



**Kitheka (Suing as administrator of the Estate of Kitheka Mweta) v Mwova & 8 others
(Constitutional Petition E001 of 2021) [2023] KEELC 21194 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21194 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
CONSTITUTIONAL PETITION E001 OF 2021**

LG KIMANI, J

NOVEMBER 2, 2023

BETWEEN

**KILONZO KITHEKA (SUING AS ADMINISTRATOR OF THE ESTATE OF
KITHEKA MWETA) PETITIONER**

AND

**ALEXANDER MWENDWA MWOVA 1ST RESPONDENT
THE LAND ADJUDICATION OFFICER-KYUSO 2ND RESPONDENT
THE DEPUTY COUNTY COMMISSIONER, KITUI KYUSO 3RD RESPONDENT
THE LAND REGISTRAR (MWINGI) 4TH RESPONDENT
THE SURVEYOR, MWINGI KYUSO 5TH RESPONDENT
THE ATTORNEY GENERAL REPUBLIC OF KENYA 6TH RESPONDENT
RUKIA IKUTHU MULUKI 7TH RESPONDENT
JOHN KYALO MUNYITHYA 8TH RESPONDENT
ESTHER KAMOLI MWOVA 9TH RESPONDENT**

RULING

1. Before the Court for determination is an application under Notice of Motion dated 16th March 2023 by the 1st Respondent Applicant seeking the following orders:
 1. That this Honourable Court do order a survey to be conducted on the suit parcels of land before the main hearing of this Petition.
 2. That costs of this application be in the cause.



2. The application is based on the grounds that it is necessary to conduct survey on the suit properties to establish the exact extent of the boundaries of each parcel of land subject of this suit in order to avert future conflicts and avoid similar applications. The applicant contends that during the hearing of an application dated 17/8/2020 in Machakos ELC Case number 69 of 2019 (later Kitui ELC No. E001 of 2021), Justice O. Angote in his ruling delivered on 30.7.2021 observed that there was need for a survey to confirm who is trespassing on whose land.
3. The Application is supported by the affidavit of Alexander Mwendwa Mwova, the 1st Respondent/Applicant herein who states that he is the registered owner of Land Parcel No.Kyuso/Kyuso "A" /597 which was the subject matter for Kitui ELC Case No.E001/2021 (formerly Machakos ELC 69 of 2019) where Angote J observed that there was need to conduct a survey on the suit land in order to establish who was trespassing on the others land.
4. He stated that upon the Petition being filed, no survey has been conducted and that he had commenced the process of survey before the death of the Petitioner's father Kitheka Meta on 9th August 2020 but the same had to await the burial.

The Petitioner/Respondent's Replying Affidavit

5. Kilonzo Kitheka, the Petitioner herein, swore a Replying Affidavit opposing the application stating that it has no merit and is only aimed at defeating justice by delaying the Petition from coming to an end. The 1st Respondent contends that the Applicant has been filing one application after the other for this reason.
6. The Petitioner deposed that the Applicant relies on a non-existing order/ruling allegedly issued by Justice Angote in a matter that is unknown to this court, which order has not even been annexed and is not related to this suit.
7. He noted that what is before the Court is a constitutional petition challenging the process of adjudication and not a boundary dispute. He is of the opinion that a survey will not cure anything, but will be a futile exercise and a waste of judicial time. He therefore prays that the court dismiss the application with costs.

The 1st Respondent/Applicant's submissions

8. Counsel for the Applicant/Respondent submitted and reiterated the contents of the supporting affidavit stating that it is necessary to conduct survey on the suit parcel of land because one of the issues involves the boundaries of the suit property. The dispute originates from Land Parcel No.179 which is the mother title to which the suit property Land Parcel No.Kyuso/Kyuso "A"/597 emanated. It is the Applicant's view that confirming the boundaries of the contentious parcel of land will help the court and parties to settle the prayers of the petitioner in the main suit.
9. In any case, the Applicant submits that the survey will not be prejudicial to any party's case and will ensure that the court's decision is fair and just and relied on the holding of the Court in the case of [*Jane Wanja Njiru v Juria Irobo Nthinga & another*](#)(2017)eKLR.
10. The applicant states that he had started the process of survey, in line with Justice Angote's order, before the death of the Petitioner's father. He states that the intended survey will in no way change the status quo order of this court given on January 26, 2023 and will avert future conflicts and avoid applications where the parties in this matter might be required to do the survey later on in the suit. They cited the case of [*Fredrick Otieno Obonyo v Gilbert Otieno Nyanjom & another*](#)(2018)eKLR.



