



Mwangi v Kihara & 10 others (Environment and Land Case E088 of 2022) [2025] KEELC 5227 (KLR) (10 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5227 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND CASE E088 OF 2022
LC KOMINGOI, J
JULY 10, 2025**

BETWEEN

ABISHAGI WARUATHIA MWANGI PLAINTIFF

AND

HON. PETER KIMARI KIHARA 1ST DEFENDANT

THE LAND REGISTRAR (KAJIADO NORTH 2ND DEFENDANT

AND

KOOLE OLE TUMPES PULEI 1ST INTENDED DEFENDANT

RERAI ENE PULEI 2ND INTENDED DEFENDANT

MOSES LEKUKA KOOL 3RD INTENDED DEFENDANT

KASHAMBA ENE PULEI 4TH INTENDED DEFENDANT

PAUL KIRAYIO KOOL 5TH INTENDED DEFENDANT

EMMANUEL KOSEN KOOL 6TH INTENDED DEFENDANT

JULIUS NTIMAMA PULEI 7TH INTENDED DEFENDANT

DAVID OGEA MONARI 8TH INTENDED DEFENDANT

ROTINO FARMERS LIMITED 9TH INTENDED DEFENDANT

RULING

1. This Ruling is in respect of three Notice of Motions two applications by the 1st Defendant dated 6th June 2024 and 19th September 2024 and one by the Plaintiff dated 3rd October 2024.



2. The Notice of Motion dated 6th June 2024 by the 1st Defendant is brought under: Order 1 Rule 10 and Order 51 Rule 1 of the Civil Procedure Rules; Section 150 of the Land Act, Article 60 and 159 of the Constitution and all other enabling provisions of Law.
3. It seeks:
 - i. Spent
 - ii. This Honourable Court be pleased to include and join the intended 3rd to 10th Defendants, being the registered proprietors of land parcel no. Kajiado/Olchoro-Onyore/79 (new numbers 7833-7838) and the 11th Defendant being the registered proprietor of Kajiado/Olchore Onyore/1294 in this suit.
 - iii. Subject to Order no.2 above, the 3rd to 11th Defendants, being the registered proprietors of land parcels no. Kajiado/Olchoro-Onyore/79 (new numbers 7833-7838) and Kajiado/Olchore-Onyore/1294 be directed to allow the Land Registrar and Surveyor Ngong entry into the mentioned parcels for area confirmation and boundary determination as per the Orders of this Honourable Court issued on the 11th April 2024.
 - iv. The O.C.S Ngong Police Station to ensure compliance with Order No.3 above.
 - v. The costs of this Application be provided for.
4. The grounds of this application are set out on its face and in the Supporting Affidavit sworn by the 1st Defendant Hon. Peter Kimari. He states that following this Court's Ruling delivered on 11th April 2024, the Court directed that the registered owners of parcels Kajiado/Olchoro-Onyore/79 (new numbers 7833-7838) and Kajiado/Olchore-Onyore/1294 be joined in these proceedings and allow the Land Registrar entry into the said parcels for boundary determination. It is claimed that the Land Registrar had initiated a survey but efforts to contact the intended defendants was meant with hostility from owners of Kajiado/Olchoro-Onyore/79 (new numbers 7833-7838). This necessitated the filing of this application as well as seeking help of the OCS Ngong Police Station in ensuring the orders are executed.
5. The 1st Defendant also the Notice of Motion dated 19th September 2024 brought under Order 5 Rule 17 and Order 51 of the Civil Procedure Rules; Section 1A, 1B and 3A of the Civil Procedure Act; Article 159 of the Constitution and all enabling provisions of the Law seeking:
 - i. Spent
 - ii. Leave be granted to Counsel for the 1st Defendant to effect service by way of substituted service of the application dated 6th June 2024 through advertisement in a widely circulated newspaper.
 - iii. Any other further order as the Court may deem fit and just.
6. The grounds are on the face of the application and in the Supporting Affidavit sworn by the advocate for the 1st Defendant's Nahashon Mwitii Mpuko Counsel. He states that efforts to effect personal service to the 3rd to 11th intended Defendants had been rendered futile. He averred that they tried to initiate contact with some of the intended defendant but it was met with hostility and there was therefore a likelihood that in the event they are found, they would evade service. He stated that the application had been filed on good faith and no prejudice would be occasioned to the intended defendants.
7. The Plaintiff filed Grounds of Opposition to the application dated 19th September 2024 opposing the application on the grounds that the Plaintiff's case was not a boundary dispute but dispute on



