



Springs Property Management Limited v Mwatsuma & others; AIN Diab Investment Limited (Interested Party) (Environment and Land Case Civil Suit 237 of 2014) [2023] KEELC 16003 (KLR) (7 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16003 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CASE CIVIL SUIT 237 OF 2014
MAO ODENY, J
MARCH 7, 2023**

BETWEEN

SPRINGS PROPERTY MANAGEMENT LIMITED PLAINTIFF

AND

LUKE BRUNO MWATSUMA & OTHERS DEFENDANT

AND

AIN DIAB INVESTMENT LIMITED INTERESTED PARTY

JUDGMENT

1. By a Plaint dated October 28, 2014 the plaintiff herein sued the defendants jointly and severally seeking the following reliefs; -
 - a. A declaration that the plaintiff is the bonafide and legal owner of Kilifi/Mtondia/332 and that the 1st, 2nd and 3rd defendants have encroached/trespassed into the plaintiff's land 8-10 meters from the original boundary.
 - b. An order compelling the 1st, 2nd, 3rd and 4th defendants to restore the suit property to the original boundary as per the recommendation of district land surveyor, Kilifi.
 - c. The land registrar Kilifi and district land surveyor- Kilifi be ordered to rectify/ amend all entries made and relating to Kilifi/ Mtondia/332 as against Kilifi/Mtondia/374 and Kilifi/ Mtondia/378 and restore the plaintiff's rights and in particular to restore the plaintiff's boundary rights of Kilifi/Mtondia/332.
 - d. An order of permanent/mandatory injunction restraining the 1st, 2nd and 3rd defendants from encroaching, trespassing, alienating, selling, transferring and/or in any way whatsoever either



by themselves or through their agents, servants or whomsoever claiming through them from interfering with or dealing with Kilifi/Mtondia/332 as may violate the plaintiff's legal rights.

- e. An order of eviction against the 1st, 2nd and 3rd defendants from Kilifi/Mtondia/332 and the 8-10 meters encroached upon by the defendants and such eviction be supervised by the commanding officer Kilifi police station.
 - f. Such other or further reliefs as the honourable court shall deem fit to grant in favour of the plaintiff in pursuant to its constitutional mandate of protecting the rule of law.
2. The plaintiff's case is that it is the registered proprietor of all that parcel of land known as Kilifi/Mtondia/332 vide land certificate issued on April 5, 2014 having bought it from Alexia Ndoki Ceppi.
 3. That the 1st defendant is the registered owner of Kilifi/Mtondia/378 and the 2nd and 3rd defendants are the registered owners of Kilifi/Mtondia/374 with all parties sharing a boundary wall with the plaintiff's property.
 4. It is the plaintiff's case that after purchasing the property, he discovered that certain persons had encroached upon the suit property, moved the boundary wall and reconstructed a new wall but was later served with an order in PMCC no 623 of 2010 Luke Bruno Mwatsuma vs Alexia Ndoki Ceppi by the 1st defendant claiming that the plaintiff had encroached on the 1st defendant's property known as Kilifi/Mtondia/378.
 5. The defendants filed defences and denied the plaintiff's claim and further the interested party also filed a statement of defence dated November 17, 2015 and echoed the 2nd defendants position in the case.

Plaintiff's case

6. PW1 Roderick Blair Charters a director of the plaintiff company adopted his witness statement filed on December 17, 2014 and produced as Pex 1 and 2 a title deed and a search certificate dated October 1, 2013 respectively told the court that they sued the 1st defendant because he encroached on their parcel of land which they purchased from Alexia Ndoki Ceppi.
7. It was PW1's testimony that several months after the purchase of the suit property, he was told by his caretaker that the 1st – 3rd defendants had encroached on his land and that when they purchased the property there was a live wire fence with concrete. He further stated that the neighbours moved 8 to 10 meters into their compound and that part of the fence exists while the other half is damaged.
8. PW1 produced a bundle of photos as Pex 3 and told the court that they had invited a surveyor in 2014 to establish the correct boundary and a report was prepared showing that there was encroachment.
9. On cross examination by Mr Muyala counsel for the 1st defendant, PW1 stated that he was not aware of any dispute between the seller and the 1st defendant. Further, that he was aware of the court order for eviction order against Alexia but he was not aware if the land she was to vacate is the 8-10 meters that was destroyed on his boundary.
10. Upon cross examination by Mr Lughanje counsel for the interested party, PW1 stated that he is not aware that there is an appeal to quash the order.
11. PW2 Boaz Oketch, land registrar Kilifi testified that there was a boundary dispute between land parcel nos 373 and 378 whereby investigations were conducted by the land registrar whose findings are as per the letter dated August 5, 2002 which report indicated that the land registrar inspected the boundaries and that the same were not tallying with the acreage on the title. Further that the parties agreed to share the deficit in the presence of the land registrar.



