



**Kariuki v M'Atugi & 5 others (Environment and Land Appeal
E015 of 2023) [2024] KEELC 6746 (KLR) (9 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6746 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E015 OF 2023
CK NZILI, J
OCTOBER 9, 2024**

BETWEEN

CHIRA KARIUKI APPELLANT

AND

FELIX MWEBIA M'ATUGI 1ST RESPONDENT

DENNIS KINOTI ATUGI 2ND RESPONDENT

FRANCIS MARANGU RINGERA 3RD RESPONDENT

STEPHEN KIMATHI KIRERA 4TH RESPONDENT

END JOY KORU MIRITI 5TH RESPONDENT

PATRICK GATUNDU 6TH RESPONDENT

*(Being an appeal from the judgment of Hon. D.W Nyambu – CM delivered on
24.1.2023 in CM – ELC case No. 27 of 2018 consolidated with CMCC 58 of 2012)*

JUDGMENT

1. The appellant, who was the defendant at the trial court, has appealed against the judgment by a memorandum of appeal dated 23.2.2023 on the basis that the court:
 - a. Erred in law and in fact, by holding that the respondents had proved their case on a balance of probabilities.
 - b. Relied on inconclusive experts' evidence failed to analyze the evidence and the issues for determination properly.
 - c. Disregarded or failed to consider the appellant's evidence, hence arriving at an unsound judgment, leaving him without a remedy.



- d. Failed to address the counterclaim.
2. The 1st and 2nd respondents had moved to the High Court before the matter was transferred on 15.1.2018 to the trial court on 15.1.2018, through a plaint dated 15.3.2012. Therein, the 1st & 2nd respondents as the registered owners of L.R No's. Ontulili Ontulili Block 1/Katheri/2300 and 2302 and 2301, respectively had alleged that the appellant had trespassed into their parcels of land on 10.11.2011 and 1.3.2012 moved to stop and attempted to stop them from pouring building materials on their properties, whereafter, they reported to the police who warned the appellant to cease his acts of trespass all in vain.
 3. As a result of the appellant's refusal or neglect to heed the warning of the police, the 1st and 2nd respondents averred that exclusive users and utilization of their properties with no color of right over them.
 4. The 1st and 2nd respondents averred that save for L.D.T. No. 117/1997 between the previous owner of L.R Ontulili/Ontulili/Block I/Katheri/1443 and Ambrose Siwa the previous part owner of L.R. No. Ontulili/Ontulili Block 1/Katheri/1444 which was subdivided into L.R No's. 2299, 2300, 2301 and 2302 there had been no previous proceedings over the suit. The 1st & 2nd respondents prayed for a permanent injunction and a declaration that they were the sole registered owners of the suit properties. The plaint was accompanied by a list of documents dated 15.3.2012 and witness statements filed on 16.3.2012.
 5. The appellant filed a statement of defense and counterclaim dated 17.4.2012. He admitted that the 1st and 2nd respondents were the registered owners of their suit properties, which he said arose out of L.R No. Ontulili Ontulili/Block 1/Katheri/ 1444, which bordered his parcel L.R No. Ontulili/Ontulili/Block I/Katheri/1443.
 6. The appellant averred that there had been a problem of wrongful occupation on the ground such that the 1st and 2nd respondents parcels L.R No. Ontulili/Ontulili/Block I Katheri/1444 now L.R No. Ontulili/Ontulili/Block I/Katheri/ 2302, 2301, 2300, 2255, and 2256, wrongly occupied the area meant for his land parcel, which fact the 1st and 2nd respondents had been aware of for they had at one instance brought a district land surveyor on the ground who confirmed that they were wrongly occupying his land.
 7. Therefore, the appellant denied the alleged trespass; otherwise it was the 1st and 2nd respondents who were trespassers to his land. Further, the appellant averred that a meeting had been convened on 1.3.2012, at the offices of the (O.C.P.D) Buuri District, attended by all the parties, the O.C.S. Timau and the District Land Surveyor after the 1st & 2nd respondents made a report for him to stop depositing building materials on his land, whereby the district land surveyor, confirmed to the attendees that the said materials had been poured on land belonging to him and that the 1st and 2nd respondent was advised to move to their correct position on the ground.
 8. The appellant averred that it was the 1st and 2nd respondents who blatantly trespassed onto his land despite confirmation of their trespass on the ground by the district land surveyor on top of the Land Dispute Tribunal Case No.117/1997, which also had confirmed his contention that there had been wrongful occupation on the ground.
 9. By way of a counterclaim, the appellant as the plaintiff in the counterclaim, sued the 1st and 6th respondents as the defendants in the counterclaim, being the owners of L.R No. Ontulili/Ontulili/Block 1 Katheri/2300 and 2302, 2301, 2255, 2256, 1445 and 1446, respectively, which were the resultant subdivisions of the initial L.R No. Ontulili/Ontulili/Block I/Katheri/1444, which bordered



