



**Kibelio t/a Rome Guest House v Koske (Environment & Land Case
19 of 2011) [2022] KEELC 14906 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14906 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 19 OF 2011
MC OUNDO, J
NOVEMBER 17, 2022**

BETWEEN

FRANCIS KIPROB KIBELIO T/A ROME GUEST HOUSE PLAINTIFF

AND

HENRY KIPNGETICH KOSKE DEFENDANT

JUDGMENT

1. By a Plaint dated the March 23, 2011, the Plaintiff herein, sought for an order of injunction restraining the Defendant by himself, agents, servants, employees or otherwise from blocking the gate, fencing the disputed portion, interfering with and/or doing any other act that was prejudicial to the Plaintiff's quiet enjoyment and occupation of Kericho Municipality block 2/133. The Plaintiff sought for general damages, costs and interest therein and any other relief that the court deemed fit and just to grant.
2. In response to the plaint, the Defendant filed his statement of defense and counterclaim on April 1, 2011 claiming that the Plaintiff was a trespasser on his land LR Kericho Municipality block 2/42 and therefore he sought an eviction and permanent injunction against the Plaintiff by himself, servants and/or agents or whosoever acting through him from entering, remaining or doing anything whatsoever on the Defendant's parcel of land. The Defendant also sought that the Plaintiff do demolish all the illegal structures he had erected on the Defendant's land, namely a butchery, sheds, car park, part of the verandah and a bar. He also sought for general aggravated damages for trespass, and profits against the Plaintiff.
3. By consent on the June 24, 2014, parties agreed to have the Kericho Government Surveyor visit the suit property to fix the boundaries separating the two parcels of land being Kericho Municipality Block 2/42 and Kericho Municipality Block 1/133 and thereafter file his report in court. The parties were also to share the costs of the surveyor. The surveyor's visits to the suit land and report then nosedived for a long period of time and was only filed on the September 27, 2017, three years later, wherein parties



sought 14 days to acclimatize themselves with the same. By consent, the surveyor's report was adopted as part of the court record.

4. The matter had then proceeded for hearing on the September 23, 2018 wherein the District Land Surveyor Kericho Mr Geoffrey Kibowen was summoned to interpret his report dated September 14, 2017 to which he stated that pursuant to receiving a court order to visit the suit lands No Kericho Municipality Block 2/42 and 133, they had visited the site on the June 15, 2017 and June 16, 2017 in the presence of both the parties, their advocates and the court. That they had used survey plans Folio of 62/39, 256/80, and 488/65 and a letter Ref AC/62/C from the Director of Survey dated May 5, 2017 and the usual survey equipment to survey the land.
5. That they then ran a traverse from the Post Office to the site which traverse crossed within acceptable limits of accuracy and they used the new traverse points to place boundary points FM1 and FM2 as per survey plan No 256/80. Other boundary points were as per FR 488/65. That they had used the same to pick the boundary as per the Director of survey's letter.
6. From their findings, there was an overlap in the 12 survey plans as reflected in survey plans No 256/80 and 488/65. From the two boundary lines, the two of them cut through Rome Guest House. That the boundaries of parcel No 42 did not tally with the original boundaries in the old survey plan No 62/39. He concluded that unless directed otherwise by the court, the Director of Survey had advised that they adopt the existing boundaries and thereafter forward the survey file for rectification. He sought for his report which had been attached to a sketch map, to be adopted by the court. The court obliged him.
7. When cross- examined by Counsel for the Plaintiff, the surveyor had responded that Block 2/133 had been subdivided into two parcels of land namely, No 139 and No 140 and that the parcels in dispute was were parcels No 139 and the neighboring parcel No 42. That by adopting the existing boundary, he meant where the fence was currently situated on site.
8. His response to cross examination by Counsel for the Defendant was that they had used two survey maps/plans from the Director's Office which essentially were free from errors. That the overlap was about 6 meters and that in such cases, they ordinarily would conduct a resurvey after the court's decision. That the gate and 2 sheds are found to be on parcel No 42 according to the survey plans.
9. Upon being cross examined by Counsel for the interested party, the surveyor had responded that the plans were erroneous. That there was an original map which could be availed. That Parcels No 140 and 139 were one.
10. The court then directed that the District Surveyor avails the original map No 62/39 so as to assist the court, reach a just decision. Thereafter, the court was informed of the intention of the parties to settle the dispute out of court and by consent parties sought to have the District Surveyor re-visit the suit parcels of land in the presence of the parties so that should there be an agreement by the parties on how to deal with the overlap, the surveyor fixes the beacons and files a report in court.
11. Indeed the report was filed but the court had been informed that parties had failed to agree on the way forward in as far as the overlap of 6 meters was concerned. The court was further informed that the Plaintiff who was a tenant on the suit land in 2011 had since left the premises and therefore the dispute was between the Defendant and the Interested Party. The interested party then sought to make an application to withdraw from the suit. The court held that in view of the new development in the matter, parties be given time to consult their clients and agree on how best to proceed. The matter was set for mention for the October 3, 2019. On the said day however, there had been no response from the parties as to whether there had been a settlement reached wherein the court directed that parties



