



Njeru (Suing Through her Power of Attorney Wilfred Njogu Njeru) v Majani (Environment & Land Case 231 of 2018) [2023] KEELC 18726 (KLR) (12 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18726 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 231 OF 2018**

**A NYUKURI, J
JULY 12, 2023**

BETWEEN

ZELIPHAH WAKINI NJERU (SUING THROUGH HER POWER OF ATTORNEY WILFRED NJOGU NJERU) PLAINTIFF

AND

GRACE MINAYO MAJANI DEFENDANT

JUDGMENT

1. By a plaint dated 6th December 2018 filed against the Defendant in this suit, the Plaintiff sought the following orders;
 - a. An order compelling the Defendant to move her beacons to slant vertically, as per the report and findings by the District Surveyor of Machakos County, thereby allowing the Plaintiff to likewise mover hers.
 - b. An order directing the Defendant to move her fence which she has put up encroaching on the Plaintiff's land.
 - c. Costs of this suit.
 - d. Such other and/or other further relief as this Honourable Court may deem fit and just to grant.
2. The Plaintiff averred that she is the registered owner of all that property known as Title No. Mavoko Town Block 3/1175 while the Defendant is the registered owner of Title No. Mavoko Town 3/1176 which are adjacent to each other.
3. She stated that in September 2017, the Ministry of Lands through the District Land Surveyor Machakos County carried out an inspection on the parcel of land where the said plots lie as well; which inspection was done on Plot Numbers 1170 to 1179 all situated in Mavoko Town Block 3 Sheet 4. According to the Plaintiff, the report from the inspection revealed that a road intended to be



constructed between Plot Nos. 1178 and 1179 had erroneously been made to pass through Plot No. 1178. Further that the report showed that Plot No. 1179 was misaligned on the ground resulting in the encroachment on Plot No. 1178 by 1.024 Ha. That as a result of the findings, owners of Plot Numbers 1170 to 1179 were required to move all their beacons to slant vertically so as to maintain the original acreage of all the plots so that Plot Numbers 1170 and 1179 measured 65 meters by 325 meters, while the rest of the plots measures 63 meters by 325 meters.

4. The Plaintiff stated that the owners of Plot Numbers 1170 to 1174 had since complied with the recommendations, while the Defendant who is the proprietor of Plot Number 1176 has refused to move her beacons so as to allow the Plaintiff move hers. She maintained that by refusing to move her beacons, the Plaintiff had been robbed of the original acreage of her plot resulting to loss. That the Defendant has put up a fence encroaching on the Plaintiff's land.
5. In response, the Defendant filed defence dated 18th January 2019 wherein she denied the Plaintiff's claim. The Defendant admitted being the owner of Plot No. Mavoko Town Block 3/1176. She stated that if there was an inspection on the suit property the same was carried out without due process. She maintained that the surveyor's report did not require the owners of Plot Numbers 1170 to 1179 to move their beacons to slant vertically.
6. The Defendant's position was that the area map of Mavoko Town Block 3 Sheet 4 does not show beacons slanting vertically as alleged by the Plaintiff. She denied encroaching on the Plaintiff's land and stated that her fence was erected in accordance with the beacons reflected in the map for Mavoko Town Block 3 Sheet 4. She denied jurisdiction of the court.
7. The issue of jurisdiction was raised in a preliminary objection dated 4th February 2019 filed by the Defendant whereof this court dismissed the preliminary objection on grounds that it had jurisdiction to hear and determine this suit.
8. The suit proceeded by way of viva voce evidence. The Plaintiff presented three witnesses while the Defendant presented five witnesses.

