



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Karanja v Gatimu (Environment and Land Appeal E030 of 2021)
[2025] KEELC 415 (KLR) (10 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 415 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E030 OF 2021
MAO ODENY, J
FEBRUARY 10, 2025**

BETWEEN

JANET NJERI KARANJA APPELLANT

AND

JOHN MUIGAI GATIMU RESPONDENT

*(Being and Appeal from a Judgment delivered by Hon. E. G. Nderitu Chief
Magistrate on 7th December, 2021 in Molo CMC ELC Case No 33 of 2019)*

JUDGMENT

1. This appeal arises from the Judgment dated 7th December, 2021 by Hon. E. G. Nderitu Chief Magistrate Molo delivered in Molo CMC ELC Case No 33 of 2019. The Appellant herein being aggrieved by the judgment lodged a Memorandum of Appeal dated 20th December, 2021 and listed the following grounds:
 1. The Honourable Magistrate erred in law and fact by finding that the Appellant has encroached the Respondent's parcel of land by 1.2 meters when relying on the surveyor's report which survey was done using the Registry Index Map that only shows the approximate boundary of a parcel of land on the ground and. (sic)
 2. The Honourable Magistrate erred in law and fact in finding that the Appellant had encroached the Respondent's boundary by 1.2 meters without the boundary dispute first being referred to the Land Registrar for purposes of fixing the boundaries.
 3. The Honourable Magistrate erred in law and fact in that she disregarded and failed to consider the weight of the evidence of the Appellant and other witnesses.
 4. The Honourable Magistrate erred in law and fact by failing to consider the submissions filed by the Appellant.



2. The Appellant had sued the Respondent in the lower court vide a plaint dated 9th May, 2019 which was subsequently amended on 5th July, 2019. The Appellant sought the following orders:
 - a. A permanent injunction restraining the Defendant whether by himself, his agents and/or servants from in any manner whatsoever dealing with or interfering with all that parcel of land known as Mau Summit/molo/block 1/790 (mutirithia).
 - b. Costs of the suit.
 - c. Any other relief that this Honourable Court shall deem fit and just to grant.
3. The Respondent filed a Counter-Claim dated 17th May, 2019 in the lower court seeking the following orders:
 - a. That this Honourable Court be pleased to issue as Order of permanent injunction restraining the Plaintiff (now Defendant) from in any manner interfering with the Defendant's (now Plaintiff's) use and quiet possession of land parcel No Mau Summit/molo Block 1/789 (mutirithia).
 - b. That the Plaintiff (now Defendant) be ordered to remove any and all illegal structures erected on the Defendant's (now Plaintiff's) land parcel No Mau Summit/molo Block 1/789 (mutirithia) and restore the same to the state it was in before the illegal intrusion of the Plaintiff (now Defendant).
 - c. That the Plaintiff (now Defendant) does bear the costs of this suit and Counter Claim.
4. The suit was heard and determined vide a judgment dated 7th December, 2021 where the court dismissed the Appellant's suit and found merit in the Respondent's counterclaim which led to the Appellant filing the present appeal.

Appellant's Submissions

5. Counsel for the Appellant filed submissions dated 9th December, 2024 submitted that the trial court overlooked the fact that the Registry Index Map serves as an approximation rather than a definitive boundary resulting in discrepancies in measurements when compared to the actual conditions on the ground. He further submitted that it would have been judicious for the court to refrain from solely depending on the report derived from the Registry Index Map and relied on the cases of Wilkister Achieng' Mamboleo vs Johnstone Oduory [2022] eKLR and Azzuri Limited vs Pink Properties Limited [2017] eKLR.
6. According to counsel, the Appellant's argument centered on trespass while the Respondent's argument focused on claims of encroachment and submitted that this matter pertains to a boundary issue and Section 18 of the [Land Registration Act](#) prohibits the court from adjudicating on matters relating to boundary disputes. Counsel also relied on Section 19 of the [Land Registration Act](#) and the case of Willis Ocholla vs Mary Ndege (2016) eKLR and stated that if at all there was any trespass, it should have been the owner of Mau Summit/molo Block 1/788 (mutirithia) who should have raised it against the Appellant.
7. It was counsel's further submission that the court did not consider the fact that the Respondent's plot was non-existent, as the Respondent did not provide any evidence through witness testimony to support the claim of possession of plot 789. Counsel submitted that the Appellant asserted that if the matter were to be classified as one of encroachment, a thorough survey should be conducted across all plots to accurately determine the location of each plot and identify the owners of the seven developed



plots as well as to ascertain which two plots are non-existent. Counsel urged this Honourable Court to find the appeal meritorious and overturn the decision of the lower court with costs to the Appellant.