do comply with the provisions of Order 11 of the *Civil Procedure Rules* so that the matter could be set down for hearing.

12. On the February 3, 2021, the interested party sought for and was granted leave to exit from proceedings.
13. On the November 29, 2021, the Plaintiff Francis Kiprop Kibelion testified as PW1 to the effect that that he resided in Lamu and was a civil engineer. That he had filed the present case against the Defendant and recorded a statement dated March 23, 2011 which he wished that the same be adopted as part of his evidence. That his complaint had been that the Defendant had blocked the entrance to Rome Guest House, which was a business premises that contained a bar, restaurant, lodgings and butchery.
14. That the Defendant had blocked the entrance using sand wherein he had also removed a fence that had separated his business premises with his property, thus making his business premises, which had no other entrance inaccessible. That he had reported the matter to the police at Kericho next to the Municipal Council wherein the police had ordered the Defendants to remove the sand. The fence was not reconstructed and therefore he had sought for orders restraining the Defendant.
15. That although he did not file a supporting affidavit to that application dated March 23, 2011, yet he sought for the court to also consider the same as his further evidence. He confirmed that he had been leasing the premises from one Rose Matwek (deceased) who was the owner of the premises, as per the certificate of lease dated August 13, 2008. That he had a certificate of official search dated September 10, 2008 that confirmed that Rose was the owner of the premises. He produced the documents as Pf exh 1(a) and (b).
16. The Plaintiff proceeded to testify that he also had an agreement dated April 13, 2009, herein produced as Pf exh 2, with his tenants to lease the premises as an ongoing concern. That he had been permitted by the relevant authority to carry out the business as per the permit of 2011. He produced the Single Business permit as Pf exh 3. He continued to testify that in his affidavit he had the annexed photographs of the premises which he produced as Pf exh 4 (a-c).
17. That there had been correspondence between him and the Defendant wherein the Defendant had complained that the landlady had encroached on his land. The argument had been based on a boundary issue. That at the time, the business was doing well and there had been some audit done to that effect, but later after the Defendant's act, his customers had disappeared.
18. He marked the audit report which had been carried out for the period between December 30, 2010 and June 2011, as Pf MFI 5 and proceeded to confirm that he had filed the suit in court because he had suffered in his business. He stated that had the Defendant had issues with the landlady, he should have taken her to court as he was an innocent tenant. He sought for the Defendant to pay costs for his loss.
19. He also confirmed that upon receiving interim orders, the Defendant had complied although he had not restored the fence that had been destroyed and the premises remained open. He said that orders be issued to the Defendant to restore and the fence as it was before as there was no privacy and security was at risk as the premises was near the road.
20. On cross examination, by Counsel for the Defendant, the Plaintiff was referred to Pf exh 2 wherein he confirmed that it was a lease agreement which did not show either the period of lease or the amount of rent he was to pay per month although he was the one who drew the document which showed neither his name or the name of the person paying the money.
21. When reference to Pf exh. 3, the Plaintiff confirmed that he had paid for the permit which showed the name of the business and that payment had been made by Rome Guest House. That before the



permit had been paid for, he had made some payments and had been issued with the receipts which he had not produced in court.