12. PW2 further stated that according to the report the surveyor marked and identified the boundaries of plot nos 332 and 374 and that the owner of plot no 332 surrendered the title deed for rectification and was issued with a new title deed with the same number.
13. On cross examination by Mr Lughanje, PW2 stated that a boundary dispute report contains the coram of members present and according to the report dated July 25, 2002, the 1st defendant and Alexi agreed to share the deficit.
14. On re-examination by Mr Siminyu, PW2 confirmed that the letter dated August 5, 2002 indicates that Luke Bruno was one of the parties present on July 31, 2002 and that the boundary inspection done in his presence. Further that the letters dated October 9, 2002 and December 20, 2002 are addressed to Gakuo & Co Advocates and not to the land registrar.
15. PW3 Athman Charo Ngoka a surveyor working with ministry of lands Kilifi county informed the court that he had a report dated September 25, 2014 prepared by one Silas Kumaya who was in charge of Kilifi survey office and the county surveyor. PW3 stated that the parcels in question were nos 332, 378 374 and 331 and the finding was that the acreage of plot no 332 was 1.57 Ha while plot no 331 was 1,57 Ha. PW3 also stated that the wall and fence erected by the owner of plot no 331 now subdivided into 4 portions has encroached into plot no 332.
16. On cross examination by Mr Lughanje he stated that the report by Mr Mwangangi a private surveyor reflects the acreage from the title and not what is on the ground.

Defendant's case

17. DW1 Luke Bruno Mwatsuma the 1st defendant adopted his witness statement dated November 25, 2016 and produced as Dex 1-3 a bundle of documents as per the list of documents and stated that he did not encroach on the plaintiff's parcel of land and urged the court to dismiss the plaintiff's suit with costs.
18. On cross examination by Mr Lughanje, he stated that he did not voluntarily agree to reduce his acreage and if that was the case then he could have signed the mutation forms. He also stated that he did not have any communication to hand over his title to the land registrar.
19. When cross examined by Mr Siminyu, he stated that his original parcel was plot no 331 which he subdivided into four parcels; 374,378,373 and 374. He added that the plaintiff's parcel plot no 332 which existed had defined boundaries.
20. On further cross-examination, DW1 stated that the plaintiff was not a party to the case in Kilifi and that he demolished a chainlink vide a court order which was supervised by the police. DW1 stated that this is a boundary dispute and not an ownership dispute.
21. DW2 Bartholomew Mwangangi a land surveyor informed the court that he carried out a survey and filed a report dated September 3, 2010 on plot no 331 with findings that plot no 332 was 4 acres and plot no 332 has encroached on plot no 331 now subdivided into 4 parcels. Further that plot no 332 borders a road reserve of a width of 20 meters which has a fixed boundary on one side and a general boundary on the side of plot no 332.
22. DW3 George Gohu Mwakale adopted his witness statement dated January 2, 2016 and produced Dex 5-15 as a bundle and stated that he bought plot no 374 which borders the plaintiff's plot no 332 from the estate of Grace Mwatsuma (deceased) around 2013 -2014 and that he was not a party to Kilifi PMCC no 623 of 2010.



Plaintiff's submissions

23. Counsel for the plaintiff identified three issues for determination as follow: -
- a. Whether the defendants have encroached onto property no Kilifi/mtondia/332?
 - b. Whether the defendants should be evicted from parcel no Kilifi/mtondia/332?
 - c. Whether the plaintiff is entitled to costs?
24. On the first issue whether the defendants have encroached on the suit parcel, counsel submitted that on August 5, 2002, the 1st defendant and Alexia Ndoki Ceppi agreed to share the deficit in the presence of the district land registrar and Alexia Ndoki Ceppi returned her title for rectification while the 1st defendant did not. Further, that both county surveyor and the county land registrar Kilifi produced reports demonstrating that the survey was carried out in presence of all parties and therefore the 1st defendant is estopped from claiming any extra land if he accepted the rectification.
25. Counsel further submitted that section under 18 (2), of the *Land Registration Act*, the land registrar having in conjunction with parties determined the boundaries by a report dated September 25, 2014 this honorable court has jurisdiction to entertain the matter.
26. Counsel relied on the case of *John Juma Muchelezi v Grace Mang'eni Nabukiyabi* [2022] eKLR and urged the court allow the Plaintiff's claim with costs.

