



**Kitonga & another (Legal Representatives of the Estate of Joyce  
Ndungwa Kitonga) v Nzyoka (Environment and Land Appeal  
E004 of 2022) [2024] KEELC 1667 (KLR) (3 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 1667 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL E004 OF 2022**

**A NYUKURI, J**

**APRIL 3, 2024**

**BETWEEN**

**CHARITY MULUNDE KITONGA ..... 1<sup>ST</sup> APPELLANT**

**KASYOKA KITONGA ..... 2<sup>ND</sup> APPELLANT**

**LEGAL REPRESENTATIVES OF THE ESTATE OF JOYCE NDUNGWA  
KITONGA**

**AND**

**FRANK MUANGE NZYOKA ..... RESPONDENT**

*(Being an appeal from the Judgment of Honourable C.N. Ondieki, Principal  
Magistrate, delivered on 10th February 2022 in the Chief Magistrate's  
Court at Machakos Environment and Land Case No. 87 of 2020)*

**JUDGMENT**

**Introduction**

1. This appeal was filed by Charity Mulunde Kitonga and Kasyoka Kitonga on behalf of the estate of the late Joyce Ndungwa Kitonga, the appellants herein against Frank Muange Nzioka, challenging the judgment delivered by Honorable C. N. Ondieki, Principal Magistrate, delivered on 10<sup>th</sup> February 2022 in Machakos Chief Magistrate's Court ELC Case Number 87 of 2020. In the impugned judgment, the learned Magistrate dismissed the appellants' counterclaim and allowed the respondent's claim as sought in the plaint.



## Background

2. By a plaint dated 24<sup>th</sup> July 2015, the plaintiff who is the respondent before this court, sought against the appellants herein, being the defendants in the lower court, the following prayers;
  - a. The court to declare the correct and official boundary between parcel number Machakos/Mua hills/217 and 425 as the one pointed out by the surveyor following the map drawn by the Director of Survey for the area being map number 2 and fix the same.
  - b. An order to remove the trees that have caused damages to the coffee plantation and damages caused to the coffee and being caused until they are removed.
  - c. Costs of this suit.
3. The plaintiff stated that he was the registered proprietor of the parcel of land known as Machakos/Mua Hills/217 which land borders the defendants' parcel known as Machakos/Mua Hills/ 425. Further that he acquired his land in 1969 and has been in possession since. He stated that he has planted coffee in his land. According to him the defendants have encroached on  $\frac{1}{4}$  an acre of his land.
4. The suit was defended. By a defence and counterclaim dated 14<sup>th</sup> September 2015, the defendants denied the plaintiff's claim and stated that their parcel of land measures approximately 0.70 hectares which the defendant and her family have been in lawful possession for over 50 years. They also stated that having occupied the suit property for over 50 years, they had acquired the prescriptive rights over the parcel of land and that the plaintiff does not hold good title to the land registered in his name as he obtained it improperly and fraudulently. They counterclaimed for the following orders;
  - a. An order for a permanent injunction restraining the plaintiff either by himself or his agents, relatives and or servants from interfering with the defendant's quiet possession and enjoyment and use of her land number Machakos/Mua Hills/ 425.
  - b. The title of plot No. Machakos/Mua Hills/217 in the names of the plaintiff be cancelled.
  - c. Alternatively, an order that the defendant has acquired prescriptive rights over the land Machakos/Mua Hills/ 425 by adverse Possession.
  - d. Costs of this suit.
  - e. Any other and our further relief that this Honorable Court may deem fit and just to grant in the circumstances.
5. The record shows that in arriving at its findings, the trial court relied on the reports filed by the plaintiff's surveyor; the county surveyor; and the defendants' surveyor, together with submissions filed by the parties.
6. The trial court found that although a cadastral map is a general boundary and indicates the approximate position of the land, the finding by the surveyor that there was an encroachment of 0.08 hectares into the respondent's parcel should not count for nothing. The trial court therefore declared that there was an encroachment into the respondent's land and directed the Land Registrar to cause a survey of the property and an amendment of the cadastral map accordingly.
7. Aggrieved by the findings of the trial court, the appellants filed the appeal herein by way of a Memorandum of Appeal dated 9<sup>th</sup> March 2022 citing five grounds of appeal as follows;