Respondent's Submissions

8. Counsel for the Respondent filed submissions dated 16th December, 2024 and submitted that the Appellant did not present an alternative view to the findings of the Surveyor during the trial and thus the evidence of the surveyor remained as the only evidence in establishing the areas of the suit property.
9. According to counsel, the lower court case was filed by the Appellant and that the Respondent filed a response and a counterclaim of which the Appellant participated fully without raising the issue that the matter was a boundary dispute to be determined by the Land Registrar. Counsel submitted that it was the Appellant's case that the Respondent's land did not exist which was disproved by the Surveyor's report.
10. Counsel also stated that if the Appellant was of the opinion that this was a boundary dispute then she ought not to have filed the suit in the first place. Counsel submitted that the trial court considered the Appellant's submissions in its judgment and therefore arrived at the right conclusion based on the evidence adduced and urged the court to dismiss the Appeal with costs to the Respondent.

Analysis And Determination

11. The issue for determination is whether the Trial Magistrate erred in dismissing the Appellant's suit and finding that the Appellant had encroached on the Respondent's parcel by 12meters.
12. In the case of *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the court stated with regard to the duty of the first appellate court as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”
13. The court while evaluating the evidence in the lower court is reminded that it did not benefit from hearing and seeing the demeanor of the witnesses. From the pleadings and the evidence on record, the Appellant filed a suit in the lower court seeking a permanent injunction against the respondent from interfering with the suit parcel of land.
14. The Respondent filed a defence and counterclaim and also sought a permanent injunction against the Appellant from interfering with his suit parcel of land and an order for the Appellant to remove the illegal structures erected on his parcel of land.
15. The Appellant admitted that the Respondent stopped her from continuing with construction on the suit parcel thereby filing this case in court. The Appellant gave evidence as to how she acquired the suit land through purchase from the son of the original owner of the suit land.
16. PW1, the son of the registered owner testified to support the Appellant's assertion that Plot No. Mau Summit Molo Block 789 does not exist on the ground as they share a common boundary with plot No. 790. It is on record that this evidence was disproved by the Appellant's own documents which she produced and indicate that the plot exists on the ground, registered in the name of the Respondent.
17. This Area Map produced by the Appellant herself corroborated the evidence that Plot No. 789 lies between plot Nos 790 and 788. The Appellant further faulted the court for adopting the survey report,



which she stated that the Registry Index Map used had approximate area. This is an argument which is neither here nor there as the Appellant should be aware that on the face of all titles, it is written “Approximate Area” which includes the Registry Map Sheet No.

18. The Appellant had an obligation to prove her case and had an opportunity to bring in an alternative Survey report to disprove what the District surveyor had presented. This report remained unchallenged hence, the court arrived at the conclusion that saw the Appellant’s case dismissed and the Respondent’s counterclaim allowed.
19. The Appellant submitted that her case was on trespass and that the Respondent’s case was on encroachment. Trespass is the act of entering private property without permission, while encroachment is the act of extending a structure or boundary onto another property.
20. From that definition it is clear that it is the Appellant who encroached on the Respondent’s parcel as the Appellant told the court that the Respondent stopped her from continuing with construction.
21. The Appellant alluded to the court handling a matter that was a preserve of the Land Registrar since it was a boundary dispute. Section 18 of the [Land Registration Act](#), 2012, which provides as follows:

“Boundaries

1. Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel
2. The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land, unless the boundaries have been determined in accordance with this section
3. Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:

Provided that where all the boundaries are defined under section 19 (3), the determination of the position of any uncertain boundary shall be done as stipulated in the [Survey Act](#) (Cap. 299).”

22. This was not a boundary dispute, as the Appellant would want the court to believe. If it was a boundary dispute, then the appellant ought not to have filed the suit in the first place. This above Section gives exceptions where, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel. I was therefore within the Trial Magistrate’s mandate to adopt the surveyor’s report on what was on the ground.
23. I have evaluated the evidence on record, the submission by counsel and conclude that the Trial Magistrate did not err in any way and therefore find no reason to interfere with the judgment. The net effect is that the appeal is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 10TH DAY OF FEBRUARY 2025.

M. A. ODENY

JUDGE

