



**Block v Kenya Forest Service; Chief Land Registrar & 3 others (Interested Parties) (Environment & Land Petition 1396 of 2014) [2024] KEELC 1202 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1202 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION 1396 OF 2014**

**MD MWANGI, J  
FEBRUARY 29, 2024**

**IN THE MATTER OF THE PREAMBLE TO THE CONSTITUTION OF THE  
REPUBLIC OF KENYA, ARTICLES 1, 2, 10, 19, 20, 21, 22, 23, 28, 29, 40, 47, 50,  
64, 165 AND 258 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA  
AND IN THE MATTER OF SECTIONS 12, 16, 18, 19, 20, 21, 24, 25, 26 AND  
107 OF THE LAND REGISTRATION ACT, CAP. 300 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE GOVERNMENT LANDS ACT, CAP. 280 OF  
THE LAWS OF KENYA (NOW REPEALED) AND IN THE MATTER OF  
THE FORESTS ACT, CAP. 385 OF THE LAWS OF KENYA AND IN THE  
MATTER OF THE SURVEY ACT, CAP. 299 OF THE LAWS OF KENYA**

**AND IN THE MATTER OF THE THREATENED INFRINGEMENT UPON THE  
FUNDAMENTAL RIGHTS AND FREEDOMS OF MR. JEREMY MARK BLOCK PRELATING  
TO HIS PROPRIETARY RIGHTS OVER THAT PIECE OF PROPERTY DESCRIBED AS  
L.R. NO. 214/432 MUTHAIGA, NAIROBI AND WHICH RIGHTS ARE RECOGNISED  
UNDER ARTICLES 40 AND 65 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**BETWEEN**

**JEREMY MARK BLOCK ..... PETITIONER**

**AND**

**KENYA FOREST SERVICE ..... RESPONDENT**

**AND**

**THE CHIEF LAND REGISTRAR ..... INTERESTED PARTY**

**THE HONOURABLE ATTORNEY GENERAL ..... INTERESTED PARTY**

**DENNIS AWORI ..... INTERESTED PARTY**

**THE DIRECTOR OF SURVEYS ..... INTERESTED PARTY**



## JUDGMENT

### Background

1. The Petitioner in this case is the proprietor of all that property described as L.R. No. 214/432, Muthaiga measuring 1.078 acres, which he has been in occupation of since 1995 – hereinafter referred to as ‘the suit property’. The property abuts with Karura Forest to the North East. Karura Forest is under the management and protection of the Respondent, Kenya Forest Service, which is a Statutory Corporation charged with protecting, conserving and managing all forests in Kenya.
2. The filing of the Petition was prompted by the action of the officers of the Respondent threatening to pull down the Petitioner’s fence demarcating the boundary between the suit property and the Karura Forest in the year 2014. The Respondent contention was that a river known as Getathuru River marks the boundary between the suit property and Karura Forest. However, the Petitioner on the other hand avers that Getathuru River runs through this property as demonstrated from the Deed Plan Number 67617 and Survey Plans. That, according to the Petitioner, has been the position as far back as 1935.
3. The Petitioner states that on 4<sup>th</sup> September, 2014, before officers of the Respondent descended upon his suit property, they had started off by pulling down a wall erected on the property abutting his property to the Southerly direction being L.R. No. 214/858 erected on the same line with the Petitioner’s fence marking the boundary with Karura Forest. The Petitioner sought Police assistance and the officers of the Respondent were prevailed upon not to pull down his fence. The Petitioner refers to the action by the officers of the Respondent arbitrary, unilateral and illegal and a treat to his right to property.
4. The Petitioner asserts that he held several meetings with the officers of the Respondent whereby he presented his documentation confirming the extent of the suit property and asserting his rights over it. The parties even carried out a joint survey which, according to the Petitioner, confirmed his position as regards the position of the boundary between his property and Karura Forest. The report, according to the Plaintiff, noted that the survey plan F/R No. 38/51 indicated clearly that the parcel boundary was beyond the river towards the forest and that the land area on the ground tallied with the one on the Deed Plan.
5. In spite of the meetings and the joint report, the Petitioner averred that the officers of the Respondent continued with their threats to tear down the Petitioner’s fence in an attempt to appropriate the Petitioner’s portion of land beyond the Getathuru River, albeit illegally, unprocedurally and arbitrarily.
6. The Petitioner’s case was that the Respondents’ actions amounted to threats to his Constitutional right to property under Articles 40 and 64 of the Constitution. It was further a violation of Article 47 of the Constitution to fair administrative action. It too ws a violation of his rights under Articles 28 and 29 of the Constitution.
7. Amongst the reliefs sought by the Petitioner was an order of perpetual mandatory injunction prohibiting the Respondent from tearing down the Petitioner’s fence and appropriating any portion of the suit property or interfering with the suit property in any form or manner. The Petitioner further sought a declaration that the boundary demarcating the suit property and Karura Forest is as delineated on the Deed Plan being Land Survey Plan No. 67617.