Plaintiff's Evidence

9. PW1 was Wilfred Njogu Njeru, who testified on 27th October 2021. He testified that Zeliphah Wakini Njeru was his mother who stays in the USA and had authorized him to handle this matter on her behalf by donating to him the power of attorney. The witness adopted the contents of his witness statement dated 6th December 2018 as his evidence in chief.
10. It was PW1's evidence that the Plaintiff is the registered owner of Title Mavoko Town Block 3/1175 which plot borders the Defendant's Plot Number Mavoko Town Block 3/1176. He stated that in September 2017, the Ministry of Lands through the District Land Surveyor – Machakos County carried out an inspection on the Plot Nos. 1170 to 1179 on Mavoko Town Block 3 Sheet 4. That the inspection revealed that a road which was intended to be constructed between Plot Nos. 1178 and 1179 as per the deed plan had erroneously been made to pass through Plot No. 1178. That it was further found that Plot No. 1179 was misaligned on the ground resulting in encroachment on Plot No. 1178 by 1.024 Ha.
11. He further testified that as a result of the findings, owners of Plot Numbers 1170 to 1179 were required to move their beacons to slant vertically so as to maintain the original acreage of all the plots whereby Plot Numbers 1170 and 1179 measured 65 meters by 325 meters while the rest of the Plots measured 63 meters by 325 meters. According to this witness, the owners of Plot Numbers 1170 to 1174 had complied with the alleged recommendations. That the owner of Plot Number 1174 moved and fenced



their property prompting the Plaintiff to move as well but that the Defendant has refused to move yet her fence encroaches on the Plaintiff's land. He also stated that the Plaintiff engaged a private investigator who advised her to obtain a Beacon Certificate. He sought for orders in the plaint. He produced the Power of Attorney, title deed for Mavoko Town Block 3/1175, Map Sheet for Mavoko Town Block 3 for Parcels 1170 to 1179, surveyor's report dated 8th September 2017, letter from the Ministry of Lands dated 7th July 2017, letter to District Land Registrar dated 26th January 2018, searches, chief's letters and demand letter.

12. On cross-examination, PW1 stated that they had stayed on their land for a long time and that their land was parallel to their neighbours. He stated that when the Plaintiff came on the land, she found the Defendant living on her parcel of land and that the problem arose after the owner of Parcel No. 1174 came on her plot as the owners were satisfied with their properties before the owner of Parcel No. 1174 came on their plot. He stated that there is no where stated in the report that the owner of Parcel No. 1176 had encroached on Parcel 1175. He also stated that there is no where in the report showing that the plots should slant vertically and that the report does not require the Defendant to move her beacons. He maintained that there was no encroachment between Plot Nos. 1175 and 1176 as the only issue was for the boundaries to move so as to be in a slanting position.
13. According to PW1, what is on the ground is not what is on the map and that it is the owner of Plot No. 1174 who told the Plaintiffs to move, which they did.
14. PW2 was Daniel Muthini Kitonyi, the Assistant Chief of Kinanie Sub Location Machakos County. He testified that there was a dispute between the owners of Parcels 1175 and 1176 on Mavoko Block 3 leading to several visits by the District Surveyor from Machakos District Survey office, the last visit being that of 7th September 2017. He further stated that all land owners were invited by the surveyor and all corner points of Plot Nos. 1170 to 1179 were marked on the ground and parties advised to respect the points marked on the ground. He stated that it is the owner of Plot No. 1176 who disobeyed the surveyor's markings on the ground and constructed structures on the land. He produced his letter dated 16th November 2017 stating what was in his witness statement.
15. In cross-examination, he stated that he is not the Assistant Chief of the area where the suit property is situated. He stated that he was sent to the suit property by his area Chief and that the District Commissioner asked him to write a report. He stated that his report did not indicate that the owner of Parcel No. 1176 had encroached on Parcel No. 1175 but that the owner of Parcel No. 1176 had constructed on Parcel No. 1175.
16. PW3 was Catherine Kisui a Land Surveyor from Machakos County office. She produced the surveyor's report dated 8th September 2017. She stated that the report was in respect to inspection of Plots Mavoko Town Block 3/1170 to 1179. She stated that the findings were that the road existing on the ground was meant to pass through Plot No. 1178 and not between Plot Nos. 1178 and 1179. According to PW3, the position of the road on the ground is not where it should be according to the map. The witness further stated that Plot Numbers 1170 and 1171 were vacant although they had a barbed wire fence. That Plot No. 1172 existed on the ground as St. Joseph Girls Secondary School.
17. PW3 informed court that Plot Number 1179 was misaligned on the ground resulting in the encroachment of Plot No. 1179 into 1178 by approximately 1.024 Ha. The witness stated that she therefore recommended that parties should respect the points shown or marked on the ground if they were to obey the map for Mavoko Town Block 3 Sheet No. 4.
18. On cross-examination, she stated that the people present during the inspection were accompanied by the area Chief and that the author of the surveyor report was deceased. According to this witness,



the encroachment is by the owner of Plot No. 1179 who encroached into Plot No. 1178. She stated that there was nothing in the report showing that Plot Number 1176 had encroached into Plot No. 1175. She maintained that then area of interest was Plot Numbers 1178 and 1179. She stated that the report did not direct the owner of Plot Number 1176 to move her beacons and that the report's recommendations do not indicate that the plots should slant vertically. She maintained that the surveyor's report produced only addressed the dispute between Plot Nos. 1178 and 1179. That marked the close of the Plaintiff's case.

