



Viehweber v Kenya Forest Service & 7 others (Environment & Land Petition E004 of 2020) [2025] KEELC 4356 (KLR) (5 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4356 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND PETITION E004 OF 2020**

MD MWANGI, J

JUNE 5, 2025

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 40, 47, 48, 50 IN CONJUNCTION WITH ARTICLES 2 (1), 3, 10, 19, 20, 21, 22, 23, 24, 25, 27, 40, 50, 162 (2), (B), 165 (3), 209, 210, 232 (1), (2), 258, 259, 260

AND

IN THE MATTER OF THE LAND REGISTRATION ACT

BETWEEN

SHAHIM MADHANI VIEHWEBER PETITIONER

AND

KENYA FOREST SERVICE 1ST RESPONDENT

COUNTY LAND REGISTRAR, KAJIADO 2ND RESPONDENT

THE MISTRY OF LANDS AND PHYSICAL PLANNING 3RD RESPONDENT

THEB MINISTRY OF ENVIRONMENT AND FORESTRY ... 4TH RESPONDENT

THE ATTORNEY GENERAL 5TH RESPONDENT

NCHICHO ENE KIROGET 6TH RESPONDENT

LIKAM OLE MUSA 7TH RESPONDENT

TINKAINE OLE LONGO 8TH RESPONDENT



JUDGMENT

Background.

1. The petition herein is dated 18th December 2020. It was filed in court on 23rd December 2020. The petitioner asserts that she is the registered proprietor of parcels of land known as Title Numbers Kjd/Meto/1849 and Kjd/Meto/1850 measuring 1.88 ha and 2.14 ha respectively situated at Maili Tisa in Kajiado County. The two parcels of land are adjacent to each other with a road separating them. They both border the Oldonyo Orok Forest Reserve also known as Namanga Hill Forest.
2. The petitioner avers that she purchased the two parcels of land from the 6th, 7th and 8th respondents herein, free from any encumbrances and had continuously enjoyed quiet possession of the same until sometimes in October 2020, when the 1st respondent, the Kenya Forest Service, through its servants, agents and or officers, without any lawful or justifiable cause and in total disregard of the petitioner's proprietary rights trespassed into the petitioner's parcel of land, Title No. Kjd/Meto/1850, placing beacons on the suit property and on the road easement separating the petitioner's two parcels of land. The officers of the 1st respondent had intended to place beacons on parcel of land Kjd/Meto/1849 as well but were prevented from doing so by the petitioner's spouse who confronted them as they prepared to do so.
3. The petitioner claims that the officers of the 1st respondent alleged that the boundary of the suit properties and Oldonyo Orok Forest Reserve as drawn in 1974 is wrong insisting that it should be a straight line contrary to what it is now. The petitioner however states that the due diligence conducted prior to the purchase of the suit properties confirmed that the title documents received from the 6th, 7th and 8th respondents matched every particular of the parcels of land including location and dimensions on the ground and the records held at the Kajiado Lands Registry and the Office of Director of Surveys.
4. It is the petitioner's case that the action of the 1st respondent of placing new beacons on Kjd/Meto/1850, and on the road easement separating the suit properties and the intended action to place new beacons in Kjd/Meto/1849 under the watch of the 4th respondent amounts to trespass and encroachment onto the suit properties and violates her proprietary rights in respect to the two parcels of land and the right to protection of the land. The 1st respondent has despite demand and notice from the petitioner refused to remove the beacons placed on Kjd/Meto/1850 and those adjacent the road easement. She asserts that the actions of the 1st respondent are patently illegal and unconstitutional. She seeks the court's protection to safeguard and prevent the violation of her fundamental rights and freedoms under *the constitution*. She prays for various orders as enumerated in her petition.
5. The petition is further supported by the affidavit of the petitioner sworn on 18th December 2020 reiterating the averments in the petition.

Response by the 1st respondent

6. The 1st respondent, who was represented by the office of the Attorney General responded to the petition by way of two affidavits. The first one is sworn by JIRA CHIMANYI on 26th January 2021 while the second titled as the '1st respondent's further affidavit' is sworn on 23rd February 2023 by the same deponent.
7. The deponent who described himself as a surveyor working for the 1st respondent affirmed that the suit properties border Oldonyo Orok Forest Reserve also known as Namanga Hill Forest; which was



declared as a forest area vide [Legal Notice No. 304 of 1979](#). The deponent alleges that a portion of the suit properties encroaches into the forest reserve.

