



REPUBLIC OF KENYA



**Ngetich & 9 others v Nyamongo & 14 others (Environment and Land
Case 145 of 2016) [2025] KEELC 7072 (KLR) (13 October 2025) (Ruling)**

Neutral citation: [2025] KEELC 7072 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND CASE 145 OF 2016**

**CK YANO, J
OCTOBER 13, 2025**

BETWEEN

**JACKSON KIPRUTO NGETICH 1ST PLAINTIFF
DAVID CHEBET KORIR 2ND PLAINTIFF
TIMOTHY KIPKOECH KENDAGOR 3RD PLAINTIFF
DR ERICK KIPKOECH RUTO 4TH PLAINTIFF
RAEL JEPCHUMBA CHEBII 5TH PLAINTIFF
GIDEON KETER KIPTARBEI 6TH PLAINTIFF
JOASH KIPKEMOI RUTO 7TH PLAINTIFF
FRANCIS KOMEN KIBOR 8TH PLAINTIFF
ROBERT KANDIE KIPKALES 9TH PLAINTIFF
DANVAS NYAUNDI OMWANSI 10TH PLAINTIFF**

AND

**JAMES NYAMONGO 1ST DEFENDANT
ISHMAEL MACHIVA 2ND DEFENDANT
JAMES MISOI 3RD DEFENDANT
JULIUS KORIR 4TH DEFENDANT
SIMEON MOBEGI 5TH DEFENDANT
FRANCIS OMWERI 6TH DEFENDANT
OMWOYO FRED 7TH DEFENDANT
MICHAEL KIGEN 8TH DEFENDANT**



FRANCIS KIPKOECH CHEPKONGA	9TH DEFENDANT
BENJAMIN OINO	10TH DEFENDANT
HELLEN KERARIO	11TH DEFENDANT
CLEDY LIMO CHAMBEI	12TH DEFENDANT
KITIABI BENSON	13TH DEFENDANT
UASIN GISHU COUNTY	14TH DEFENDANT
ATTORNEY GENERAL	15TH DEFENDANT

RULING

1. The Plaintiffs/Applicants filed a Notice of Motion dated 6th August, 2025 seeking the following orders:-
 - a. Spent
 - b. Spent
 - c. The court be pleased to order the Land Registrar Uasin Gishu County and land Surveyor Uasin Gishu County to visit land parcels;
 - i. Uasin Gishu/Kimumu/4706
 - ii. Uasin Gishu/Kimumu/4707
 - iii. Uasin Gishu/Kimumu/4708
 - iv. Uasin Gishu/Kimumu/4709
 - v. Uasin Gishu/Kimumu/4709
 - vi. Uasin Gishu/Kimumu/4710
 - vii. Uasin Gishu/Kimumu/4711
 - viii. Uasin Gishu/Kimumu/4712
 - ix. Uasin Gishu/Kimumu/4713
 - x. Uasin Gishu/Kimumu/4714
 - xi. Uasin Gishu/Kimumu/6373
 - xii. Uasin Gishu/Kimumu/6374, undertake survey/ground inspection and prepare a report and sketch plan as to the physical and separate existence of the eleven parcels, their locations on the Registry Index Map relative to neighbouring parcels and any developments/occupancies thereon.
 - d. The Land Registrar Uasin Gishu and Land Surveyor Uasin Gishu be directed to comment on the persons in occupation of both properties hereinabove.
 - e. That the survey report and sketch plan together with a certified copy of the current Registry Index Map where the parcels of land are shown to be filed in court within 30 days of this order.