22. He also confirmed that Rose Matwek was deceased although he could not remember when she passed on. That he could not also remember if she was alive or dead by the time he brought this suit, but that he had renewed the lease agreement with whoever took over from the deceased.
23. He confirmed that he was suing for loss of business. That the landlord, who was the deceased's husband, had never informed him that he was there illegally and neither did he know the size of the property he had leased. He also confirmed that he did not file a response to the defense, but his view was that the landlord ought to have responded. He confirmed that his manager had participated in the process of resurveying the land but that since he was not there, he could not remember how many times the re-survey was done.
24. That after he had reported the matter to the police, he had opened another gate which was within the plot. He was referred to Pf exh 4 (b) wherein he confirmed that it depicted the fence but that the poles and the barbed wire were no longer there and that he did not know who had removed them. That the plot was open and anybody could walk in and that he did not know where the border line was.
25. He was also referred to Pf exh 3 wherein he had confirmed that it was the permit for the year 2011 and that he had not produced the permit for 2021. That the purpose of the suit was that he had wanted to get orders of injunction against the Defendant barring him from blocking the gate and fencing the disputed portion. He confirmed that since he had filed the suit, the Defendant had "un-blocked" the gate but nothing had changed.
26. His evidence was that after the Defendant had blocked the gate, he had incurred losses as per the figures depicted in the accounts report which had been prepared before and after for comparative analysis. That he could not tell how much he had lost in 2012, but given time he would submit to the same from the year 2011-2021. He confirmed to not having labeled an inventory of daily accounts but had labeled the accounts. That Joseph Bor was his manager and not a tenant at the premises which got burnt during the current year (2021).
27. That after that gate had been blocked, and he had reported the matter at the police station, he had been issued with an OB, which he had not produced in court. His evidence was that he had never talked with the Defendant but had met him twice in court.
28. That the deceased Rose Matwek's husband was called Asiaki and he was now the new landlord and was aware of this suit as they sometimes went to court together. He reconfirmed that the said Asiaki had been joined to the case on a boundary issue although he himself had no case on a boundary issue as his matter was purely on the loss of business and he had no claim on land or proprietary interest on the land as the land did not belong to him. That he was not claiming to be the registered owner of the land.
29. In re-examination, the Plaintiff confirmed that he had no dispute with the landlord over the tenancy, or the terms of the tenancy and that he did not know the size of his occupancy although Pf exh 1 contained the size of the land as 0.2740 hectares which size was not in dispute.
30. That the current land lord was not one of his witnesses although in his list of witnesses, he had been listed as one. That the reply to defence and counterclaim was filed on the April 27, 2011 and it had been a long time, such that he was not sure whether or not it had been filed. He confirmed that the court had ordered the Defendant to remove the material that had blocked the gate. He also confirmed, after reference was made to a Grant, that the original land lady died on March 18, 2010 and therefore the suit had been filed after her death. That the evidence on the inventory was the audited accounts which gave a picture of the business.



31. By consent, the audited account report and financial statement of the Plaintiff for the period ended 31st December 2010 up to June, 2011 was produced as Pf exh 5 wherein the Plaintiff closed its case.