- his L.R No. Ontulili/Ontulili/Block I/Katheri/1443 measuring one acre. He complained that the respondents' parcels of land were wrongly occupying the ground area meant for his land.
10. The appellant averred that all the successive parcel to L.R No. 1444 and the respondents have always been aware of the wrongful occupation but have unlawfully failed to have their parcels demarcated on the correct position on the ground and had continued to trespass onto his land.
 11. The appellant sought eviction and permanent orders of injunction to restrain the respondents from any further trespass thereon and an order directing the district land surveyor and land registrar to indicate to the 1st – 4th respondents to the correct position of their parcels of land on the ground which exercise shall also affect the 5th and 6th respondents who owned adjacent parcels L.R No. Ontulili/Ontulili/Block 1/Katheri/1445 and 1446, hence the reason that they were necessary parties to the counterclaim. The defense and counterclaim were supported by a list of documents, witnesses dated 17.4.2012 and a further list of witness statements dated 8.8.2019.
 12. From the court record, I have not come across any reply to the defense and defence to the counterclaim by the respondents herein.
 13. At the hearing, Felix Mwebia M'Atugi testified as PW 1. He told the court that he was a private land surveyor, while the 2nd respondent was his brother. PW 1 relied on a witness statement filed on 16.3.2012 as his evidence in chief. PW 1 told the court that on 15.9.2011, he bought two plots measuring 40 by 130 ft and 40 by 100 ft from Nancy Wakinyi Kinyua, which were excised from L.R No. Ontulili/Ontulili/Block 1 Katheri/2254 excised and transferred as L.R No. Ontulili/Ontulili/Block I/Katheri/2302 and 2301, respectively which he took vacant possession and started cultivating therein. PW 1 said that in November 2011, he also bought an extra plot from the same mother parcel, measuring 40ft by 80 ft, from the same vendors and took vacant possession. He said that the appellant had been making wanton destruction of her plot without any justification and was now purporting to stop any developments thereof; hence, the reliefs sought. PW 1 relied on a sale agreement dated 15.9.2011 copies of the record for L.R No. 2300, 2201, and 2302, 6 photographs copies of title deed as P. Exh No. 1, 2 (a) – (c), 3 (a – f) and 4 (a) (b) & (c).
 14. PW 1 told the court that the land registrar and the district land surveyor had visited the suit land following an order by the court made on 24.5.2012 and furnished before the court a report dated 24.5.2022 whose findings that the appellant had no claim over the land. He said that the appellant, after being dissatisfied with the said report, applied for a revisit, which led to a fresh report, which again found that the respondent had not encroached on the appellant's land.
 15. PW 1 told the court that he took possession of the suit premises on 15.9.2012 following registration as the owner in October 2011 and March 2012. According to PW 1 his parcels of land were resultant subdivisions of L.R No. Ontulili/Ontulili/Katheri/2254, which had come from L.R No. 1444. As to the appellant's parcel of land, PW 1 told the court that he had a map showing the position of the appellant's parcel of land on the ground and the map; otherwise, he was not aware of the occupation of L.R No. 1443. Further, PW 1 stated that the previous owners of the land were initially his witnesses but withdrew their names after they were named as parties to the counterclaim, namely, Ambrose Sirwa, Stephen Kimathi, and Francis Malangu, the former being the husband of Nancy Wamwithi.
 16. Similarly, PW 1 said that initially parcel L.R No. 1444 was owned by three people who partitioned it then Nancy subdivided it into the resultant subdivisions. PW 1 added that during the transactions, he never dwelt with either the initial owners of the land or the defendants save for Nancy Kinyua.
 17. Dennis Kiuto Ntugi testified as PW 2, relied on his witness statement dated 21.10.2020 as his evidence in chief. He associated his evidence with that of PW 1. He said that this interest was on parcel L.R No.