- a. The learned Magistrate erred in law and in fact in finding that the precise boundary between title numbers Machakos/Mua Hills/425 and Machakos/Mua Hills/217 is 0.08 hectares into Machakos/Mua Hills/425.
  - b. The learned Magistrate erred in law and in fact in failing to appreciate the opinion of the defendant’s surveyor and the county surveyor that the Registry Index Map should be amended to conform to the boundaries on the ground.
  - c. The learned magistrate erred in law and in fact by failing to find that the boundaries of the ground supersede the Registry Index Map and that the map is not conclusive authority unless the boundaries are fixed as per section 18 of the *Land Registration Act* 2012.
  - d. The learned Magistrate erred in law and in fact by finding that the measurements on the ground were as per the Registry Index Map whereas the boundaries had not been fixed.
  - e. The learned Magistrate erred in law and in fact by finding that 0.08 hectares had been hived from Machakos/Mua Hills/217 by the appellants’ parcel Machakos/Mua Hills/ 425.
8. Consequently, the appellants sought that the orders of the trial court of 10<sup>th</sup> February 2022 be set aside by this court.
  9. The appeal was canvassed by way of written submissions. On record are the appellants’ submissions filed on 13<sup>th</sup> April 2023 and the respondent’s submissions filed on 20<sup>th</sup> August 2023.

### **Appellant’s submissions**

10. Counsel for the appellants combined grounds 1, 3 and 4 of the appeal and submitted that the trial court failed to appreciate the fact that the boundary for parcel Nos. 425 and 217 was not fixed. Counsel relied on section 18 (1) of the *Land Registration Act* and argued that the appellants had acquired their parcel in the year 1964 from the Settlement Fund Trustees and that the boundaries were as shown by the District Settlement Officer while the respondent acquired his parcel in 1969 and therefore the boundaries have existed for a period of more than 50 years. Counsel cited the case of Samuel Wangau v. AG & 2 Others [2009] for the proposition that the Registry Index Maps are not authorities on the boundaries and that where there is a dispute on the position and location of a boundary when the boundary is not fixed, one must go beyond the Registry Index Maps in solving the dispute.
11. It was further argued for the appellants that as the boundaries were not fixed in this case, parties agreed to have the parcel visited by the county land registrar to have the boundaries ascertained as per section 18 of the *Land Registration Act*. Counsel argued that the County Land Surveyor’s report was clear that the boundary as per the ground should be adopted and the Registry Index Map amended to conform to the situation on the ground which was a recommendation made after concluding that during the survey and comparing the Registry Index Map, they noted that the ground does not conform to the former and there was an encroachment of an approximate area of 0.124 hectares. Counsel argued that the appellants’ surveyor one Obel concluded that the Registry Index Map is inaccurate by mistake, error or omission or with intention to defraud and should not be relied upon in resolving the dispute. Further that this surveyor adopted the same recommendation as that of the county surveyor that the boundaries on the ground should be adopted so that the Registry Index Map should conform with the ground as per sections 79 and 80 of the *Land Registration Act*. Counsel also observed that the report by the respondent’s surveyor, Geosurv System Ltd was to the effect that the measurements of the two parcels were as indicated in the Registry Index Map. Hence counsel argued that the court ought to have been guided by the recommendations of the county surveyor and the appellants’ surveyors because



the boundaries on the ground supersede the measurements indicated in the Registry Index Map and therefore there was need to amend the Registry Index Map to conform to the situation on the ground.

12. In arguing grounds 2 and 5, counsel submitted that there was no concurrence of the expert opinion on the acreage attributed to the encroachment as the respondent surveyors report at pages 114 to 115 remained silent on the alleged encroachment. Therefore, counsel argued that in accordance to section 16 one of the [Land Registration Act](#), the Registry Index Map ought to be amended to conform to the ground.