11. The Applicant also noted that the Petitioner/Respondent has never been present on any occasion when the Land Adjudication Officers visited the suit property and therefore does not know the extent to which the boundaries sought to be surveyed have shifted and the survey will help the Court and parties know here their boundaries reach. They also relied on Ouko JA's ruling in the case of *Ensokon Group Ranch v Mukuvuini Farmers Co Ltd & 54 others* (2011)eKLR on conducting a survey on the property.

The Petitioner/Respondent's submissions

12. Counsel for the Petitioner/ Respondent filed written submissions in opposition to the instant application, submitting that the Petition seeks to revoke and to rectify and/or cancel the already existing boundaries which the petitioner holds were illegally and unlawfully issued and violated his rights and has never implied that there is any boundary dispute.
13. Their view is that if the application is allowed, then the current boundaries will be revoked or removed, which beats logic to waste the court's judicial time to engage in an exercise that may be overturned by the same court after determining the petition on merit. They therefore submit that the application has no merit, is illogical, is aimed to delay the petition and should be dismissed with costs.

Analysis and Determination

14. The Petition filed before this Court is one where the Petitioner challenges the adjudication process that led to the suit land being awarded to the 1st Respondent claiming that the process violated his constitutional right of a fair administrative action and fair hearing under articles 47(1) and 50(1) of the *Constitution of Kenya* (2010). He states that this is not a boundary dispute as the applicant suggests. He is of the opinion that a survey will not cure anything but will be a futile exercise and a waste of judicial time.
15. The 1st respondent on the other hand states that the Petition relates to a parcel of land known as Kyuso/Kyuso"A"/179 and 597 where the disputes relating to the parcels went through the entire adjudication process up to the Minister's Appeal. The applicant disputes that land parcels Kyuso/Kyuso"A"/734, 587, 152, 153, 154,155, 157, 179, 568, 569, 570, 571, 572, 573, 574, 575, 576 and 597 were part of the dispute during the adjudication process.
16. In order to determine whether or not the orders sought in the application herein have merit the court has considered the prayers in the petition which are as follows;
 - (1) A declaration that the proceedings, trial and decisions of the Land Adjudication Officer at Kyuso dated 27/11/2009, 25/11/2010, 31/05/2011 and that of the Deputy County Commissioner dated 13/08/2019 and who was sitting as the Special Minister for Lands under section 29 of the *land Adjudication Act* cap 294 in appeal No. 395 of 2011 were in violation of the guaranteed fundamental rights of a fair administrative action, reasonable and legitimate expectations, and a fair hearing before an impartial tribunal or body within the meaning of article 47 (1) and 50(1) of *the Constitution of Kenya* 201, and hence fore, null and void.
 - (2) A declaration that the subdivision of land parcel Kyuso/Kyuso "A"/179 by the 2nd Respondent and the subsequent subdivisions into parcels numbers Kyuso/Kyuso"A"/734, 587, 152, 153, 154,155, 157, 179, 568, 569, 570, 571, 572, 573, 574, 575, 576 and 597 were ultra vires, unlawful and unconstitutional.
 - (3) An order directed to the 2nd 4th and 5th Respondents to revoke all the suit parcels of land namely KYUSO/KYUSO"A"/734, 587, 152, 153, 154,155, 157, 179, 568, 569, 570, 571, 572, 573,



574, 575, 576 and 597 and re-issue new title deeds including re-drawing of the map to reflect the judgement of the panel of elders of 1989 as it describes the disputed land

17. A look at the respondent's replying affidavit also shows that the dispute between the parties is bigger than a question of boundaries or a question that would be resolved by carrying out survey on the disputed parcels of land. Indeed, the indication by the 1st respondent that boundaries may be involved in the dispute is when he states that the Petitioner had never been present on all the occasions when the Land Adjudication Officers visited the suit land and he therefore does not know the extent of the land in dispute.
18. The applicant states that on July 30, 2021, Justice O.A Angote delivered a ruling on an application dated August 17, 2020, where he observed that in order to establish who was trespassing on whose land, survey needs to be conducted on the suit land. However, the said ruling has not been annexed to the application. The court also observes that if the Hon. Justice Angote had directed the carrying out of the survey exercise then there would be no need to make another application for the same orders.
19. The applicant stated that he had commenced the survey process and in the Court's view, the reason given for abandoning the process is not a valid one. In the court's view nothing prevents the applicant from carrying out survey on the suit land if he believes that the same will advance his case or will help with the just resolution of the dispute herein.
20. From the court's perspective it is premature at the moment and with the pleadings as filed, to determine that carrying out survey will result in a timely and just resolution of the dispute at hand.
21. For the above reasons the application dated March 16, 2023 is found to have no merit and the same is hereby dismissed with costs to the respondent/petitioner.

DELIVERED, DATED AND SIGNED AT KITUI THIS 2ND DAY OF NOVEMBER, 2023.

L. G. KIMANI

JUDGE

ENVIRONMENT AND LAND COURT KITUI