- 2254 that he purchased and not the previous owners or occupiers. Further, he said that the immediate owner of the land had fenced it and was cultivating the land before she handed over vacant possession to them after signing the sale agreement. Further, PW 2 said that the seller had signed a witness statement before she passed on which forms parts of the court record.
18. PW 3 was George Njoroge, a Land Surveyor Meru Central who testified on behalf of N.S.W. Musunya, a retired land registrar and maker of two reports before court dated 24.5.2012 and 12.7.2012, whose conclusion was that parcel L.R No. 1443 did not border or share a boundary with the plaintiff's parcel of land and that the occupation of the 1st and 2nd respondents on the ground corresponds with what in the registry index map for the area. PW 3 produced the two reports as P. Exh No's. 5 & 6.
 19. In cross-examination, PW 3 said that though he was not present during the scene visit from the map shown as sheet No. 2, parcel L.R No. 1443 must exist on the ground as captured on the map. Similarly, they confirmed that the appellant's original title deed and official security thrown to him had not been tampered with and appeared genuine. PW 3 said that the requisite procedure was followed in generating the registry index map; otherwise he had not seen any other report contradicting what was on the ground.
 20. Peter Kimani testified as PW 4 a county land surveyor at Meru Central, representing the national government. He said that during the two scene visits, Alexandre Muriuki Njaagi, the then-district surveyor, had prepared a report confirming the ground position of L.R. No's. Onutlili/Ontulili/Block 1/Katheri/2301, 2299, 2256, 2300, 2301, 2302, 1445 and 1446. He refuted the allegations by the appellant that L.R No. 1443 was neighboring L.R No's. 2300, 2301, and 2303. He produced the land surveyor report as P. Exh No's. 7 & 8, respectively.
 21. According to him, in the report dated 28.5.2012, sketch maps were prepared based on the map as the referee for land in the general boundary survey, while in the 2nd report, the surveyor focused on L.R No. 1444 and not L.R No. 1443. PW 4 said that with reference to point 2, there was a dispute as to size, which could only be solved after knowing the area as P. no. 1445. PW 4 said that where an area was not tallying with the map the ordinary procedure is for a proprietor to request for a re-survey to establish the beacons.
 22. Chira Kariuki testified as DW 1. Relying on his witness statement dated 5.2.2021, he told the court that he was the appellant and the plaintiff in the counterclaim the owner of land parcel L.R No. 1443 measuring 0.4047 ha as appearing in Registry Index Map No. 2 which parcel brought in 2000 from Katheri Farmers Coop Ltd where he was a shareholder who owned a larger parcel that was subdivided and given to the members depending on their respective shares. In this case, DW 1 said that his parcel of land was one acre as per his title deed, which came out in 2000 though he took vacant possession much earlier, fenced the land with barbed wire, and erected a temporary structure therein.
 23. DW 1 said that he enjoyed quiet possession until November 2011, when the 1st and 2nd respondents damaged his fence, claiming to have bought some portions of his land, to which he stopped thereon only to resurface in March 2012, where attempting to purchase building materials on his land. DW 1 added that the police were called and referred them to court.
 24. Similarly, DW 1 stated that the 1st and 2nd respondents were wrongfully occupying part of the land supposed to belong to him or the initial mother title where the 1st and 2nd respondents' parcel came from used to share a boundary with his parcel number and that it was in the process of subdivisions of the former before the whole mess occurred leading to encroachment onto his land. DW 1 said that he relied on a report from Geostate Surveys that confirmed the problem to his as per the report and advanced that the only way was to re-establish the boundaries in order to rectify the same regarding parcels No