- f. That the Officer Commanding Station of the nearest Police Station where the properties are situated be directed to provide security to the Land Registrar and Land Surveyor during the exercise.
 - g. That the parties be at liberty to attend in the company of their private surveyors if need be.
 - h. The cost of this application be in the cause.
2. The Motion is supported by an Affidavit of even date sworn by Jackson Kipruto Ngetich, the 1st Plaintiff. He deponed that the subject matter of the case is the alleged trespass by the 1st to 12th Defendants onto parcel of land L.R. No. Uasin Gishu/Kimumu Block 30/93 that formerly belonged to him. He averred that he subdivided the land into Uasin Gishu/Kimumu/4706-4715, 6373 and 6374 (the suit properties herein). The 1st Plaintiff deponed that one Fredrick Charles Ng'ang'a (deceased) was allocated a 5 Acre parcel known as Uasin Gishu/Kimumu/94 which was subdivided into Uasin Gishu Kimumu Scheme/1395-1412.
 3. He averred that there was need to ascertain which of the parcels of land is occupied by the Plaintiffs and the Defendants on the ground and a survey report on the subdivisions and relative locations on the map filed in court. The 1st Plaintiff stated that for an expedited and conclusive determination of the case, the court ought to direct the County Land Registrar and the County Land Surveyor prepare and submit the said report in court. The 1st Plaintiff averred that the application was made in good faith, and that the visit will enable the court to determine the matter fully and with finality.

The 10th Defendant's Response;

4. The Application is opposed by the 10th Defendant/Respondent through his Affidavit in Reply sworn on 27th August, 2025. He averred that the Plaintiffs have realised that they have no evidence to support the alleged trespass, thus the Application is an attempt at gathering evidence in support of the Plaintiff's case. He pointed out that the case has been in court for 10 years and the application is an attempt to forestall the hearing and defeat the expeditious conclusion of the matter.
5. The 10th Defendant asserted that the burden of proof on the alleged trespass lies on the Plaintiff. He averred that the land he occupies does not belong to any of the Plaintiffs and he had in fact sued the registered owners in Eldoret ELC No. E011 of 2021 over Uasin Gishu/Kimumu/4709. He termed the Application an abuse of court process and thus it ought to be dismissed with costs to him.

The 1st , 2nd , 4th , 5th -7th , 11th and 13th Defendants' Response;

6. The Application was also strongly opposed by Julius Korir, the 4th Defendant, on behalf of the 1st, 2nd, 5th-7th, 11th and 13th Defendants. He termed the application a non-starter and that it reeks of mischief. He pointed out that the case has been in court since 2016, and the Plaintiffs were alive to the case they brought to court and cannot purport to raise other claims after 10 years.
7. The 4th Defendant accused the Plaintiffs of not being keen in prosecuting the suit, and using the instant Motion to try and scatter the scheduled hearing. He deponed that parties are bound by their pleadings, and that nothing in the Plaintiffs' pleadings reveal anything to warrant consideration of the instant Motion. He averred that no basis has been laid for grant of the orders sought, and pointed out that the Plaintiffs had already acknowledged in their pleadings the persons occupying the suit properties.
8. The 4th Defendant also accused the Plaintiffs of trying to patch up their case by bringing in the Land Registrar and the Land Surveyor to breathe life into their claim. He averred that there is no law giving this court jurisdiction to grant the orders sought. In addition, he deponed that the court cannot assist a



party in fishing for evidence and cautioned the court against descending into the arena of the litigants. He deponed that the Defendants will be greatly prejudiced if the application is allowed as it would give the Plaintiff an undue advantage, which is against the principle of impartiality required under the adversarial system.

9. The 4th Defendant also averred that no explanation has been given as to why these orders are being sought for 10 years after institution of the case, and in that regard, he accused the Plaintiffs of laches. He deponed that they will be further prejudiced since the Plaintiffs now seek to alter the character of the case and raise a new cause of action through the survey sought. Further, that the orders sought are not backed by any pleadings and the Plaintiffs have not expressed what they intend to do with the information they seek to obtain from the orders sought. He asked that the application be dismissed with costs.