Defendant's Evidence

19. DW1 Josphat Kiume adopted his witness statement dated 17th March 2020 as his evidence in chief. He testified that he was the owner of Plot Number Mavoko Block 3/1172 and that since allocation of his plot, the beacons have never changed and that therefore the Plaintiff's evidence was not true. According to him, Plot Number Mavoko Town Block 3/1172 was their family property left to them by their late father and where they established a school called Valley View. The testified that their Plot No. 1172 was fenced in accordance to the acreage and the same is parallel and not vertical as alleged. His position was that the surveyors allocated plots in equal measures and beacons erected to identify each plot. He denied the allegation that the surveyor recommended that they move beacons to slant vertically. He stated that the map for Mavoko Town Block 3 Sheet 4 has never changed to warrant the Plaintiff's allegation that the plots should slant vertically.
20. In cross-examination, he stated that there is one road accessed by all the ten plots and that his plot was not affected by the road. He stated that the area Chief came with the surveyor to confirm whether beacons were in the right places and that from Plot Numbers 1170 to 1173, they have no disputes. He stated that the was not aware of any disputes among the plot owners because they were informed by the surveyor that their plots were in the right positions.
21. DW2 was Anne Wanjiku Munene. She adopted her witness statement dated 7th February 2020. Her testimony was that she had been the registered owner of Plot Mavoko Town Block 3/1177 which borders the Defendant's plot, which plot she sold to the Defendant. That she had three other plots located on the upper side of the block. She also informed court that before purchasing the plots, the land was properly surveyed and that she confirmed that the beacons on the ground tallied with the survey map from Survey of Kenya. She stated that at the time of demarcation, the plots were subdivided according to acreage and beacons erected to confirm boundaries, and that Plot Nos. 1170 to 1179 are parallel to each other and not vertical as alleged by the Plaintiff. She stated that before selling her plot to the Defendant, it was fenced in accordance to the survey map from Survey of Kenya and that the same was never been changed. She stated that the Defendant has never encroached on the Plaintiff's land and that the Plaintiff's allegations that owners of Plot Nos. 1170 to 1174 have complied by removing their beacons to slant vertically is not true. She denied having been invited in the boundary review exercise.
22. On cross-examination, she stated that she owns three other plots being Plot Numbers 78, 1205, 1206 and 1207 and denied having been summoned by the surveyor's report or being aware of the inspection of the properties on Mavoko Town Block 3. She stated that the beacons are in the same place where they were as per the map.
23. DW3, Grace Masua adopted her witness statement dated 17th February 2020 as her evidence in chief. She stated that her plot was Number 1179 and that she bought the plot from one Dr. Kivua. That the plot is registered in the name of her late husband Boniface Masua. She stated that they purchased their plot from Lukenya Ranch in 1995 and that she has lived thereon ever since then.