## Response by the Respondent

8. The response by the Respondent was by way of a Replying affidavit sworn by one Evans Kegode, the acting Head of Survey of the Respondent deposed on 2<sup>nd</sup> February, 2015. The deponent deposed that Karura Forest is a Forest for purposes of the Forest Act, 2003, having been gazetted as such by way of Proclamation No. 44 of 1932 as read together with Legal Notice No. 174 of 1964.
9. The deponent acknowledges that the Petitioner is the registered proprietor of the suit property. However, it was his testimony that from the available records and from a ground survey, the boundary between Karura Forest and the Muthaiga Estate (which includes the suit property) is Getathura River in accordance with the Legal Notice 174 of 1964 and the survey plan F.R. No. 23/1 of 1923 developed after the 1<sup>st</sup> Survey undertaken on the area prior to the proclamation of the forest.
10. The deponent further stated that it was clear from the survey records maintained by the Director of Surveys that the course of the Getathuru River is consistent with the separation of the residential plots including the suit property and that the river marks the boundary between the forest and the suit property.
11. It was the deponent's testimony that the river was a natural boundary and it was inconceivable that it would change course and thereby shift its position from that indicated in the maps to the position purported by the Petitioner. He alleged that the maps presented by the Petitioner misrepresent the position in Law and on the ground for various reasons as here below:
  - i. The said River Getathuru being a natural river has never changed its course as suggested in the said maps and by the Applicant herein whether naturally or by way of canalization and the purported change in its position in the later survey maps has no basis on the ground and in law.
  - ii. No part of the forest reserve has been degazetted and ceded to the Applicant herein so as to form part of his premises.
  - iii. Rivers form part of public land under Article 62(1) of the Constitution and cannot therefore be appropriated in whole or in part by an individual as purported herein.
  - iv. The management plan of the Karura forest which was developed from the survey maps maintained by the Director of Surveys clearly shows that the river Getathuru is the boundary between the forest and the adjoining parcels of land.
  - v. Independent surveys on the forest by various institutions, indicate that the river aforesaid is the boundary delimitation point between the forest and the neighbouring private parcels of land and that the area now fenced off by the Applicant herein constitutes part of the forest.
12. According to the Respondent, it was untenable that the suit property would consist of part of River Getathuru and any area extending across it into the Karura Forest as contended by the Petitioner. The Respondent accused the Petitioner of alienating a portion of the Karura forest for himself by putting an electric fence thereby encroaching into the forest reserve and carving off approximately 0.107 ha of the forest. This meant that the structures and fence erected by the Petitioner are unlawful and illegal and further that the claim of part of the forest land is untenable in consideration of the clear provisions of Article 69(1) of the Constitution as read together with Section 42 (1) (a) to (f) of the Environmental Management and Co-ordination Act which forbids the interference of a river save with the approval of the Director General of NEMA.
13. The Respondent further contended that the Petitioner's actions were prejudicial to the enjoyment of the river by the general animal population within the forest and further limits access thereto by any



person(s) accessing the forest. It is untenable that one person can privatize a natural resource to the exclusion of all others.

14. The Respondent's conclusion was that the Petition herein has no merit and the purported constitutional issues raised are merely intended to confuse an otherwise straightforward matter where the Petitioner has encroached into public land and appropriated part thereof for individual use.
15. I note that the 3<sup>rd</sup> Interested Party, Dennis Awori, swore an affidavit in support of the Petition. He is a proprietor of a parcel of Land known as L.R. No. 214/30, Muthaiga, that abuts the Petitioner's property on one side and Karura Forest on the other side.
16. The 3<sup>rd</sup> Interested Party deposed that Getathuru River passes within his Land in the same way it does the Petitioner's property.
17. The Petitioner filed a Supplementary affidavit in response to the reply by the Respondent sworn on 11<sup>th</sup> May, 2015. In the said affidavit, the Petitioner deposes that the Map F.R. No. 23/1 of 1923, F.R. 40/52 of 1932 and F.R. 40/53 of 1932 are outdated and misleading as they depict the situation which was obtaining before the proclamation/gazettement of Karura Forest or before the subdivision of the suit property and the adjoining properties and before the canalization of the Getathuru River. The deponent pointed out that the Respondent had admitted to the existence of 'later and upto date maps' prepared by the Director of Surveys.
18. The Petitioner deposed that in the 'later and upto date' maps, Getathuru River is shown to have been moved by way of canalization, a situation which resulted into it running through the suit property. The boundary between the Karura Forest and the suit property did not change after the canalization of the Getathuru River. It was the course of the river that was changed by canalization.