- trespass and encroachment which ought to be remedied through payment of damages and mesne profits. The Plaintiff also indicated that the 1st defendant was being malicious by coercing potential buyers into breaching their purchase agreements with the Plaintiff. The plaintiff added that the dispute between her and the 1st defendant had no connection with neighbouring parcels 79 and 1294 and the 1st defendant should not drag her into his boundary dispute with his neighbours. As such, the Court should determine the cause of action necessitating the instant suit in which the survey report dated 22nd March 2023 had conclusively determined the boundary dispute.
8. It was also argued that the 1st defendant had not produced evidence to show that he had diligently tried to effect service to the third parties unsuccessfully by use of less intrusive means other than substituted service in a widely circulated newspaper. It was also contradictory for the 1st defendant to claim that the parties could not be found yet he had indicated that efforts to survey the land was met with hostility. The application should therefore be dismissed with costs.
 9. The Plaintiff then filed the Notice of Motion dated 3rd October 2024 brought under Order 2 Rule 15(1)(b), (c) and Order 51 Rule 1 of the Civil Procedure Rules; Section 3A of the *Civil Procedure Act* and all enabling provisions of law seeking:
 - i. Spent
 - ii. This Court may be pleased to hold that the 1st and/or 2nd defendants statements of defence, are frivolous, scandalous, vexatious prejudicial, embarrassing, intended to delay the fair trial of this action and an abuse of the Court process.
 - iii. This Court be pleased to strike out the 1st and/or 2nd defendants statements of defence, and enter judgment for the Plaintiff in terms of the Plaintiff;
 - iv. Any other orders be provided as this Honourable Court deems fit and just;
 - v. Costs of this application be provided for.
 10. This application supported by the grounds on the face of the application and in the Affidavit sworn by Charles Alenga Khamala, Advocate for Plaintiff.
 11. He avers that the 1st defendant is seeking to re-litigate a matter that had already been determined by this court while continuing to encroach on the Plaintiff's parcel Kajiado/Olchoro Onyore/192 and had even constructed temporary shelters on the encroached parcel. Counsel indicated that the ongoing dispute continued to aggravate the Plaintiff's delicate health adding that she was also of advanced age. Counsel averred that the 1st and 2nd defendants' claim against other third parties had nothing to do with the Plaintiff as her dispute with the 1st defendant had already been determined and she was being subjected to unnecessary litigation and financial inconvenience to retain an advocate.
 12. This is because in the 2nd Defendant's survey report dated 22nd March 2023, the 2nd defendant admitted that the Plaintiff was the owner of parcel 192 and that parcel 193 had encroached on to parcel 192 and its fence was not in line with the boundary of parcel 1294. The Land Registrar concluded that parcel 192 was in the right position and its beacons should, be respected. Therefore, the 1st defendant was free to pursue any claim against the third parties in a separate suit without because the dispute between the Plaintiff and the 1st defendant had been determined. The 1st defendant's defence should thus be struck out as per Order 2 Rule 15(1) (b), (c) and (d) Civil Procedure Rules and judgement should be entered in the Plaintiff's favour together with costs.
 13. These applications were canvassed by way of written submissions.



Submissions of the 1st defendant

14. On whether the 1st defendant has met the threshold for an application for substituted service, Counsel submitted that in this Court's ruling delivered on 11th April 2024, the Court ordered for joinder of owners of parcel Kajiado/Olchoro Onyore/79 (new 7833-7838) to allow the Land Registrar and surveyor Ngong entry to the mentioned parcels for confirmation and boundary determination. However, efforts to effect personal service to the intended defendants had been unsuccessful due to their unknown whereabouts. Counsel also submitted that efforts to get their telephone numbers so as to effect service via phone had also been unsuccessful. Therefore, the only other mode of service was through substituted service.