The Defence Case

32. The Defendant, Henry Kipngetich Koskei testified that he lived in Motobo and was involved in the business of selling petrol. That he had just known the Plaintiff as they had never met before. He confirmed that he was the proprietor of land parcel No Kericho/Municipality block 2/42 measuring 0.2120 hectares. He produced the search certificate as Df exh 1.
33. He went on to testify and that when he bought the land, they had gone to the site with the District Surveyor called Mr Kibuba, who had showed him the boundaries, and put the beacons wherein he had also issued him with a beacon certificate. That at the time, there had been a gate, butchery, parking, two shades, the main house verandah and toilets which were on his land.
34. That he had then sought services of his Counsel to have the said structures removed so that he could proceed to work on his land, since the same was on loan. That the person whose buildings were on his land continued to get interest for more than 10 years while he (Defendant) continued to service a loan without any interest.
35. That after he had given notice to the Plaintiff, the next thing he had seen was a court order. That he had not seen his neighbor Rose and did not know at the time whether she was alive or dead. He confirmed that the Plaintiff was no longer on the land. That after he had received the court order not to do anything on the land, the Plaintiff had continued building on the land wherein he had spoken to him on the phone and the Plaintiff had asked him whether “they are still building?” wherein he had responded that he should know better.
36. That he had bought the land from one Anthony Korir and that its title had been kept as security by the bank. He however produced a copy of the same as Df exh 2 and the beacon certificate as Df exh 3. He also produced the RIM showing dimensions of his land as Df exh 4 (a) (b) and proceeded to testify that he had reported the matter to the police station at Kericho through a letter to the OCS informing him that somebody was building on his land. The police did not take any action because, as they had informed him, the matter had already been filed in court. He produced the letter dated 7th March 2011 as Df exh. 5. His evidence was that he had never gone back to the land after the court order and therefore he did not know whether the beacons were still intact or not.
37. He was positive that should the court visit the land, he could point out where the beacons were, as he had marked the position with a fence. That he had bought the land in 2011 but had never used it as the Plaintiff was the one who had been using it despite there having been no contract entered with him to use it and neither had he paid him any money. That the Plaintiff had been benefitting from his land. He adopted his statement filed in court on 4th April 2011 as his evidence in chief.
38. The Plaintiff also confirmed to having sworn an affidavit, which was filed on 4th April 2011, in support to his application of which he wished that the same as well as the annexures therein be adopted as his evidence. He proceeded to testify that the Rome Guest house was on parcel No133 and that it neighbored his land and that he had not encroached on the Plaintiff's land. That after parcel No133 was subdivided it became No 139 and whereas his land was No2/42, that it had been the Plaintiff who had trespassed on his land. He sought that the court helps him to have beacons put on his land. He also sought for orders for costs of the suit, for the demolition of the impugned structure that were on his land, the Plaintiff be declared a trespasser and for mesne profit.



39. His evidence was that they had had a conversation with the deceased's husband, over the boundary issues, wherein the deceased's husband had informed him (Defendant) that it had been the Plaintiff who had asked him (deceased's husband) not to erect a fence on the suit land. That the Plaintiff's landlord knew that there was a boundary and therefore had no claim over the Defendant's land.
40. That indeed after the surveyor had gone on the land and indicated the boundary, the landlord, Meshack, was present and did not complain. That he had a claim with Meshack as they had not established the boundary. He confirmed that as it were, anybody could use the land as at the time, a person by the name of Joseph Bor was already renting the premises as a tenant.
41. In cross examination, the Defendant confirmed that they did not know the Plaintiff before and only came to know him in court. However he knew that there was a business going on in his neighbor's plot as there was a hotel therein. He also confirmed not knowing the landlady but that he knew that a lady by the name Rose was the owner of the land. That he was not aware that the Plaintiff was not the owner of the plot until he brought the court orders.
42. That in his Replying Affidavit he had indicated that the Plaintiff was a tenant on the land. That the Plaintiff had been making profit on his land. He confirmed that although he had built a petrol station on part of the land, yet it had been on the other end of the land which the Plaintiff was using. He conceded that he and Meshack needed to put up a boundary, but they could not do so because of the injunctive orders from the court. That they were willing to put up the boundary with the court's permission. He confirmed that the Plaintiff had not sought for proprietorship but that he only had his business on the Defendant's plot whereby he made profit.
43. That he had gone to the District Surveyor, Kibuba who had given him a fencing certificate. He also confirmed that he had not informed the owner of the land that his tenant had encroached on his land and that he had put up his fence because he had the documents. That the neighbor also had a fencing certificate and beacon certificate and that the land was his since he had been cleared. That the Plaintiff was a trespasser and that while he was planning to go to court to get orders, the plaintiff had beat him to it and had obtained court orders instead. That after he had acquired the beacon and fencing certificates, he had started fencing because the bank had wanted to build for him on the land so that he could continue servicing the land. He confirmed to have offloaded the sand complained of but stated that the same had been put on his land where he had also put the fence, posts and holes because he had wanted to build on his land.
44. He also confirmed that on his land was a gate, butchery, two sheds and toilets. He sought that the court considers the map to see the structures on his land. That he had suspected that it had been the Plaintiff who had removed the sand and barbed wire. That he could have proceeded to build on his land were it not the court orders.
45. In re-examination, the Defendant reiterated that Mr Kibuba had given him the fencing and beacon certificates. That he gave copies to the workers in the hotel so that the landlord and Plaintiff could be given. That he had also planned to file suit against the Plaintiff but had filed a counterclaim for the structures to be removed. That he poured materials on his piece of land because he had wanted to start building. That at the moment, he was not making use of the whole of his land because the Plaintiff had been using part of it land to date.
46. He confirmed that the landlord, Meshack, had never sued him and reiterated that after getting the fencing and beacon certificate, he had fenced his land and that he suspected the Plaintiff to have removed it although he did not have a court order. He was categorical that the gate, butchery, two