- 1441, 1442, 1553, 1453 & 1445 and 1446. He prayed for the reliefs sought in the counterclaim. DW 1 subsequently produced a copy of his title deed official search and map dated 25.7.2008 as D. Exh No. 1-Mf1D (3), clearance certificate, receipt for payment, share certificate and surveyors report by Geostate surveys as D. Exh No. (4) & (5) G and MF I D (7).
25. In cross-examination D.W. 1 said that he purchased the land from Katheri Farmer Co. Ltd as per D. Exh No. (5) for Kshs.120,000/= but was not issued with a receipt. He said that the 1st and 2nd respondents were the ones who demolished his structure on the land. DW 1 confirmed that he had proof that the reports by PW 3 and 4 were false.
 26. At the close of the defense case, the trial court allowed the 1st and 2nd respondents' claims. The appellant, by written submissions dated 6.9.2024, submitted that he thought the trial court relied heavily on expert reports dated 24.5.2012, 28.5.2012, and 27.7.2012; yet the same was not conclusive. For instance, the appellant submitted that the ground measurements of L.R No. 2300, 2301, and 2302 were in agreement but not measurements of L.R No. 1443, with the registry index map going by the district surveyors and land registrar report dated 24.5.2012 and 28.5.2012, meaning that the two reports did not address the terms of reference of the court's orders dated 9.4.2012 as to the parties position on the ground and who was occupying where.
 27. Regarding the second report, dated 12.7.2012, by the two experts, the appellant submitted that the court's visit was to re-survey and confirm if the respective registered areas indicate boundaries to the parties and affect the variance between the ground, occupation and registration area. In this case, the applicant submitted that the district land registrar's report did not conform to the tour site and never showed the registered area and boundaries of L.R No. 1443. Similarly, regarding the district land surveyor report dated 12.7.2012, the appellant submitted that it failed to mention him, which led to the trial court on pages 7 & 8 of the judgment to express her doubts over the reports.
 28. Therefore, the appellant submitted that given that the two expert reports were not conclusive on both positions and the location of the boundary, one had to go beyond the registry index map to solve the dispute. For this proposition, the appellant relied on Samuel Wanjao vs Attorney General & another (2009) eKLR.
 29. The appellant submitted that even though the trial court framed the issues for determination it failed to analyze and address all of them, hence arriving at an unsound judgment, which, according to the appellant, was because either the court misunderstood the issues or was overwhelmed by the strength of the parties respective cases.
 30. The appellant submitted that his title deed had not been challenged and therefore, remains valid and indefeasible and could not be said not to exist on the ground as held on page 7 of the judgment, yet it appears on the Registry Index Map Sheet No. (2).
 31. Regarding the two reports it was submitted that they should have indicated that after the subdivision of L.R No. 1444, the ground area was more significant than the registration area, being 1.6190 ha as opposed to a ground area of 1.6662 ha, an excess of 0.0472 ha.
 32. On the counterclaim, the appellant submitted that the trial court only addressed the counterclaim as regarded the 1st and 2nd respondent and not the rest of the respondents, then went on to dismiss it without giving any reason or remedy to him. The appellant submitted that if the appeal were not allowed without ordering a retrial, he would have no land to go to, and if it is dismissed, he would have no remedy; otherwise, he would be holding a paper title without land. Reliance was placed on SM vs HGE (209) eKLR and Chandaria vs Njeri (1982) eKLR.