24. According to DW3, prior to purchasing their plot, the land was properly surveyed by the surveyors assigned by the Lukenya Ranch who were the original owners and beacons aligned in accordance with the survey map from Survey of Kenya. That the farms were subdivided according to acreage and beacons placed to identify boundary and that the farms are parallel and not vertical as is alleged by the Plaintiff.
25. In cross-examination, she stated that she was not aware of summons in respect of the inspection of the suit property or the report dated 8th September 2017.
26. PW4 was Pauline Ndungu Kaloki who adopted contents of her witness statement dated 22nd February 2020 as her evidence in chief. She testified that her land was Plot No. 1178 and that there is a road between her land and Plot Number 1179. She stated that she had lived on her plot since 2002 and the road has been there since then to date. She stated that it was not true that the road should pass through her plot and that the road is where it is on the map.
27. In cross-examination, she stated that the survey report was not correct and that she did not attend the inspection and was not aware of the survey report. She stated that she was not aware that they were recommendations on the report.
28. DW5 was Grace Minayo Masani the Defendant herein. She adopted her witness statement dated 18th January 2019 as her evidence in chief. Her testimony was that she was the owner of Plot No. Mavoko Town Block 3/1176 which she started occupation and farming in the year 2000. She testified that ever since she occupied the land, Plot Numbers 1175 and 1176 were already separated with a fence of posts and barbed wire. She stated that the Plaintiff constructed his compound fence in accordance to the beacons on the ground and that they lived harmoniously until 2018 when the Plaintiff asked her to move her beacons and fence vertically.
29. PW5 stated that at the time of demarcation, the farms were subdivided according to acreage and beacons erected to identify boundaries. She stated that the plots in Mavoko Town Block 3 Sheet 4 are parallel to each other as per the survey map not vertical as alleged by the Plaintiff. She stated that on the ground all the plots from Plot Numbers 1170 to 1179 run parallel to each other as reflected on the map. She denied encroaching on the Plaintiff's plot and that even the alleged survey report produced by the Plaintiff does not state that she had encroached on the Plaintiff's land and that even the said report does not support the Plaintiff's prayers and that therefore the suit is mis-concerned. She stated that the map for Mavoko Town Block 3 Sheet 4 had never changed to warrant the Plaintiff's allegations that the plots slant vertically. She further informed court that the Plaintiff's allegations that owners of Plot Nos. 1170 to 1174 have complied by slanting their beacons vertically was not true. She produced an original map for the plots in issue. She also produced photographs of the suit property.
30. On cross-examination, she stated that she saw the surveyor's report in court and that there is no misalignment on the ground. She stated that Lukenya Ranch was the initial owner of the land in dispute and that they had the land surveyed. According to DW5, the owner of Plot Number 1174 fenced the plot vertically and illegally. She stated that if the Plaintiff has a problem, she needs to ask the person who sold her the land to address it and that the Plaintiff's problem is with the owner of Plot No. 1174 and not her. That marked the close of the Defendant's case.
31. Parties filed written submissions in urging their respective cases. On record are the Plaintiff's submissions dated 8th February 2023 and the Defendant's submissions dated 16th January 2023.



Plaintiff's Submissions

32. Counsel for the Plaintiff submitted that the totality of the Plaintiff's evidence points to the fact that the Defendant has illegally and without justification encroached on the Plaintiff's plot, as the evidence of the Plaintiff showed that the Defendant had refused to comply with the recommendations in the surveyor's report by failing to move her beacons which recommendations, the owners of Plot Numbers 1170 to 1174 had complied with.
33. Reliance was placed on Article 40 of *the Constitution* as well as Section 24 (a) of the *Land Registration Act* and the case of Ahmed Ibrahim Suleiman and Another v. Noor Khamisi Surur [2013] eKLR, for the proposition that the Plaintiff being the registered proprietor of Mavoko Town Block 3/1175, is entitled to the protection of the law.
34. Counsel also submitted that a surveyor's report and the Land Registrar's decision is extremely important in boundary disputes and the findings and recommendations therefore ought to be respected and obeyed. Counsel referred the court to the decision in the case of Abdalla Ali Nassoro v. Wycliff Lukio & Another [2021] eKLR, for the proposition that where a surveyor's report shows encroachment, the same is material evidence in a case where the Plaintiff alleges encroachment. Counsel's position was that the surveyor's report dated 8th September 2017 recommended that owners of Plot Numbers 1170 to 1179 move their respective beacons to slant vertically so as to maintain the original acreage of all the plots so that Plot Nos. 1170 and 1179 measures 65 meters by 325 meters and Plot Numbers 1171 to 1178 measures 63 meters by 325 meters. Counsel argued that the Defendant's failure to move her beacons had occasions loss of property by the Plaintiff.
35. On whether the Plaintiff is entitled to the reliefs sought in the plaint, counsel submitted, it is a legal principle that where there is a right there is a remedy. Counsel argued that the Defendant's failure to comply with the surveyor's recommendations and the Land Registrar's decision entitles the Plaintiff to the orders sought. Counsel took the position that it is in the interest of justice and fairness that the orders sought be granted as they will be giving effect to the provisions of Section 18 and 19 of the *Land Registration Act* pertaining to boundary dispute.