The 3rd, 8th and 9th Defendants' Response;

10. The 9th Defendant, Francis Chepkonga, swore a Replying Affidavit on 29th August, 2025 with the authority of the 3rd and 8th Defendants contesting the Application. He explained that they had indicated on the court record and earlier Affidavits sworn in this suit the Plaintiffs' numerous application in which they sought to amend pleadings. He deponed that the issue of conducting a survey was never raised during the 10 years of the suit and no orders to that effect were ever issued. He claimed that they purchased and have been living on their respective plots since 2005 and were already on the land when this suit was filed.
11. The 9th Defendant deponed that they opposed the present application for reason that it brings confusion to the suit. He called into question the veracity of the green cards annexed to the Plaintiffs' application herein. The 9th Defendant proposed that the Deputy Registrar of this court visit the land parcel no. Uasin Gishu/Kimumu/93 and see where the Defendants are settled, and bring the records from the settlement office. He alleged that the application is not made in good faith and is intended to delay the suit and deny them justice. That the suit is part heard and awaiting production of documents by the Plaintiff in compliance with the court's directions.

The Plaintiff's Supplementary Affidavit;

12. The 1st Plaintiff filed a Supplementary Affidavit dated 8th September, 2025 reacting to the Defendant's various responses. He deponed that he is aware of the scheduled hearing date given by the court and that the application will not prevent the case from proceeding to hearing. He accused the Defendants of dishonesty in the suit. He reiterated that the instant application will help this court make a full determination of the issues herein, by ascertaining who is in occupation of the suit parcels of land.
13. The Plaintiff acknowledged that the issue arose in Eldoret ELC No. 218 of 2015; Irene Gathoni Njenga vs Danvas Nyaundi Omwansa & 2 Others, where it was realised that verification of actual occupation was necessary. He averred that this court has jurisdiction to grant the orders sought, and that the application is made in good faith to enable the court fast track the determination of all the issues raised and save on the court's time.

Submissions:

14. On 16th September, 2025 when this matter was mentioned for directions, the court directed that the application be canvassed by way of written submissions. In compliance, the Plaintiffs filed their submissions dated 23rd September, 2025 and the 10th Defendant filed his submissions of even date. The 1st, 2nd, 4th-7th, 11th and 13th Defendants filed two sets of submissions, the first dated 25th September,



2025 and the second dated 29th September, 2025. The 3rd, 8th, 9th and 12th Defendants' also complied by filing their submissions dated 30th September, 2025.

Analysis and Determination:

15. I have considered the application herein and the responses filed by the parties, as well as the submissions filed and the authorities cited therein. The only issue for determination is whether the application is merited.
16. The Plaintiffs seek an order directing the County Land Registrar and the County Land Surveyor to undertake a survey/ground inspection and prepare a report and sketch plan of the suit properties herein. The Plaintiffs also want the said survey report and sketch plan filed in court, together with a certified copy of the Registry Index map (RIM).
17. In their submissions, the Plaintiffs have explained that the purpose of the intended survey is to ascertain the existence of the plots as delineated in the RIM, their locations and sizes as registered, and also determine the current person in occupation. Another reason given by the Plaintiffs in their submissions is that the Defendants have not filed any mutation forms, survey plans and RIM to assist the court in reaching a just decision.
18. Primarily, the rules of evidence provide that the burden of proving the Plaintiffs' case lies squarely on the Plaintiffs. Accordingly, if the Plaintiffs required a RIM to prove their case they ought to have obtained one and filed it before court. In practice, one only needs to pay the requisite fees to obtain a copy of the RIM, therefore the survey is not necessary to obtaining the said documents from the respective government offices.
19. Moreover, while it might be the case that the Defendants have not filed the Registry Index Map, the Plaintiffs cannot decide for the Defendants what documents to file in support of their case. Since the parties herein are adversaries, it is left to each one of them to formulate their cases in their own way, subject to the basic rules of pleadings (See the case of Dakianga Distributors (K) Ltd v Kenya Seed Company Limited (2015) eKLR). It is upon the Defendants to decide whether they need the RIM to defend the suit, and for some of the Defendants who have filed a counterclaim in this suit, to support their case as laid out in the counterclaim.
20. The same goes for the prayer to compel the County Land Registrar and the County Land Surveyor to conduct a ground survey. The Plaintiffs' suit is premised on the facts as set out in the Further Amended Plaintiff, where they have pleaded that the Defendants encroached onto their properties and put up structures on the land. The Plaintiffs were clear at paragraph 3A (page 4 of the Further Amended Plaintiff) that it is the 1st to 13th Defendants who have settled on the suit parcels of land, and these are the people they have sued in the instant case. They pleaded that the Defendants have refused to vacate the suit land, and they seek orders of eviction and a permanent injunction against them.
21. This court moves on the understanding that the Plaintiffs knew their case before instituting their claim. Therefore, with regards to the position and occupation of the suit property, the Plaintiffs must have had this information which is the reason they formulated the suit in the manner they did, against the people who had allegedly encroached into their land, which is the Defendants herein.
22. In any event, nothing stopped the Plaintiffs from conducting the survey/ground inspection prior to filing the suit to ascertain the true position on the ground. No explanation has been given as to why this was not done at the time of filing suit, or why the Plaintiffs have waited 10 years to decide that the survey is an integral component of their suit. In *Kassam & 12 others vs Shah & 16 others* (Environment