33. The mandate of this court under Section 78 of the *Civil Procedure Act* is to reconsider the evidence, evaluate it, and draw its conclusion, though it has to bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. See *Gitobu Imanyara & others vs Attorney General* (2016) eKLR. In *Peter vs Sunday Post Ltd* (1958) E.A 424, the court observed that if there is no evidence to support a particular conclusion or if it is shown that if there is no evidence to support a particular conclusion or if it is shown that the trial judgment failed to appreciate the weight or bearing of circumstances admitted or proved or was plainly wrong, the appellate court will not hesitate to decide so.
34. The court has carefully gone through the court record, pleadings evidence tendered, grounds of appeal, written submissions and the law.
35. The issues calling for my determination are:
- i. If the trial court had jurisdiction to entertain the suit.
 - ii. If the 1st and 2nd respondents pleaded and proved trespass to their parcels of land by the appellant.
 - iii. If the appellant filed, served, and prosecuted his counterclaim against the respondents.
 - iv. If there was any defense by the respondents against the appellant's counterclaim.
 - v. If the expert's reports, as ordered by the court, were conclusive as to whether the appellant had encroached onto the respondent's parcels of land.
 - vi. Whether the appellant and the 1st and 2nd respondents were entitled to their respective reliefs in their pleadings.
 - vii. Whether the appeal has merits.
 - viii. What is the order of costs?
36. It is trite law that parties are bound by their pleadings, and issues flow from the pleadings. In this appeal, the 1st and 2nd respondents' claim was based on the plaint dated 15.3.2012, claiming that the appellants had trespassed on their parcels of land on 10.11.2011 and 1.3.2012.
37. The manner, particulars, and extent of trespass were not pleaded. The 1st and 2nd respondents had sought a permanent injunction and a declaration that they were the owners of the suit parcels of land. The 1st and 2nd respondents relied on a sale agreement dated 15.9.2011; copy of records; photographs and title deeds copies dated 3.11.2011, 12.11.2011 as P. Exh No's. (1), (2) (a) (b) & (c), 3 (a & b) and 4 (a-c). On the other hand, the appellant denied the allegations of trespass. He averred that it was the 1st and 2nd respondents who were in wrongful occupation of his land, a fact known by the predecessors in title. He produced a title deed dated 25.5.2000, and an official search showing his land area as 0.40447 issued under Map Sheet No. (2) and produced as D. Exh No's. (1), (2) & (3).
38. Following an order dated 19.4.2012 by the High Court, this suit was transferred. A report by the land surveyor and land registrar was filed on 30.5.2012 and 25.5.2012. The two were later on produced as P. Exh No. (5) & (6). Through a further affidavit sworn on 7.6.2012, the appellant disputed the two reports due to a private surveyor report by Geoland Surveys Land Surveys & Consultants dated 5.6.2012.
39. Out of this, the High Court ordered a revisit of the site. This led to the second report, P. Exh No. (7). The district land surveyors were silent on parcel No. 1443 and its relation to the 1st and 2nd respondents'



parcel of land P. Exh No. (6) did not mention the locality, size and boundaries of L.R No. 1443 in relationship to the 1st – 6th respondents parcels of land.