Defendant's Submissions

36. Counsel for the Defendant submitted that the Plaintiff alleged that the owner of Plot 3/1174 surveyed her land and as a result her boundary encroached into their land and that he was advised by the owner of Plot No. 1174 to move diagonally into Plot No. 1176. Counsel submitted that the Plaintiff however did not produce the survey report he alleged was relied on by the owner of Plot No. 1174 in advising the Plaintiff to move diagonally into Plot No. 1176.
37. Counsel argued that from the Plaintiff's testimony, it is clear that the owner of Plot No. 1174 encroached into the Plaintiff's land and that the Plaintiff cannot justify actions of the owner of Plot No. 1174 by suing the Defendant. It was further submitted for the Defendant that there was no evidence of the Defendant's encroachment on the Plaintiff's land but that at the point of purchase, the Plaintiff did due diligence and was satisfied with the acreage of his land or he should have raised the issue of encroachment or smaller acreage at the time of purchase. Counsel further argued that no report had been produced to show that the Plaintiff's land was smaller.
38. Counsel submitted that from the surveyor's report produced by the Plaintiff, there is nowhere in the report stating that the Defendant had encroached on the Plaintiff's land; there are no recommendations in the report that plots should slant vertically; the report does not state or recommend the Defendant to move her fence or her beacons; there is no encroachment between the Plaintiff's and the Defendant's



plots and that the report does not indicate that the Plaintiff's land is smaller. Counsel therefore argued that the Surveyor's report relied on by Plaintiff do not support the Plaintiff's prayers.

39. Counsel relied on Section 107 of the Evidence Act and submitted that it is trite law that the who alleged must prove and that the Plaintiff herein failed to prove her case. Counsel argued that the letter by the Assistant Chief had no evidentiary value as the said witness was not the Assistant Chief of the location in issue and that the letter from the Ministry of Lands required the area Chief himself to provide security. Counsel pointed out that from the evidence of PW3 who was the Surveyor, the surveyor's report noted that;
- a. That the road existing on the ground was made to pass through Plot 1178 and not between Plot 1178 and 1179 as should be the case with the map.
 - b. That Plot Numbers 1170 and 1171 had barbed wire fence along the perimeter as one block and was vacant while Plot 1172 existed on the ground as St. Joseph Girls Secondary School.
 - c. That Plot Number 1179 was misaligned on ground resulting into encroachment of Plot 1179 into 1178 by approximately 1.024 Ha.
40. Therefore counsel argued that from the surveyor's evidence, there was no evidence of encroachment by the Defendant; the surveyor did not direct the Defendant to move her beacons to slant vertically; the surveyor did not direct the Defendant's to move her fence, and that there is no boundary dispute between the Plaintiff and the Defendant.
41. It was submitted for the Defendant that the boundaries between the plots herein were determined at the time the land was registered and title issued in conformity with the registry index map and map sheet. Counsel argued that the law protects the Defendant under Section 24 of the Land Registration Act against encroachment and trespass and that the Defendant fenced her land according to the map produced by the Defendant as Exhibit 1. Counsel argued that the report of the surveyor does not show any dispute between the Plaintiff and the Defendant. Counsel argued that the Defendant's witness testimonies were not controverted as DW1 disapproved the Plaintiff's allegation that Plot owners of Plot Nos. 1170 to 1174 had moved their beacons to slant vertically and that DW1 confirmed that being the owner of Plot No. 1172, the beacons thereof had never been moved. Counsel argued that the evidence of DW2 showed that there was no encroachment. Counsel relied on the cases of *Azzuri Limited v. Pink Properties Ltd* [2017] eKLR and *Ravindra Karsan Vishram & Another v. Abdul Wahab Abdulrahman Noorwali & Another* [2019] eKLR.