shades, toilet and part of the verandah were on his land. (Referred to Df 4(c). The Defence closed its case and parties were directed to file their respective written submissions.

Plaintiff's Submissions

47. The Plaintiff's submission was to the effect that pursuant to a lease agreement of April 13, 2009, between him and one Rose Matwek, (deceased) the proprietor of LR Kericho Municipality Block 2/133, he took possession and occupation of the premises wherein he ran his Restaurant business in the name of Rose Guest House. That on the March 14, 2011, the Defendant had un-procedurally moved onto the land and off loaded sand at the entrance thereby denying his patrons, lodgers and/or customers access to the premises hence interfering with the Plaintiff's enjoyment, quiet and peaceful occupation of the premises, which occasioned him to suffer loss and damages.
48. That the Defendant on the other hand has denied encroaching on the Plaintiff's land stating that it was the Plaintiff who had encroached on his land instead and put up the disputed structures.
49. The Plaintiff framed his issues for determination as follows;
 - i. This the Plaintiff entitled to orders of injunction.
 - ii. Is the Defendant entitled to the orders sought in the counterclaim?
 - iii. Has the Plaintiff suffered any damage, if he has what would be the appropriate quantum of damages to be awarded?
50. On the first issue for determination, it was the Plaintiff's Submission That indeed the Defendant was interfering illegally with his peaceful occupation of the alleged land in dispute. That having so demonstrated, the principles applicable in the circumstance as to whether to issue an injunction order against him were set in the celebrated case of *Giella v Cassman Brown & Company Limited* [1973] EA 358. That the Defendant, having illegally and un-procedurally moved onto the disputed portion thereby committing the acts complained of, ought to be restrained from the unlawful interference through the issuance of a permanent injunction.
51. On the second issue for determination, it was the Plaintiff's submission that since the Defendant contended that his parcel of land had been encroached onto by sizable portion thereby annexing it to LR No Kericho Municipality Block 2/133, his claim was therefore based on a boundary dispute between him and the owner of LR No Kericho Municipality Block 2/133 who was not party to the proceedings and therefore he was not entitled to the prayers as sought in his counterclaim.
52. The Plaintiff's submission was that he had proved his case on a balance of probabilities and was entitled to the orders as sought.

Defendant's Submissions.

53. In opposition to the Plaintiff's case the Defendant analyzed the evidence adduced in court in both the Plaintiff's case and his case whereby he framed the issues for determination as follows;
 - i. Did the Plaintiff produce any document before this honorable court to prove to the court on the purported lease as alleged and if it was renewed, is there proof of the same?
 - ii. Was there proof of the financial loss experienced by the Plaintiff herein?
 - iii. Does an ELC court (sic) have jurisdiction to award compensation for damages.
 - iv. Did the Plaintiff plead any special damage as required by the law?