Submissions of the Plaintiff

15. Counsel submitted that there was no proof such as a certificate of official search to indicate that the intended defendants were the actual owners of the neighbouring parcels. He went on to submit that in seeking to join the intended parties, it would have been imperative to amend the Plaint to establish a cause of action against them as held by the Court of Appeal in *David Kihara Gitonga & Another v National Bank of Kenya Ltd & 85 Others* [2023] KECA (KLR).
16. Counsel went on to submit that the 1st defendant purchased fictitious land and it was upon him to undertake due diligence to determine the proper boundaries. Therefore, any boundary dispute between him and any other persons should not be linked with the Plaintiff's dispute which was based on the tort of trespass. The 2nd Defendant's survey concluded that the 1st Defendant should respect the Plaintiff's beacons and as such, the Plaintiff's application for interim injunctions dated 27th October 2022 should succeed. Counsel submitted that it was unfortunate that the Plaintiff's former advocate did not pursue the suit's logical conclusion after the conclusive survey, however, this lapse should not be visited upon the Plaintiff. Counsel added that a survey having been undertaken by consent and report filed, meant that the 1st defendant was attempting to re-litigate which was res judicata contrary to Section 7 *Civil Procedure Act*. Reference was made to *Jacob Agengo Anzigale alias Manase v Kolongei Farmers Cooperative Society* [2023] KECA 413 (KLR) on grounds for res judicata.
17. Counsel also pointed out that the Ruling dated 11th April 2024 had been appealed against at the Court of Appeal on grounds that the joinder should not be allowed. Counsel argued that the Court had authority to depart from the said order should it deem that it was erroneously entered on the per incuriam doctrine. Reference was made to the Supreme Court in *Jashbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* [2023] eKLR where it held that "while it is good practice for the court to follow its stability and good order, it was nonetheless not bound by a decision which it considers to have been reached per incuriam or which is unconscionable given a change of circumstances or for any other sound reason..."
18. Counsel submitted that the 1st defendant's defence should be struck out for being substantively unsustainable and procedurally prejudicial. Counsel submitted that the orders issued on 19th December 2022 should take precedence over subsequent orders which might be incompatible, conflicting or inconsistent with those order such as the Ruling delivered on 11th April 2024 ordering for joinder of other parties. The 1st defendant should therefore be precluded from prolonging this litigation and the Plaintiff's application should be allowed.
19. The Plaintiff's supplementary submissions in response to the 1st Defendant's submissions were also considered. Counsel submitted that the 1st Defendant was estopped from seeking re-survey of the suit property which had already been done, rehashing that the intended defendants' property was not part



of the dispute between the Plaintiff and the Defendant and the sought joinder should be dismissed with costs.

Analysis and determination

20. I have considered the Notice of Motions, the affidavits in support, the responses thereto, the written submissions, the authorities and find that the issues for determination are:
 - i. Whether the 1st Defendant's application for joinder of additional parties to the suit is merited;
 - ii. Whether the 1st Defendant's application for orders to effect service by way of substituted service through an advertisement in the local newspapers is merited;
 - iii. Whether the suit was on trespass and not a boundary dispute;
 - iv. Whether the Plaintiff's application for striking out of the Defendants' Statement of Defence and judgement entered in the Plaintiff's favour is merited;
 - v. Who should bear the costs?
21. All these issues for determination will be addressed jointly since they are part of the same transaction.
22. This suit was instituted by the Plaintiff by the Plaint dated 27th October 2022 on the claim that the Plaintiff was the owner of parcel Kajiado/Olchoro Onyore/192 measuring approximately 13.6 hectares through transmission after the passing of her husband who acquired it in 1996 and had been in possession since then. She had since subdivided it to parcels Kajiado/Olchoro Onyore/12526 to 12531, sold off three of them and retained parcels 12527, 12528 and 12431.
23. Sometime in December 2020, the 1st Defendant being the owner of parcel Kajiado/Olchoro Onyore/193 trespassed on her property and fenced off a portion of about 3.34 hectares of the Plaintiff's parcel. She thus sought for orders of declaration that she was the registered owner of parcel 192, that the 1st Defendant should be restrained from interfering with her possession and consequently evicted, among other orders.
24. The 1st Defendant in his Statement of Defence dated 7th December 2022 contested this claim on grounds that he purchased his parcel 193 in May 2015 and subdivided it into 78 parcels and sold off some of them. He stated that a boundary dispute had been lodged with the Land Registrar who recommended that a holistic survey of all neighbouring parcels be undertaken to confirm the extent of the encroachment if any.
25. By a consent entered on 19th December 2022, parties agreed to refer the matter to the Land Registrar to determine the boundaries between parcels 192 and 193 and the report be filed in Court.
26. Following this directive, a Survey report dated 22nd March 2023 found that
 - “ ... according to the pickings the area for parcel 192 compares well with the registered area. The fence erected by the owner of parcel 193 has encroached into parcel 192 and the fences are not in line with the boundary of parcel 191 and 1294 thus distorting the boundary and the area of the land. In conclusion, parcel 192 is in the right position and its beacons should be respected except the beacon marking the boundary with 193 and 194. It should be brought inside by 15m. The owner of parcel 193 should lodge a dispute with parcel 1294 so that the boundary is straightened from parcel 191 to the river...