Interested party's submissions

27. Counsel for the interested party identified the following issues for determination;-
- a. Whether the plaintiff's action of suing the estate of Grace Nazi Mwatsuma without suing the administrator of that estate was fatal to its case.
 - b. Whether in matters of fixing the boundaries in the absence of the party can be termed as final determination of the boundaries.
 - c. Whether the magistrate's courts have jurisdiction to entertain matters falling within the jurisdiction of the Environment and Land Court and whether court orders that have not been appealed from or set aside are valid for all purposes.
 - d. Whether the company encroached onto the plaintiff's plot and whether in participated in breaking the boundary wall.
 - e. Costs should be payable to the interested party.
28. On the first issue counsel submitted that it is trite that one cannot raise a cause of action by suing the estate of a deceased person without including the name of the administrator as an estate cannot defend itself without the involvement of its administrator. Counsel relied on the case of *Abdirashid Adan Hassan v Estate of W H E Edgley* [2022] eKLR and submitted that the proceedings against the 2nd defendant are a nullity and the case against her should be dismissed with costs.
29. On the issue whether the magistrates 'court had jurisdiction to hear land matters, counsel relied on the case of *Kibwana Ali Karisa & another v Said Hamisi Mohamed & 3 others* [2015] eKLR where the court held in the affirmative and submitted that the subordinate court in question had jurisdiction to entertain the case before it and that the orders of that court had neither been appealed nor set



aside/reviewed hence are still binding. Counsel further cited the case of *Wilson Kipmagut Arap Soi v Armstrong Kasuku & another* [2005] eKLR.

Analysis and determination

30. The issues for determination in this case is whether the defendants have encroached on the plaintiff's suit land and whether orders sought for injunction and eviction are sustainable.
31. This suit emanates from a boundary dispute which complaint was filed at the land registrar's office and the same was adjudicated as per section 19 of the *Land Registration Act*, 2012, which vests the duty to fix boundaries to registered land in the land registrar. It provides that:
- “ 1 If the registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the registrar, the registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.
 - 2 The registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.
 - 3 Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section”.
32. In the case of *Maria T Chebiego v Kimutai Kangogo Sawe & 18 others* [2020] eKLR this court held as follows: -
- “The section specifically gives the land registrar the mandate to fix boundaries and the court would not be in a position to determine boundaries as it does not have the technical expertise in surveying. The court relies on such expertise to guide in decision making. This particular case benefited from such expertise where a report was filed in court and adopted as a judgment of the court. If the parties were not happy with the contents of the report, then they should have asked the land registrar to help with the implementation of the same.”
33. The land registrar gave evidence and explained the process above which she followed in fixing and rectification of the boundary in the presence of all the parties concerned.
34. It is on record that vide a letter dated August 5, 2002 the district land registrar noted that an inspection was carried out on July 31, 2002 in the presence of the area chief and the neighboring owners of the suit plot.
35. I have also noted vide a letter dated July 25, 2002 all parties were invited to the inspection by the land registrar and further a letter dated August 10, 2002 by the assistant chief confirming that all parties were present during the inspection. The 1st defendant denied being present during the inspection or entering into any agreement. However, there is no evidence to refute the report dated August 5, 2002 by the land registrar.



36. The land registrar in her findings stated that what appears on the ground does not appear on the mutation and the total acreage did not tally with the acreage on their title deeds. She also noted that both owners agreed to share the deficit in her presence and the surveyor in turn marked for them new boundaries.
37. According to the report the surveyor marked and identified the boundaries of plot nos 332 and 374 and that the owner of plot no 332 surrendered the title deed for rectification and was issued with a new title deed with the same number.
38. This is a case where the court can only come to the conclusion that the only way to resolve this boundary dispute is the implementation of the survey report dated September 25, 2014 which indicated that a new wall and fence erected by owner of plot no 331(now subdivided into 4 portions has encroached into plot no 332 and that a fence which was brought down as observed on the ground should be the rightful boundary between plot nos 331 and 332.
39. Further the court finds that the land registrar should also implement the recommendation as per the report dated August 5, 2002. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 7TH DAY OF MARCH, 2023

M A ODENY

JUDGE

NB: In view of the Public Order no 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