### **Respondent's submissions**

13. Counsel for the respondent argued that a first appeal is by way of retrial citing the case of *Gitobu Imanyara v. Attorney General* [2016] eKLR. Counsel submitted that therefore that this court ought to be cautious in interfering with the judgment of the trial court. Reference was made to section 2 of the [Land Registration Act](#) on the definition of cadastral map to mean a map or series of maps referred under section 15 of the Act. Counsel argued that the cadastral map must be maintained for every registration unit and the same must be compatible with other documents.
14. In supporting the findings of the trial court, counsel contended that although cadastral maps are not authoritative, under section 22 of the [Land Registration Act](#), the Land Registrar may define the precise position of the boundary on a parcel of land after giving sufficient notice to adjoining land owners of his intention to ascertain and fix the boundaries. Counsel argued that pursuant to the orders of that court of 10<sup>th</sup> February 2022 and in compliance with the above provision the Land Registrar Machakos County, together with the surveyor upon giving the affected parties the required notice visited the suit properties, conducted a survey and determined the boundaries fixed the same and amended Machakos/ Mua Hills sheet 2 cadastral map to conform with the repositioned boundary in the presence of the parties and the chief. Counsel argued that in conducting the survey, the surveyor observed that there were all beacons which were used as controls and even though the appellants had fenced off some of the respondent's beacons, they were not tampered with.
15. Counsel argued that the issue of boundaries had already been fully determined and that the appellants are not ignorant of the fact that the boundaries of the parcel of land have already been fixed as after demarcation exercise they cleared all the Kei apple trees, that they had illegally grown on the respondent's land and that the parties have since lived in peace and harmony and the protracted confrontations have ended. It was submitted for the respondent that even if cadastral maps were not authoritative, if courts were to allow parties to amend boundaries as they wished, then that would have overlooked the importance of conducting a survey. Counsel agreed with the trial court's finding that although cadastral maps are not authoritative, it was clear from the reports of the county and the appellant's surveyor that plot No. 217 had lost acreage due to boundary adjustments. Counsel insisted that the said adjustments were procured unlawfully and with approval of government agencies as the appellants had blocked the respondent's access to his own parcel of land and also allowed Kenya Power and Lighting Company to fix electricity cables over the respondent's land without a way leave thereby trespassing on the said parcel of land.
16. It was maintained for the respondent that the acreage that was stated by the county surveyor was a total sum of the total area under dispute and the trial court found it equitable to use the specific acreage specified by the appellants' surveyor that is 0.08 hectares. Counsel submitted that this court has been invited to wish away the respondent's portion of land measuring 0.08 hectares which was lawfully acquired and that if this were to be allowed, it will mean that one party is free to alter the boundaries on the ground arbitrarily.



17. Responding to grounds 2 and 5 of the appeal, counsel argued that the court below rightly and properly analyzed the expert opinion of the defendant’s surveyor and county surveyor, by finding that although the cadastral map is inconclusive on the precise position of the boundary, there are concurring findings on reduced acreage of Machakos/Mua Hills/217 which cannot be said to count for nothing. Further that this finding validates the respondent’s claim that the acreage of his parcel has been reduced by moving the boundary position and the exact acreage lost is a matter of ascertainment.
18. Counsel argued that the appellants wanted the Registry Index Map to be amended so that the same reflects the unauthorized adjustment placed by themselves and not the real boundaries on the ground, yet both parties are duty bound to ensure the correct boundaries are maintained and not altered.