& Land Petition E007 of 2024) (2025) KEELC 3847 (KLR) (15 May 2025) (Ruling), the Court held that:-

“52. The Petitioners, having voluntarily instituted the present proceedings and alleged various violations of their rights, including non-compliance with building regulations and planning laws, bear the legal obligation to substantiate these claims. This principle is firmly anchored in Sections 107 and 109 of the Evidence. Section 107 provides thus:

‘(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.’

53. Similarly, Section 109 reinforces that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless the law provides otherwise.

54. In the circumstances, the court is not persuaded that allowing the Petitioners access to the suit property, ostensibly to verify claims they have already pleaded as facts, is consistent with the rules of fair trial. The objection raised by the 4th Respondent is therefore well-founded, and the court must guard against being drawn into fishing expeditions by parties.”

23. In the above-cited case, while declining the Petitioners’ application to access the suit premises, the court explained that the Petitioners moved the court on the presumption that they had gathered enough documents to use in the prosecution of their case. Similarly, in this suit, the Plaintiffs are presumed to have obtained all the documents they required to prosecute their case before moving the court.

24. I am also guided by the decision in *Moraro vs General & 7 others* (Petition 5 of 2021) [2023] KEELC 21239 (KLR) (2 November 2023) (Ruling), where the court held that:-

“8. The problem I have is with the prayers to direct the County Surveyor to proceed to the ground and make certain determinations. The petitioner came to court alleging that her land has been illegally dug up and a road created. The burden of proof is certainly on her. Nothing stopped her, and nothing stops her even at this moment, from proceeding to the office of the County Surveyor, or any other surveyor for that matter, in order to have a report to support her allegations. In fact a prudent litigant would first have sought the opinion of a surveyor before proceeding to rush to court to file such a suit. This is an exercise that she needed to undertake before filing suit, for how can she then allege that a road has been created through her land without any supporting survey documentation? I do not see why the court should be engaged in order to fact find on behalf of the petitioner.

9. In any case, one does not need a court order so as to engage a surveyor unless there are special circumstances for which the court’s discretion needs to be invoked and I have not seen any special circumstances herein. It has not been shown to me that the County Surveyor, or other surveyors, are unable to proceed with survey, for one reason or another, which can only be remedied



by a court order, and I wouldn't wish to set a precedent encouraging persons to inundate the court with applications seeking orders that are completely unnecessary. I am not aware of any law that says that you must have a court order in order to undertake a survey which you require to support your case; you simply proceed to engage one and pay for the service...