- v Does this Honorable court had jurisdiction to grant damages as regards to Tenancy?
 - vi. Did the Plaintiff enjoin the land lord in the suit?
 - vii. Who is liable for damages if at all?
54. On the first issue for determination, it was the Defendant's submission that the Plaintiff did not produce a lease agreement to prove that he had leased the property from the landlady/land lord or whosoever leased to him the property and neither had he produced any agreement to show that he had renewed the lease. His allegations therefore remained as such based on the provisions of Sections 107, 108 and 109 of the *Evidence Act*. Reliance was also placed on the decided case in *Evans Otieno Nyakwana v Cleophs Bwana Ongaro* [2015] eKLR to buttress his Submissions.
 55. On the second issue for determination, the Defendant's submission was that the Plaintiff had failed to prove that he had suffered any financial loss which had occurred, as a result of the closure of the gate, as was required of him by the provisions of Sections 107, 108, and 109 of the *Evidence Act*. That in fact what was proved by the document produced as Pf exh 5, being the annual report and financial statement, was that the Plaintiff had made a profit in the year 2011 and no losses had been registered.
 56. On the third issue as to whether the Plaintiff had pleaded any special damages as required by law, the Defendant's Submission had been that he did not and this was because, the case was based on mere allegations. Reliance was placed on the case in *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others* [2018] eKLR to further submit that the Plaintiff had the burden of proof to place material before the court demonstrating how the amount that was claimed for special damages, if any, had been arrived at.
 57. The Defendant further submitted that the Plaintiff failed to join the landlord or her legal administrator to the suit, in which the court's order stood to affect directly. That further there was no agreement for renewal of the lease produced by the Plaintiff so as to inform the court as to whether he was on the suit land legally. The landlord or her legal administrator ought to have been joined to the suit more so due to the prayers sought in the counterclaim.
 58. As to whether the court had jurisdiction to award damages as regards to a tenancy agreement, it was the Defendants submission that although the Plaintiff's claim was that he had filed suit in this court because the Business Premises Rent Tribunal was not sitting, the same was now operational and this matter ought to have been referred thereto.
 59. That since the Plaintiff had not proved its case on a balance of probability, he was not entitled to costs as sought and by virtue of the provisions of Order 7 Rule 3 of the Civil Procedure Rules, the Defendant had proved his counterclaim against the Plaintiff and the same should be allowed with costs.

Determination.

60. I have considered the evidence herein adduced, the submissions and authorities herein cited. Indeed it is not in contention that the suit herein was filed by the Plaintiff against the Defendant for an act of trespass on land parcel No LR Kericho Municipality block 2/133, land upon which he carried out his business of a hotel and bar in the name and style of Rome Guest House, and secondly on the loss of business which I must say at this early stage that the second limb of prayers is not within the ambit of the jurisdiction of this court and therefore I shall not venture into that arena.
61. His main complaint was that on or about 14th March 2011, the Defendant without any legal justification moved onto the said land and offloaded sand at the entrance of the guest house thereby denying the Plaintiff by himself, his patrons, lodgers and/or customers access to the premises hence



interfering with the Plaintiff's enjoyment, quiet and peaceful occupation of the premises which subsequently occasioned him to suffer loss and damages. That the Defendant had also removed the fence on the said disputed portion that had separated his business premises and his property, hence there was no privacy and security was at risk as the premises was near the road.