Analysis and Determination

42. The court has carefully considered the pleadings, evidence and submissions filed by the parties; and the sole issue that emerge for consideration is whether the Defendant had trespassed or encroached onto the Plaintiff's land Parcel No. 1175.
43. Trespass is an unlawful entry on another's land. The Plaintiff relied on the surveyor's report dated 8th September 2017. That report makes reference to inspection of Plots Mavoko Town Block 3/1170 to 1179. The report does not state the basis for the inspection or whether the inspection was done pursuant to any complaint from any of the owners of Plot Numbers 1170 to 1179.
44. The findings made by the surveyor are as follows; that all the above plots existed on map Mavoko Town Block 3 Sheet 4; Plot Nos. 1170 and 1179 measured 65 meters by 325 meters while the rest measured 63 meters by 325 meters; that all corner points of Plot Nos. 1170 to 1179 were marked on the ground in the presence of parties present; that the road which was existing on the ground, was made to pass through Plot No. 1178 and not between Plot Numbers 1178 and 1179 as should be the case with the



- map; that Plot Numbers 1170 and 1171 had barbed wire fence along the perimeter as one block and was vacant whereas Plot No. 1172 existed on the ground as St. Joseph's Girls Secondary School; and that Plot No. 1179 was misaligned on the ground resulting in the encroachment of Plot No. 1179 into Plot No. 1178 by approximately 1.024 Ha.
45. Subsequently, the report made a recommendation that the land owners are advised to respect the points shown to them on the ground if they are to obey the area map for Mavoko Town Block 3 Sheet 4. Attached to the report was a copy of a map the Plot Nos. 1170 to 1179 as per the ground. The same shows that all the plots are rectangular in shape. It also shows road from the top right corner of Plot No. 1178 to the bottom left corner of the same plot dividing Plot No. 1178 into two equal triangles. The map also shows a road between what is described as Plot No. 1178 and Plot No. 1179. There is a line drawn in Plot No. 1179 dividing Plot No. 1179 into two equal triangles. From the map which is said to depict the ground, all the Plots are rectangular touching/adjoining a road on the northern side and none of the plots slants as alleged by the Plaintiff. I have considered that map vis a vis the map produced by the Defendant which is the map from Survey of Kenya dated 1st February 2019. The same shows Plot Number 1170 going all the way to Plot No. 1179 which appear to be about the same size. The diagonal road in Parcel No. 1178 which is on the map showing the ground is not on the map from Survey of Kenya but what is in this map is the road between Plot Nos. 1178 and 1179.
46. Having compared the map by the surveyor depicting the ground of the plots in issue, as against the map produced by the Defendant, I note that the position of the Plot Nos. 1170 to 1177 are the same on both maps. The only difference is in regard to Plot Nos. 1178 and 1179. From the evidence of PW3, there is a road which was erroneously placed inside Plot No. 1178 instead of being placed on the boundary between Plot Nos. 1178 and 1179. She also testified that she was only concerned with Plot Nos. 1178 and 1179 in which the road was misplaced and that therefore Plot No. 1179 was misaligned.
47. Clearly, there is no evidence from the map in respect of the ground to show that Plot Numbers 1175 and 1176 were affected on the ground in any way as a result of the misalignment of Plot No. 1179 and the erroneous construction of the road on Plot No. 1178. Indeed, I find no basis for exporting the purported misalignment and encroachment of Plot Nos. 1179 into 1178, to create a dispute between Parcel Nos. 1175 and 1176. This is because the map from Survey of Kenya and the map by the surveyor (PW3) of how the ground appears in respect of Parcel Nos. 1170 to 1177 are in tandem and there is no plot that joins the road on the north diagonally, apart from Plot Nos. 1178 and 1179.
48. Section 107 of the [Evidence Act](#) places the burden of proof in a suit on the Plaintiff and provides as follows;
1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
49. In this case, the Plaintiff alleges encroachment of Plot No. 1176 into Plot No. 1175. The report relied on by the Plaintiff shows that in so far as the position of Plot Numbers 1175 and 1176 are concerned, the boundaries on the ground and those on the map from Survey of Kenya are in tandem and the ground reflects what is on the map. The allegation by the Plaintiff that the owners of Plot Numbers 1170 to 1179 were all required to move their beacons to slant vertically has no basis as no authority made such requirement. Even in cross examination, PW3 who was the surveyor testified that in the report, there is nothing to show encroachment of Plot No. 1176 on Plot No. 1175 and that the report did not direct the owner of Plot No. 1176 to move her beacons and that the report does not indicate



that the plots should slant vertically. According to PW3, the surveyor's report produced addressed the dispute between Plot Nos. 1178 and 1179.