8. It is further deposed that the 1st respondent (KFS) draws its mandate from [the Constitution](#), the [Forest Conservation and Management Act](#), 2016, relevant statutes and policies as well as executive orders on the organization of government. As part of its mandate, the deponent deposes that Kenya Forest Service, is responsible for the management of Public Forests as defined in [the Constitution](#) and the statute. Its functions include conservation, protection and management of all public forests. The deponent therefore asserts that the actions of KFS of placing beacons on the suit properties cannot amount to trespass or encroachment. Routine checks and fact finding by its public officers on public forest land is a core mandate/function and power of the 1st respondent and is not peculiar to the petitioner's purported parcels.
9. In the further affidavit, the deponent deposes that as per the legal notice No. 304, the boundaries of Namanga Hill Forest which covers an approximate area of 11,740 Hectares, are clearly delineated on boundary plan No. 175/214 deposited in the surveys records' office. A portion of the petitioner's suit properties encroach into the forest by approximately 1.4 hectares (3.4 acres).

Directions by the court.

10. The directions by the court were that the petition be canvassed by way of written submissions. The petitioner's submissions are dated 9th June 2022 filed way back on 21st June 2022. The 1st respondent's submissions are dated 17th February 2025. The court has had the opportunity to read and consider the submissions in writing this judgment.

Issues for determination.

11. In framing the issues for determination in this matter, I am guided by the pronouncement of the Court of Appeal in the case of DEN –vs- PNN (2015) eKLR, as cited in the case of Kenpipe Co-operative Savings and Credit Limited –vs- Daniel Githinji Waiganjo (2017) eKLR, by the Court of Appeal (differently constituted). The court held that;

“Generally, the law is that the courts would determine a case on the issues that flow from the pleadings and judgment would be pronounced on the issues arising from the pleadings or from issues, framed for court's determination by the parties. It is also a principle of law that parties are generally confined to their pleadings unless pleadings were amended during the hearing of the case”.
12. Under the provisions of Order 15 rule 1 of the Civil Procedure Rules, an issue arises when a material proposition of fact or law is affirmed by one party and denied by the other. Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.
13. Having carefully analyzed the petition herein and the response by the 1st respondent, the ownership of subject properties by the petitioner is not disputed. The 1st respondent in its response acknowledges the petitioner as the proprietor thereof. The issues that present themselves for determination in this matter are;
 - a. Whether the petitioner's properties Kjd/Meto/1849 and Kjd/Meto/1850 have encroached into the Namanga Hill Forest;



- b. Whether the 1st respondent has the statutory authority to alter and place beacons on the boundary between the Namanga Hill Forest and the petitioner’s properties Kjd/Meto/1849 and Kjd/Meto/1850;
- c. Whether the petitioner is entitled to the remedies sought in her petition; and,
- d. Who shall bear the costs of the petition.

Analysis for determination.

A. Whether the petitioner’s properties Kjd/Meto/1849 and Kjd/Meto/1850 have encroached into the Namanga Hill Forest and whether the 1st defendant has the statutory authority to alter and place beacons on the boundary between the Namanga Hill Forest and the petitioner’s properties Kjd/Meto/1849 and Kjd/Meto/1850.

- 14. The facts of this case as pleaded by the parties disclose the existence of a boundary dispute between the petitioner properties and the Namanga Hill Forest. Whereas the petitioner accuses the 1st respondent of trespassing into her properties in the pretext of erecting beacons, the 1st respondent insists that a portion of the petitioner’s properties encroach into the Namanga Hill Forest.
- 15. The *Land Registration Act* provides the mechanism for resolution of boundary disputes. The Act first and foremost distinguishes between fixed boundaries and general boundaries. The Act gives the mandate to the Land Registrar to resolve boundary disputes of lands with general boundaries.
- 16. This was position was affirmed by the court in the case of George Kamau Macharia –vs- Dexka Limited (2019) eKLR, where Kemei J held that;

“It is manifestly clear that the above section {18(2) of the *Land Registration Act*} gives the mandate to the Land Registrar to resolve boundary disputes of land with general boundaries. ...the framers of Section 18(2) of the *Land Registration Act* placed this matter before the Land Registrar who has the technical advice and resources of the District Land Surveyor to determine and ascertain the boundaries.”
- 17. The Court of Appeal in the case of Azzuri Limited –vs- Pink Properties Limited (2018) eKLR, restated the above position holding that,

