the suit property. He faulted the court for failing to consider his testimony that the surveyor



- changed the boundary of the land on the instructions of the 1st respondent, who was the area Chief then and in control of the local security apparatus.
5. The matter was canvassed by written submissions. The appellant submitted that the 2nd respondent admitted that in June 2013 he learned that the District Surveyor was going to determine the boundary dispute between the appellant and Kinyua Gateru. That he complained to the Chief through the letter dated 2/6/2010 that on 25/5/2010 the 1st Respondent sent surveyors to his land who erected a bridge on his land on 27/5/2010. He submitted that the Learned Magistrate overlooked expert evidence in the field diagram and observation map signed by a land surveyor indicating that there was no road or subdivision on his parcel of land.
 6. He wrote the letter dated 2/6/2010 complaining that the bridge was constructed on his land which according to him was against the previous surveyor's directions. He relied on the answers given during cross examination denying that the surveyor subdivided the land to show that indeed his land had been subdivided. He contended that these facts and the expert evidence presented proved that there was no road, bridge or subdivision on his land and that the Learned Magistrate overlooked the evidence. He reiterated that his land had been encroached upon and that he had demonstrated that his land had no road or river running through it to justify the construction of a bridge on his land or the subdivision of his land. He submitted that he had proved his case to the required standard.
 7. The respondents filed their submissions on 9/8/2018 which raise two issues for determination. That is, whether the appellant proved his case on a balance of probabilities and whether the appeal was merited. They submitted that the appellant's testimony on record did not match show that the respondents erected a bridge or interfered with the suit property. They contended that the appellant did not produce a surveyor's report to show the alleged encroachment. The respondents testified that the foot bridge was not on the appellant's land and that they had no interest in the suit property. They submitted that the record showed that there was a longstanding boundary dispute between the appellant and his neighbour which led to his lodging the complaint. The respondents urged that the appeal was not merited and should be dismissed with costs.
 8. The issue for determination is whether the court should allow the appeal. It was the appellant's testimony before the trial court that the surveyor changed the boundary of the suit property on the instructions of the 1st respondent who was the area Chief. He testified that the 1st respondent invaded a portion of his land damaging his crops and sought the cost of the damage to his crops. He told the court that the 2nd respondent was involved in the subdivision of his land by leading the surveyor, Chief and police to the suit property.
 9. The appellant denied having a boundary dispute with his neighbour Zipporah Wahito, wife of the late Kinyua Gateru and stated that he filed a claim with the Land Registrar because he wanted a surveyor to mark his boundaries. He produced the letter dated 2/6/2010 in which he complained to the DC about the Respondents invading his land and erecting a bridge thereon.
 10. The appellant called Mr Samson Nyamu Gatitu who testified that the appellant was given the suit property in 1975 as a shareholder of Magutu Farmers' Cooperative Society. He told the court that the appellant's land was exchanged. He described that it did not border any other land, only a dam. He denied that the suit property had a river on it or that Kinyua Gateru's land bordered the suit property.
 11. The respondents gave evidence. The 1st respondent told the court that there had been a land dispute since 2004 between the Appellant and the family of the late Kinyua Gateru. The appellant lodged a complaint on 2/6/2010 with the land registrar who in turn wrote to the 1st Respondent on 26/11/2010 to provide security during the boundary rectification. The appellant was dissatisfied with the outcome



- of the exercise. He stated that the bridge was built on Kinyua Gateru's land and that it was constructed by the community and that he merely provided security for the surveyor.
12. The 2nd respondent denied subdividing the appellant's land and selling his trees. He testified that he bought land from Zipporah Wahito and learned of a boundary dispute between her family and the appellant. He told the court that the land registrar, surveyor and Chief visited the land in a bid to solve the dispute. He went to the scene as a spectator.
 13. The trial court found that the appellant failed to prove his case to the required standard. It found that the appellant did not call expert evidence to prove encroachment on his land. The Learned Magistrate stated that it was important for the appellant to call the land registrar and a surveyor to testify as to the nature and extent of the alleged encroachment since they had handled the dispute. He found that there was no evidence to show that the Respondents intended to sell the appellant's land.
 14. The issue for determination is whether the appeal is merited. The Learned Magistrate found that the appellant failed to prove that the Respondents had encroached on his land and erected a bridge on his land. Further, that he did not call any expert evidence to prove that the Respondents had encroached on his land. The court observed that he should have called the Land Registrar and the surveyor to testify as to the nature and extent of the alleged encroachment.
 15. He produced a copy of his title over the suit property issued on 17/6/2004. The Appellant produced a copy of the receipt dated 21/10/2004 for the payment of Kshs 4500 on account of a boundary dispute over Laikipia/Daiga/Ethi Block 1/139. The field diagram and observations on site dated 26/5/04 shows parcel number 139 as A with some measurements indicated on the diagram. There is a road dividing parcel numbers 140 and 141 even though they have truncation marks which ordinarily would imply that the same parcel of land continues on the other side of the road.
 16. In order to prove that there was encroachment on the suit property and that a bridge and road had been constructed on it, the appellant ought to have carried out a survey on the suit property to show the location of the bridge and the road in relation to the beacons demarcating his land. He should have called a surveyor to give expert evidence on whether or not there was a road on the suit property and demonstrate that the appellant's land had been encroached on.
 17. If a road was created on his land as the appellant contended, then that road should be reflected in the amended Registry Index Map (RIM) for Laikipia/Daiga/Ethi Block 1 which the appellant did not tender in evidence. One cannot tell by simply looking at a title deed that the land has been encroached on without evidence. The court agrees with the Learned Magistrate that the appellant failed to prove his claim on a balance of probabilities.
 18. The appeal lacks merit and is dismissed with costs to the respondents.

DELIVERED VIRTUALLY AT NANYUKI THIS 18TH DAY OF OCTOBER 2022

K. BOR

JUDGE

In the presence of: -

Mr. Wilfred Kigotho – Appellant present in person

Mr. Amos Chweya for the Respondents

Ms. Stella Gakii- Court Assistant