62. The Defendant on the other hand has denied the allegations brought forth by the Plaintiff wherein in his counter claim, he confirmed that he was the proprietor to land parcel Kericho/Municipality block 2/42 measuring 0.2120 hectares which bordered Rome Guest House. That at the time he bought the land, he had visited it with the District Surveyor who had showed him the boundaries, and put the beacons and even issued him with a beacon certificate. That at the time, there had been a gate, butchery, parking, two shades, the main house verandah and toilets which were on his land. That he had tried severally to have the structures removed in vain as the Plaintiff had been the one benefiting from them. That indeed it had been the Plaintiff who had trespassed on his land.
63. A report herein filed in court by the District Land Surveyor Kericho Mr Geoffrey Kibowen dated September 14, 2017 was to the effect that they had visited the parcels of land in dispute being parcel No Kericho Municipality Block 2/42 and 133, on the June 15, 2017 and June 16, 2017 in the presence of the parties, their advocates and the court. That they had used survey plans Folio of 62/39, 256/80 and 488/65 and a letter Ref AC/62/C from the Director of Survey dated May 5, 2017 and the usual survey equipment.
64. That it was their findings that there was an overlap in the 12 survey plans as reflected in survey plans No 256/80 and 488/65. From the two boundary lines, the two of them cut through Rome Guest House. That the boundaries of parcel No 42 did not tally with the original boundaries in the old survey plan No 62/39. He concluded that unless directed otherwise by the court, the Director of Survey had advised that they adopt the existing boundaries and thereafter forward the survey file for rectification. That by adopting the existing boundary, he meant where the fence was currently placed on the ground. The surveyor's evidence during cross examination was that the overlap was about 6 meters and that the gate and 2 sheds are found to be on parcel No 42 according to the survey plans.
65. Having considered the pleadings, the evidence and the submissions filed herein I find the issues arising for determination as being;
 - i. Whether the Defendant trespassed onto the suit properties without authority of the Plaintiff;
 - ii. Whether the Plaintiff is entitled to damages.
 - iii. Whether the order of permanent injunction restraining the Defendant from dealing with the suit property should be given.
 - iv. Whether the Defendant's counterclaim is plausible.
66. Trespass has been defined by the 10th Edition of Black's Law Dictionary as;

“an unlawful act committed against the person or property of another; especially wrongful entry on another's real property.”
67. Section 3 (1) of the *Trespass Act*, also defines trespass as follows;

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”(Emphasis mine)



68. The Court in *John Kiragu Kimani v Rural Electrification Authority* [2018] eKLR in defining trespass relied on *Clark & Lindsell on Torts*, 18th Edition on page 923 which defines trespass as;

“any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to prove that the Defendant invaded his land without any justifiable reason’.

69. From the holding herein above and the definition of trespass, the court has considered the evidence herein adduced by the surveyor who confirmed that indeed there had been an overlap of about 6 meters and that the

“gate and 2 sheds were found to be on parcel No 42 according to the survey plans.”

In essence therefor there was no evidence confirmed by the experts that the Defendant had trespassed onto the Plaintiff’s parcel of land and to this effect, I find that the Plaintiff has not proved his case on a balance of probabilities and is therefore not entitled to the orders as sought.

70. In regard to the Defendant’s counter claim, and the prayers therein sought to wit that the Plaintiff had trespassed on his land LR Kericho Municipality block 2/42 and therefore he sought an eviction and permanent injunction against the Plaintiff by himself, servants and/or agents or whosoever acting through him from entering, remaining or doing anything whatsoever on the Defendant’s parcel of land and that the Plaintiff do demolish all illegal structures he had erected on the Defendant’s land namely a butchery, shade, car park, part of the verandah and a bar, I find that it is clear and not controverted that the Plaintiff in this matter had only leased out the premises for his business, it is also not in contention that he was not the proprietor of the suit land and/or premises and that the registered proprietor was one Rose Matwek (deceased) as per the certificate of official search dated September 10, 2008 herein produced as Pf exh 1 (b). It is also not in contention that the Legal administrator of the estate of the said Rose Matwek (deceased) was not party to the suit.

71. It is trite that where a decision and/or outcome of the court would adversely affect the rights of party not joined to the suit, then such person ought to, as a matter of his/her constitutional right be joined to that suit, so that a trial based on fair hearing can be conducted. In this case, it is quite clear that the orders sought by the Defendant if issued would affect the proprietary rights of the owner of parcel No LR Kericho Municipality Block 2/133 without according her estate a fair hearing, an action which this court frowns at. The Defendant’s counterclaim also fails.