“....This means that under the aforesaid provisions, boundary disputes pertaining to lands falling within general boundary areas must be referred to the Land Registrar for resolution.”
- 18. It is therefore not within the jurisdiction of this court to determine whether or not the petitioner’s properties have encroached into the Namanga Forest Reserve neither is it the mandate of Kenya Forest Services. That is the exclusive jurisdiction of the Land Registrar.
- 19. A perusal of the copies of the titles of the petitioner’s properties discloses that they were issued under the Registered *land Act* (repealed). Their acreage is indicated as ‘approximate area’ with a registry map sheet number indicated. Their boundaries are automatically general boundaries; not fixed boundaries. Any boundary dispute arising concerning the said parcels must be handled in accordance with the provisions of Section 18(2) of the *Land Registration Act*.
- 20. When the 1st respondent discovered, as it alleges in the responses to the petition, that the petitioners properties had encroached into the Namanga Hill Forest, it ought to have lodged a complaint with the relevant Land Registrar for determination. Instead, it literally took the law into its own hands and



assumed the responsibilities of the Land Registrar and the Director of Surveys to erect beacons on the presumed boundary line between Namanga Hill Forest and the petitioner's parcels of land without notice or reference to the petitioner.

21. No action must be taken without affording the affected person the opportunity to be heard. The right of any party to be heard before a decision affecting him or his property is made is sacrosanct. That was the holding in the case of *General Medical Council –vs- Spackman (1943) 2 ALLER 337*, cited with approval in *Republic –vs- Vice Chancellor JKUAT*, where the court held that;

“If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision”.
22. It has been argued on behalf of the 1st respondent that under Section 20 of the *Land Registration Act*, the 1st respondent has the power to maintain the forest boundaries through fences, pillars, beacons, walls and other features that demarcate boundaries. While that may be so of every proprietor of land, the power does not extend to marking one's own boundaries and erecting one's own beacons and boundary marks. That is the preserve of the Land Registrars and the Director of surveys.
23. Taking matters into one's own hands puts at risk the entire system of the rule of law and due process. The 1st respondent must always remember that ours is a country governed by rule of law not by rule of power.
24. The 1st respondent has severally repeated that it has the Constitutional and Statutory mandate to conserve and manage public forests. Off course it does; however, it must execute its mandate under the law. Being a state organ, it is bound by the provisions of Article 10 of *the Constitution* in executing its mandate. It is bound by the National Values and Principles of Governance, one of which is rule of law.
25. From the foregoing, the actions of the 1st respondent were unlawful and violated the petitioner's right to fair administrative action and equal protection and equal benefit of the law.

B. Whether the petitioner is entitled to the reliefs sought.

26. Articles 23(3) of *the Constitution* of Kenya empowers the court, in any proceedings brought under Article 22 to grant appropriate relief, including –
 - a. A declaration of rights;
 - b. An injunction;
 - c. A conservatory order;
 - d. A declaration of invalidity of any law;
 - e. An order of compensation; and
 - f. An order of judicial review.
27. The petitioner has sought an assortment of reliefs in her petition. The court in determining the reliefs available to the petitioner takes cognizance of the fact that though the 1st respondent entered into the petitioner's land and erected beacons without lawful authority, it did not encroach or otherwise take possession of any portion of the petitioner's properties.
28. From the above analysis of the petitioner's case, the court grants the following reliefs;



- a. A declaration that the 1st respondent has no statutory authority/power to determine and fix boundaries.
- b. A declaration that the beacons placed in the petitioner's properties by the 1st respondent are inconsequential.
- c. The 1st respondent is restrained by way of a permanent injunction from claiming and or encroaching into the petitioner's properties KAJIADO/METO/1849 and KAJIADO/METO/1850, until and unless the boundary dispute between the petitioner and the 1st respondent is determined under the relevant provisions of the law.
- d. The petitioner is awarded nominal damages for trespass against the 1st respondent of Kshs. 50,000/- only, with interest at court rates from the date of this judgment until payment in full.
- e. The costs of the petition are awarded to the petitioner against the 1st respondent.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 5TH DAY OF JUNE 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Opwaka h/b for Mr. Masafu for the Petitioner

Mr. Mwambonu for the 1st to the 5th Respondents

Court Assistant: Mpoye

M.D. MWANGI

JUDGE