### **Analysis and determination**

19. Having considered the appeal herein, the entire record and submissions made by the parties, the sole issue that arise for determination is whether the trial court was justified in arriving at the conclusion that although the cadastral map is not authoritative on the position of boundaries, the surveyors’ finding that there was an encroachment of 0.08 hectares into the respondent’s parcel Machakos/Mua Hills/217 should not count for nothing.
20. The duty of this court as the first appellate court is to reanalyze, reassess and reevaluate the evidence presented before the trial court and make its own independent conclusions, bearing in mind that it had no opportunity to hear or see witnesses (See *Gitobu Imanyara v. Attorney General* [2016] eKLR).
21. The respondent’s claim in the trial court was for the court to “declare the correct and official boundary between parcel No. Machakos/Mua Hills/217 and 425”.
22. Section 18 of the [Land Registration Act](#) provides for cadastral maps and the jurisdiction in determining boundary disputes as follows;
  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).
23. Therefore, a boundary dispute involving general boundaries, is a dispute under the jurisdiction of the Land Registrar and not the court.
24. A cadastral map is defined under section 2 of the [Land Registration Act](#) to mean a map or series of maps referred to under section 15. On the other hand, section 15 of the same Act provides concerning a cadastral map as follows;
  1. The office or authority responsible for the survey of land shall prepare and thereafter maintain a map or series of maps, to be known as the cadastral map, for every registration unit.



2. The parcel boundaries on such maps shall be geo-referenced and surveyed to such standards as to ensure compatibility with other documents required under this Act or any other law.
25. The repealed Registered [Land Act](#) Cap 300 Laws of Kenya, referred to the cadastral map as the Registry Map also known as Registry Index Map, (RIM) which was defined in section 18 of the Act to mean a map or series of maps prepared and maintained by the Director of Surveys for every registration district.
26. Therefore, a cadastral map or a Registry Index Map indicates outlines of individual parcels in a given area using general boundaries which are not coordinated. Cadastral maps regarding general boundaries merely give approximations regarding the positions of parcels of land which are demarcated by natural or man made features like hedges, ditches, walls, pillars, fences, or stones, and whose boundary lines are inaccurate and not legally binding. It is used to identify on the ground a plot shown on the register; assist in the relocation of a boundary should it be lost; and enable effecting subdivision. The RIM is prepared using ground survey methods for every registration district or part thereof and is divided into registration sections identified by distinctive names. Even the registration section may be further divided into blocks identified by numbers or letters or both. A RIM has information on the location, sheet and index number, edition of the sheet, sheet history (amendments), plot numbers and scale, but its greatest limitation is its lack of indication of measurements to show dimensions of the boundaries or the length, and areas of individual parcels. (See also Siriba, Vob & Mulaku, 2011, in their Article “The Kenyan Cadastre and Modern Land Administration”).
27. It is clear that where the boundary is not fixed like boundaries made under the repealed Registered [Land Act](#), like in the instant case, the office with the mandate and jurisdiction to determine such a boundary dispute is that of the land registrar. And where there is a dispute concerning general and or unfixed boundaries, such dispute ought to be referred to the land registrar who takes evidence by hearing the parties and subsequently decides by determining the boundary. On the other hand, where the boundary is fixed, the court can determine such disputes under the provisions of the [Survey Act](#). A dispute of fixed boundaries is purely a dispute of measurements, because the boundaries are coordinated. In my view, a dispute concerning general boundaries is not a dispute of measurements to be handled by a land surveyor, but a dispute of establishing through evidence, where the boundary is, by establishing, among other matters, the location of fences, hedges, stones, pillars, beacons, walls and other boundary features that demarcate the boundaries. Section 20 of the [Land Registration Act](#) places the responsibility of maintenance of boundary features on proprietors of land.
28. Therefore, the dispute herein turns on where the boundary between parcel number 217 and 425 is positioned.
29. It is not disputed that the land owned by the parties in this matter was registered under the repealed Registered [Land Act](#) Cap 300 which means that the boundaries thereof are general boundaries.
30. In the instant case, the appellants fault the trial court for its holding and argue that a cadastral map is an approximation with no precision on the position of the boundary, and that the ground should supersede the cadastral map.
31. On the other hand, the respondent supports the findings of the trial court that although the cadastral map is an approximation, both surveyors’ reports show encroachment of 0.08 hectares and it is equitable that the land encroached upon reverts to the respondent.
32. It is not in doubt that the maps produced herein and relied upon by the surveyors herein in preparing their respective reports were RIMs and therefore only refer to an approximation and not precise boundaries. As I have earlier stated a boundary dispute of general boundaries, is a dispute regarding the boundary features, to be determined by the land registrar and not a matter of measurements to be



determined by surveyors, and therefore, the evidence of the surveyors given in this matter regarding the measurements of the two properties, is in my view, irrelevant in these proceedings.