72. Indeed from the evidence on record, whereas the Plaintiff claims trespass against the Defendant, the Defendant has also claimed the same of the Plaintiff to the effect to the court had directed that there be a report filed by the surveyor and which report was indeed filed as captioned herein above stating that there had been an overlap of the parcels of land, which then brings us to the question as to whether this court has the jurisdiction to determine issues revolving around a boundary dispute.

73. The *Registered Land Act*, Section 21 (2) of the *Registered Land Act* (now repealed) stipulates as follows:

“Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary”.
(Emphasis mine)

74. From the foregoing it is clear that where there is any uncertainty as to the position of any boundary, the Registrar is enjoined to determine and indicate the position of the uncertain or disputed boundary.



75. In the case of *Azzuri Limited v Pink Properties Limited* [2017] eKLR, Justice Angote, while making a decision relating to general boundaries stated;
- “In his paper, “*The Role of the Registry Index Map (RIM) in Land Management in Kenya*”, Peter K. Wanyoike has stated that the Registered Index Map is a very useful document in registration and management of land in Kenya within the context of “General Boundaries” or “approximate boundaries.”
76. The *paper* defines “General Boundaries” as follows:
- “A boundary of which the precise line is undetermined in relation to the physical features which demarcate it ... However, it is clear on the ground where the parcel is situated and where the boundaries are, for they are clearly visible and unmistakable physical features, though they do not indicate the exact location of the line within the breadth which such physical features necessary process.”
77. In the case of *Ali Mohamed Salim v Faisal Hassan Ali* (2014) eKLR it had been held as follows:
- “The type of survey that generated the Registry Index Map is what was known as “general boundaries” which has been defined in Section 18(1) of the *Land Registration Act, 2012* to mean “the approximate boundaries and the approximate situation only of the parcel.” Indeed, most of the titles under the repealed Registered Land Act were issued on the basis of the general boundaries, meaning that such parcel of land had no fixed beacons. On the other hand, land registered under the Registration of Titles Act required a cadastral survey to be prepared, which is based on a fixed boundary principle. Such a survey has an accurate linear and angular measurements to aid the registration of a title of a plot. The boundaries of land registered under the Registration of Titles Act can easily be identified by any Surveyor because of the fixed nature of its beacons.”
78. In the case of *Samuel Wangau v AG & 2 others* (2009) eKLR, it was held as follows:
- “However, it is common ground that such maps (RIM) are not authorities on boundaries. Both the District Land Registrar and the District Land Surveyor said as much.....It means therefore that when and where there is a dispute as to the position and location of a boundary as in this case, unless the same is a fixed boundary, one has to go beyond the RIM in solving the dispute.”
79. Indeed, for one to determine a dispute in respect to general boundaries, the physical features existing on the ground are very critical. Such features include rivers, hedges, fences, roads etc. Because general boundaries are identifiable by using the existing physical features, and by interviewing the owners of the adjacent plots, the law requires disputes relating to such boundaries to be handled by the Land Registrar, and not Surveyors or even the court.
80. For avoidance of doubt section 13 of the *Environment and Land Court Act* in my view does not oust the jurisdiction of the court to determine boundaries. However when it comes to general boundaries section 18(2) of the *Land Registration Act* provides in mandatory terms that the dispute should be submitted to the Land Registrar. It is only after the Land Registrar has determined the dispute that the matter can be escalated to this Court.



81. Putting all the matters herein aforesaid into consideration, I find that neither the Plaintiff nor the Defendant, in his counterclaim have proved their respective cases on a balance of probability and I proceed to dismiss both the main suit and the counterclaim. Each party shall bear its costs.

DATED AND DELIVERED VIA ZOOM CONFERENCE AT KERICHO THIS 17TH DAY OF NOVEMBER, 2022.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