50. Therefore, I find and hold that the surveyor's report having not stated that there was encroachment by the owner of Plot No. 1176 into Plot No. 1175 and the same report having tallied with what is on the map from Survey of Kenya in so far as boundaries between Plot Numbers 1175 and 1176 are concerned, I find and hold that the Plaintiff did not by expert evidence demonstrate encroachment into her plot by the Defendant.
51. I will hasten to add that the evidence of the surveyor herein and the surveyor's report herein is not and cannot be equated to the findings or determination made by a Land Registrar under Section 18 (3) of the [Land Registration Act](#). That section provides as follows;
- "Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registration may, in any proceedings concerning the parcel, secure 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)."
52. I take the above view because the determination of a boundary dispute is done by the Land Registrar and not the Land Surveyor. The Land Registrar takes evidence from the disputants and any other available witness and makes a determination of where the boundary is. In the case of *Azzuri Limited v. Pink Properties Limited* [2017] eKLR, the court held that the determination of boundary dispute is done by the Land Registrar. Having considered the surveyor's report herein, it refers to an inspection, without making reference to what informed the inspection. The report does not show whether the inspection of Parcel Numbers 1170 to 1179 was as a result of any dispute between any of the land owners of the mentioned land. In addition, no evidence was taken from any of the land owners to arrive at what is referred to as recommendations and therefore it remains merely an observation of what was on the ground and more particularly between Plot Nos. 1178 and 1179 as the ground in respect of Plot Nos. 1170 – 1179 had nothing of relevance to be reported about. Therefore in view of the above, the Plaintiff's submission that the surveyor's report was done pursuant to Section 18 of the [Land Registration Act](#) and that this court should enforce the same is rejected for being misleading.
53. In addition, the surveyor's report showed a variance of the ground and the map in regard to Plot Nos. 1178 and 1179, whereof a road meant to run parallel to the two plots and between the two plots was made to run diagonally across Plot No. 1178. PW3 stated that the road was situated on the ground erroneously and not in the place it ought to have been as per the map from Survey of Kenya. The Plaintiff argued that because the road slant vertically, then all the plots from Plot Nos. 1170 to 1179 ought of slant vertically. I do not agree with that proposition because where there is a variance between the map and the ground and where no determination has been made by the Land Registrar in accordance to Section 18 (3) of the [Land Registration Act](#), then the map must prevail. Having looked at the map from Survey of Kenya, the plots in the series of Plot No. 1170 go all the way to Plot No. 1197, which directly face and correspond with plots in the series starting from Plot Nos. 1200 to 1227.
54. The justification to start the slanting at Plot No. 1179 going backwards to Plot No. 1170 is not given by the Plaintiff. Even the allegation by the Plaintiff that the owners of Plot Nos. 1170 to 1174 had complied by moving their beacons was discredited by the evidence of DW1, who owns Plot No. 1172 who stated that he has never moved his beacons. The allegation that Plot Number 1179 slant vertically was discredited by the evidence of DW3, the owner of Plot No. 1179 and DW4 the owner of Plot Number 1178. The Plaintiff admitted that they had lived harmoniously with the Defendant until 2018



when the owner of Plot No. 1174 asked her to move her beacons which she complied with and so she expects the Plaintiff to move her beacons as well, to slant as proposed.

55. While the Plaintiff has sought that the Defendant moves her beacons, the map produced by the Plaintiff shows that from the Defendant, the next plot is Plot Number 1177. Therefore the Defendant cannot move her beacons to a vacuum. If they are to be moved, the consequence would be that they will land in Plot Number 1177. The owner of that plot is not a party to this suit and no complaint has been made against him or her. Therefore granting the orders sought would not only be without basis but they will violate the rights of a person who is not party to this suit and against whom the Plaintiff has no complaint. The Plaintiff's problems began when she took the advice of the owner of Plot Number 1174 to move her beacons. She may need to go back to the same person if she is to solve her problem.
56. For the reasons above, I find and hold that the Plaintiff has not placed any material before this court to demonstrate that the Defendant has encroached on her Plot No. 1175 or the extent of the encroachment. In the premises, I find no merit in the Plaintiff's suit and I hereby dismiss the same with costs to the Defendant.
57. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 12TH DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Kitila for Plaintiff

Mr. Kisia for Defendant

Abdisalam – Court Assistant