33. The appellants produced what they termed as the decision of the Land registrar regarding the boundary dispute herein. That “decision” is dated 12<sup>th</sup> March 2014 and made by one G. M. Njoroge, Land Registrar, Machakos District. It indicates that those who were present when the dispute was being heard were the registered owners of parcels Machakos/Mua Hills/217 and 425; the Land Surveyor; two neighbours; sons of the disputants; and the Chief and Assistant Chief of the area where the disputed land is situated. The evidence of the appellant, the respondent, neighbours, Assistant Chief and Chief were taken by the Land Registrar. In that “decision”, the Land Registrar stated that the boundary dispute between the parties was unresolved by the Settlement Department and that therefore the Land Registrar was unable to make an informed decision. He therefore referred the dispute back to the department of Settlement and Survey to resolve the matter.
34. What I gather from the record in view of the correspondence from the department of Settlement and the findings of the Land Registrar Machakos, is that the appellants entered their parcel of land around 1964 and were joined by the respondent on the adjacent property in 1969. Each party lived on their portion until the Settlement department began the survey process for purposes of titling, around 1983. That is when the dispute on the boundary arose, because the ground and the RIM were at variance, indicating that part of Machakos/Mua Hills/425 had encroached in parcel 217. Noting that the RIM was at variance with the ground, the owner of parcel 425 filed a boundary dispute before the District Settlement Officer who determined the matter in favour of the respondent on 23<sup>rd</sup> March 1983. The appellants being dissatisfied, appealed before the Director of Settlement. However, the later declined to determine the matter and stated that the process of registration should proceed first and any party aggrieved with the Registry maps should file their boundary dispute before the Land Registrar. When that opportunity arose and the appellants herein filed the dispute before the Land Registrar, the later declined to make a decision, noting that the dispute remained unresolved by the Settlement department and referred the matter back to the department of Settlement and Survey. That being the position, and considering that this matter has been pending since 1983 and the Land Registrar having failed to exercise his statutory mandate under section 18 (2) of the *Land Registration Act*, although the determination of general boundary disputes is the mandate of the Land Registrar; the court will in the circumstances, proceed to determine this dispute, in view of the Constitutional edict of expeditious determination of disputes demanded in Article 159 of *the Constitution* and the requirement for the just, expeditious, proportionate and accessible resolution of disputes under section 3 of the *Environment and Land Court Act*.
35. In the instant matter, this being a boundary dispute, and the respondent having pleaded that there was encroachment on his parcel and requiring that the boundary be declared between his parcel and that of the appellants, section 107 of the *Evidence Act*, places the burden of proof on him. Therefore, the respondent was duty bound to demonstrate the boundary features, whether they be stones, walls, pillars, beacons, hedges or any other feature which existed on the suit property to show that the suit property was encroached upon by the appellants, and the manner of the alleged encroachment.
36. I have considered the witness statement of the respondent filed with the plaint. He stated that the appellants planted Kei apple shrubs on the disputed boundary bordering his land and which have prevented sunshine from reaching his coffee plantation. He further stated that the roots of the appellants’ Kei apple had encroached on his coffee plantation reducing yields. I have also considered the evidence of the respondent before the Land Registrar, and all the respondent stated was that when parcel No. Machakos/Mua Hills/315 was subdivided to hive off the appellants’ Parcel No. 425, he was not invited and not shown the new boundary between parcel Nos. 425 and 217 and that the