27. In a Notice of Motion application by the 1st defendant dated 5th October 2023, the 1st defendant sought joinder of owners of parcels Kajiado/Olchoro Onyore/79 (new number 7388-7838) and 1294 in this suit to enable undertaking of a re-survey for a complete report on the grounds that the Land Registrar's report dated 1st April 2022 and the Surveyor's report dated 22nd March 2023 were conflicting and efforts to initiate survey on parcel 79 (new number 7388-7838) were met with hostility. The 1st Defendant also indicated that it was the Land Registrar's recommendation that parcel 1294 be surveyed to determine the extent of the encroachment.
28. The Plaintiff contested this application on grounds that she did not have a claim against owners of parcels 79 and 1294 and if the 1st Defendant had any dispute against them, then he should lodge an independent boundary dispute with the Land Registrar.
29. This application was heard and determined by this Court in its Ruling dated 11th April 2024. This Court made reference to the reports dated 1st April 2022 and 22nd March 2023 in coming up with a determination where one of the recommendations was to resurvey the neighbouring parcels by bringing the owners. And that owners of the adjacent parcels ought to be notified of these proceedings before the surveyor goes to the ground. As such joinder of owners of the adjacent parcels was allowed; and directed owner of parcels Kajiado/Olchoro Onyore/79 (new numbers 7833-7838) to allow the Land Registrar and Surveyor Ngong to enter their parcels of land for boundary determination and ordered that they be notified of these proceedings.
30. These orders are still in force having not been varied or set aside.
31. While the Court takes cognisance of the Plaintiff's opposition that the dispute was on encroachment and trespass, and that the 1st Defendant continues to trespass on the Plaintiff's land, this matter was referred to the Land Registrar to help determine this issue of trespass to aid the Court in making a just determination. The Court orders issued in the Ruling dated 11th April 2024, comes from the recommendation of the Land Registrar and the Surveyor in the reports dated 1st April 2022 and 21st March 2023. While it is not in dispute that both reports show that parcel 193 has encroached on parcel 192, the reports further indicate that parcel 192- the Plaintiff's parcel borders parcel 79 and 193 and that parcel 79 was much bigger on the ground and recommended a resurvey for parcel 79, as well as parcel 1294 which borders parcel 193.
32. However, the Plaintiff categorically states that she has no dispute with the neighbouring parcel 79 or parcel 1294. That this suit between the Plaintiff and the 1st defendant should be determined. And the 1st defendant who has a dispute with parcel 1294 be at liberty to pursue that dispute independently without 'dragging' the Plaintiff into it. The 1st Defendant has approached court seeking joinder of owners of parcels 79 (new 7833 to 7838) and 1294. It is on record that parcel 79 (new 7833 to 7838) does not border the 1st Defendant's parcel 193 and the Plaintiff categorically indicates that she has no dispute with that boundary.
33. While Article 48 of *the Constitution* of Kenya guarantees the right of access to justice, it does not oblige a party to exercise that right. It is a facilitative rather than coercive provision. Parties must be free to determine whether or not to seek judicial redress. Forcing a person to litigate would violate their autonomy and the voluntary nature of legal proceedings.
34. However, while taking cognisance of the fact that the Plaintiff states that she has no dispute against parcel 79, the Court can only set aside a duly issued order *ex debito justitiae* where the orders were a nullity or made in error. And the Orders issued on 11th April 2024 were neither a nullity nor made in error.



35. As such, the Plaintiff should properly move the Court for the setting aside/varying of the said orders.
36. On whether the 1st defendants' application dated 6th June 2024 for joinder of the intended defendants was merited, it is on record that this order had already been issued and has not been set aside.
37. I find that the 1st Defendant has demonstrated that he is unable to effect personal service on the 3rd – 11th Defendants as their whereabouts are unknown. I therefore find that the Notice of Motion dated 19th September 2024 is merited and the same is allowed.
38. On whether the Plaintiffs application to strike out the 1st defendant's statement of defence is merited, my view is that while it is on record that there is encroachment of the 1st Defendant's parcel on the Plaintiff's parcel and that was the gist of this suit, the suit is active. Some orders were granted. It would be imperative that any active order be first set aside or altered before the Court can strike out the statement of defence.
39. It is well settled law that the power of the court to strike out pleadings should be used sparingly and cautiously, as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. See the case of D.T. Dobie & Company (Kenya) Limited Vs. Muchina (1982) KLR.
40. For this reason, I find no merit in the Notice of Motion dated 3rd October 2024 and the same is dismissed. The costs of these applications do abide the outcome of the main suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 10TH JULY 2024.

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

Dr. C. Khamala for the Plaintiff.

N/A for the 1st Defendant.

N/A for the 2nd Defendant.

Court Assistant - Mateli