40. Trespass is defined under Section 3 (1) (d) of the Trespass Act as an entry into or remaining on or undertaking acts on private land without reasonable excuse and consent of the occupier. In *PM 6 & another vs P.N.E.C.* (2019) eKLR, the court cited *Kuene & Nagel Ltd vs Forward International Ltd* (2011) 1 E. A 252 that trespass or detinue lies at the suit of the person who has an immediate right to possession of the good against another, who is in actual possession of them and who, upon proper demand, fails or refuses to deliver them up without lawful excuse.
41. Sections 21 (4), 22, 23 & 24 of the Registered Land Act (repealed) and Section 18 (2) of the Land Registration Act provide that no court shall enter any action or other proceedings relating to a dispute as to the boundaries of the registered land owner unless the boundaries have been determined in accordance with this section after a complaint has to be made to the land registrar.
42. As at the filing of the suit, there is no indication if the 1st and 2nd respondents had invoked Sections 18 and 19 of the Land Registration Act or its predecessor for the land registrar and surveyors to ascertain, fix, and determine the boundaries. In *S.K Macharia vs K.C.B. & others* Civil April No. 2 of 2011, the court observed that a court could only exercise jurisdiction as conferred to it by the Constitution or statute. It cannot arrogate to itself jurisdiction exceeding what it is conferred upon it by law.
43. The dispute before the trial court was on alleged encroachment or trespass. Paragraph 4 of the plaint refers to trespass on 10.11.2011 to parcels L.R No's. 2300, 2302 and 2301. As of 18.10.2011, parcel No. 230 was in the name of Nancy Kinyua, going by P. Exh No. 2 (a). P. Exh No. 2 (b) shows the land was in the name of Nancy Kinyua as of 18.11.2011 and only became the land of the 2nd respondent on 22.11.2011 P. Exh No. 2 (c) shows that the 1st respondent became the owner on 3.11.2011.
44. If then there was any interference with the boundaries as of 11.11.2011 or trespass on 1.3.2012, no evidence was availed that the 1st and 2nd respondents or the predecessors in the title had sought and obtained a land registrar's or surveyors' report, ascertaining and fixing the boundary before moving to court on 16.3.2012. Even after the court directed that the land registrar and surveyor on 19.4.2012 there is no indication if the land registrar and land surveyor exercised their mandate under the law and ascertained and fixed the boundaries on the grounds.
45. In *George Kamau Macharia vs Dex Ka Ltd* (2019) eKLR & *Azzurra Ltd vs Pink Properties Ltd* (2018) eKLR, the court said that jurisdiction was everything and without it, a court need not make any further step, irrespective of the strength and nature of evidence in the parties possession. In *Estate Sonrisa Ltd & another vs S.K Macharia & others* (2020) eKLR, the court observed that it is the land registrar under Sections 16-19 of the Land Registration Act who is empowered after giving notice to all the affected parties and other owners, whose land adjoins the boundaries in question and with the assistance of the land surveyor to ascertain and fix the disputed boundaries.
46. In this appeal, the 1st and 2nd respondents should have invoked that mechanism before coming to court. From evidence tendered by the parties even after the experts prepared the four reports. It is evident that the boundaries and beacons over the suit parcels of land had not been defined, ascertained and effected on the ground for the court to be seized of jurisdiction.
47. Without the boundaries and beacons, definition, ascertainment and effectation on the ground, the trial court could not have been able to determine whether there was encroachment or not. Equally, the 1st and 2nd respondents had no conclusive report showing the extent, particulars and the nature of the alleged trespass by the appellant vis a vis their land parcels.



48. In *Menkar Ltd vs Ratilal Ghika Samat Shah & others* (2019), eKLR, the two parcels of land in dispute had been surveyed, and their boundaries marked with beacons, so some of the encroachment from one to the other fell for determination by the Environment and Land Court.
49. In this appeal, the 1st and 2nd respondents, apart from relying on the inconclusive land surveyors and land registrar's reports, had nothing to show that their suit parcels of land, by the filing of the suit and after that had been determined, ascertained and marked with beacons on the ground under Section 19 of the [Land Registration Act](#).
50. The appellant's defense and counterclaim, as indicated above, had not been opposed through pleadings or a report under Sections 16-19 of the [Land Registration Act](#). It went to the jurisdiction of the court. The report dated 28.5.2012 by the land registrar and the subsequent one dated 12.7.2012 & 12.7.2012 did not comply with Sections 16-19 of the [Land Registration Act](#) as to the ascertainment and fixing of the boundary so as to clothe the trial court with.
51. Given that there was no specific report on the ascertainment and fixing of the boundary and bearing in mind that the two sets of reports had errors or lacked conclusive findings on the locality and size of the appellant's land both on the map and on the ground, I think the 1st and 2nd respondents failed to prove any trespass or encroachment of their parcels of land by the appellant.
52. I find the appeal merited. The same is allowed. The 1st and 2nd respondents' suit is dismissed for lack of jurisdiction. The counterclaim by the appellants is allowed in terms of an order directing the land registrar, with the assistance of the land surveyor, to exercise their mandate under sections 14-19 of the [Land Registration Act](#) to ascertain, determine and fix the boundaries between the parties. Any aggrieved party by the report shall move the trial court within 30 days from today under Section 79 of the [Land Registration Act](#).
53. Costs of the appeal and in the lower court to the appellant.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 9TH DAY OF OCTOBER, 2024

HON. C K NZILI

JUDGE

In presence of

C.A Kananu

1st respondent

Chweya for appellant

Mwirigi Kaburu for the 1st & 2nd respondent