- disputed area is occupied by the appellants. Having considered the complaint and the above evidence, it is clear that the respondent's complaint was that the appellants' Kei apple roots had interfered with his coffee bushes. There is no evidence that boundary features delineating the respondent's land from the appellants, exist inside the land occupied by the appellants.
37. I have considered the reports by the three surveyors herein, regarding the position of the two properties herein. The county surveyor, upon conducting a survey, noted that there was a Kei apple boundary between parcel number Machakos/Mua Hills/ 217 and 425 and that the RIM was not conforming to the ground. His position was that the ground supersedes the RIM hence the RIM should be amended to conform to the ground.
  38. The respondent's surveyor, Geosurv Systems Limited, who also conducted a survey, noted that there was encroachment of parcel 425 into 217, although the extent of the encroachment was not mentioned, and that the encroachment was found by way of measurements done by GPS.
  39. On the other hand, the appellant's surveyor Geomatics services Limited, conducted survey and stated that the RIM of Mua Hills scheme was prepared in 1978 after adjudication based on aerial photograph of the same year and that, that photography show different scenario in terms of shape and size of parcel No. 425 compared to the RIM meaning that the RIM was not prepared in strict conformity with aerial photography. Further that on the RIM, there is a boundary which is non existent on the ground and on the original aerial photograph. Therefore, from the observations and findings of the three surveyors, the boundary on the RIM does not appear on the ground on the two parcels herein.
  40. On the other hand, the appellant stated that she purchased her parcel in 1964 and entered thereon and planted Kei apple marking the boundary of her land. That thereafter, the respondent bought the adjacent land being No. 217. She insisted that the boundary on the ground is as it was since 1963.
  41. That being the position, and taking into account the evidence of both parties that the boundary on the ground between parcel No. 425 and 217 is a hedge of Kei apple planted by the appellants, I find and hold that the respondent did not present any evidence to show that there existed boundary features whether they be hedges, stones, walls, pillars or any other features demonstrating the boundary that hives off the disputed area towards his parcel Machakos/Mua Hills/217. Clearly, there is no boundary feature hiving off the disputed area towards the respondent's land. Indeed, this position is confirmed by the findings in the report of Geomatics Services Limited that the boundary defined by points D-F on the RIM is non existent on the ground and neither does it appear in the original aerial photograph used to prepare the RIM. The respondent's key argument is that he owns 4 acres of land and that the appellants owns 0.7 hectares. What the respondent is silent about is that both his 4 acres and the appellants' 0.7 hectares are approximations, meaning that his parcel may be less or more than 4 acres and the appellants' parcel may be less or more than 0.7 hectares. There is no dispute that the appellants have been on the suit property as seen in the aerial photograph, since acquisition, as the hedges thereof demonstrate.
  42. That being the position, the issue herein therefore is whether the RIM supersedes the ground.
  43. The suit property underwent adjudication and during adjudication the boundaries from the aerial view was adopted as the general boundary, reflected on the ground. Therefore, the basis of the RIM was the ground and not vice versa. In the circumstances as the RIM comes after and or is secondary to the ground boundaries, it is the RIM that ought to conform to ground boundary features like fences, pillars, hedges, stones and not the other way round. I have considered the aerial photograph of the two parcels which is not disputed and it clear that the hedges/fences of parcel 425 includes the disputed area.



44. Considering that a boundary dispute for general boundaries is not about survey measurements but about the boundary features on the ground and any other evidence of where the original boundary was, I find and hold that the ground as depicted in the aerial photograph supersedes the RIM as demonstrated in the report by Geomatics Services Limited at page 98 of the record. Therefore, the RIM ought to be amended to conform to the ground.
45. In the premises I find merit in the appeal and the same is hereby allowed. Consequently, I set aside the findings and determination and judgment of the trial court to the extent of allowing the respondent's claim, and I hereby dismiss the respondent's case before the lower court. As the appellant's counterclaim was properly dismissed and no appeal having been raised on the same, the trial court's orders on the counterclaim are maintained. Consequently, I order the Land Registrar Machakos together with the Director of Surveys to cause to be amended the RIM/Cadastral Map regarding the common boundary between parcel Nos. Machakos/Mua Hills/217 and 425 to conform to the ground.
46. In view of the circumstances obtaining in this matter, I order that each party shall bear its own costs before the trial court and before this court.
47. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 3<sup>RD</sup> DAY OF APRIL, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.**

**A. NYUKURI**

**JUDGE**

In the Presence of;

Mr. Kaloki for respondent

Ms. Nzilani for appellants

Court assistant – Josephine