10. I therefore regret my inability to grant the order to direct the County Surveyor to proceed to survey the petitioner's land and/or that of her neighbours, but as I have said, if the petitioner wants to privately engage the County Surveyor, or indeed any other surveyor, nothing stops her from doing so."
25. As matters stand, the suit is part-heard and is awaiting production of original documents by the Plaintiffs with a scheduled hearing date. Instead of pursuing the said hearing and prosecuting their case, the Plaintiffs lodged the present Motion. It is difficult not to come to the conclusion that the Plaintiffs may have, after the partial testimony by PW1, identified some holes in their case which they now seek to fill through the proposed survey.
26. This being an adversarial system, the Court is an impartial adjudicator. The court cannot for any reason abandon its position as a neutral arbiter and turn itself into an investigator. Since it is the parties that are responsible for presenting their cases and evidence, there is no room for this court to intervene or help either party to supplement and/or better its case. The role of the court as a neutral arbiter is limited to determining the dispute based on the evidence and arguments presented by each party. A court must not descend into the arena of disputes or assist one party over another by gathering evidence for them, or helping them to do so.
27. A court engaging in evidence collection undermines its role as a neutral arbiter, and is antithetical to the adversarial system and the fundamental principles of the rule of law. The Supreme Court of Kenya in *Odinga & 16 others vs Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) (2022) KESC 56 (KLR) (Election Petitions) (26 September, 2022) (Judgment)*, explained that:-
 - "28. The law of evidence complements the existing civil and criminal substantive and procedural laws in this country. The outcome of a case depends on the strength, accuracy and reliability of evidence. In an adversarial court system like ours, the courts and judges are 'blind', in the sense that they do not carry out any investigative roles or gather evidence on behalf of the parties before them. They depend on and determine disputes from what parties present. Consequently, cases are won or lost on the evidence placed before the court."
28. For the above reasons, there is no basis laid for grant of the orders sought by the Plaintiffs. If anything, from the application one may wonder whether the suit is one for trespass or a boundary dispute, which would raise the question of whether this court has original jurisdiction to determine it.
29. I note that the Plaintiffs talked about amendment of pleadings in their Supplementary Affidavit. The Plaintiffs also submitted on the issue of consolidation of suits. However, there were no prayers for either amendment of pleadings or consolidation of any suits in the Motion. In *Dakianga Distributors (K) Ltd vs Kenya Seed Company (supra)*, the Court of Appeal held that:-
 - "Sir Jack Jacob in an article entitled "The Present Importance of Pleadings" published in (1960) *Current Legal Problems* and which article was quoted with approval by the Supreme



Court of Malawi in *Malawi Railways Limited vs Nyasulu* (1998) MWSC 3 states of the importance of pleadings:

‘As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called ‘Any Other Business’ in the sense that points other than those specific may be raised without notice’.”

30. To make matters worse, if indeed the Plaintiffs sought to amend the Pleadings, it is not clear what amendments are being proposed as no draft amended pleading was annexed to the application. As for the consolidation, the same was only raised in the submissions and the Defendants herein were not given any opportunity to respond to the same in their various replies to the application. Suffice it to say that neither the order for amendment of pleadings nor the one for substitution can issue in the circumstances.

Orders:

31. From the foregoing discourse, the following orders shall issue: -
- a. The Plaintiffs/Applicants Notice of Motion dated 6th August, 2025 is without merit and the same is dismissed.
 - b. The Plaintiffs shall bear the costs of the application.
32. Orders accordingly.

DATED , SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 13TH DAY OF OCTOBER , 2025 VIDE MICROSOFT TEAMS.

HON. C. K. YANO

ELC, JUDGE

In the presence of;

Ms. Otuma holding brief for Mr. Angu for the Plaintiffs.

Ms. Odwa holding brief for Mr. Mutiso for 1st, 2nd, 5th, 6th, 7th, 11th & 13th Defendants.

Mr. Cheptarus for 3rd, 8th, 9th & 12th Defendants.

Mr. Momanyi for 10th Defendant.



Court Assistant - Laban.