**Evidence adduced for the Petitioner:**

19. During plenary hearing of this matter, the Petitioner called three (3) witnesses who testified as PW1, PW2 and PW3 respectively whilst the Respondent called one witness who testified as DW1.
20. In his testimony, the Petitioner, Jeremy Mark Block who testified as PW1 confirmed his supporting affidavit sworn on 26<sup>th</sup> September, 2014 and a Supplementary Affidavit sworn on 21<sup>st</sup> May, 2015 which were adopted as his evidence in chief.
21. PW1 averred that he purchased the suit property in 1995 from the founders of Rhino Ark. He produced the conveyance documents as marked in his list of documents including a Deed Plan prepared by the Director of Surveys in 1958 showing the acreage of the suit property to be 1.078 acres (approx).
22. It was PW1's testimony that his property abuts Karura Forest. They have a dispute in which the Respondent claims that Getathuru river marks the boundary between his property and the Karura Forest.
23. In his testimony, PW1 produced Deed Plans which demonstrated that the canalized stream passes through his Land. According to him, the Respondent alleges that the river Getathuru marks the boundary between his land and Karura Forest, thus claiming all his land beyond the river.
24. PW1 asserted that the river is exactly where it was when he took possession of the land in 1995 and that he did not canalize the river. He stated that the dispute with the Respondent started in 2008. He produced correspondences between his Lawyer and the Respondent, the last of which is dated 27<sup>th</sup>



- June, 2008. He denied taking part in the canalization of the river. He averred he was never supplied with any maps or plans by the Respondent on which they were basing their claim.
25. PW1 averred that there were no further correspondence with the Respondent after the letter of 27<sup>th</sup> June, 2008, but afterwards, the Respondent through its warders came to his property and threatened his wife. This was after they had demolished the electric fence of his neighbor one Charles Njonjo. However, the Petitioner obtained an injunction from Court pending the resolution of the dispute. That is what saved his fence from demolition by the Respondent.
  26. In his testimony, PW1 averred that he filed this case on 26<sup>th</sup> September, 2014 and obtained an order of injunction. He produced a report by Mr. Kennedy Kobasu of Highland Surveyors as Exh. 10 whose findings on the boundary beacons of L.R. No. 214/432 and Karura Forest revealed that from the map, 'F.R. 38/51, the parcel boundary is clearly indicated being beyond the river towards the forest.' The report also revealed that the Land area on the ground tallies with the one on the Deed plan.
  27. PW1 stated that the Surveyor also attached various maps/plans from the Survey of Kenya and the Map dated 18<sup>th</sup> March, 1935 also show that the river Getathuru passes through his property. He also produced another plan of 10<sup>th</sup> November, 1969 which also show that the Getathuru river passes within his property. He produced as Exhibit 14, a plan, folio No. 79 of 25<sup>th</sup> October 1959 which also confirms the position of the land on the map.
  28. It was his further testimony that Exhibit 13 is a map of 1932 showing the course of Getathuru river as being outside the boundaries of the properties and which according to him, is the river's natural course (outside the boundaries of the plots).
  29. It was alleged that the other maps after 1932 showed the course of the river being a straight line meaning that the course of the river had been canalized by then. According to PW1, it was clear from the maps on record that the course of the Getathuru river had been changed after 1932.
  30. Referring to the Respondent's Exhibit 1 which is the Forest Ordinance of 1932 comparing with his Exhibit 13, PW1 stated that Exhibit 13 and the Forest Ordinance of 1932 are in agreement as to the position of the Getathuru river. He asserted that the other maps were not in agreement as the course of the river was canalized after 1932.
  31. Referring to the Respondent's Exhibit 2 ("a Declaration of Central Forest"- Legal Notice No. 174 of 20<sup>th</sup> May, 1964), PW1 stated it does not indicate the boundaries between his property and that of Karura Forest.
  32. PW1 stated that it was after canalization that the river cut through his property.
  33. In responding to questions by Mr. Njenga, learned counsel for the Respondent, PW1 confirmed that he bought the land in 1995 and got title by way of conveyance dated 17<sup>th</sup> October, 1995.
  34. He asserted that the conveyance document contained all the details of his land including the boundaries and the dimensions. He stated that the abutments of the land were contained in the 1939 conveyance as indicated in the conveyance dated 17<sup>th</sup> October, 1995. However, he could not remember if he had seen the 1939 conveyance document also mentioned in the documents attached to his supporting affidavit.
  35. PW1 confirmed he did not have the original survey plan and he could not remember if it was attached to his list of documents.
  36. He averred that the Deed Plan dated 10<sup>th</sup> March, 1958 with survey plan number 67617 and attached to his title is the one that sets out the boundaries of his land. He however did not have the Deed Plan of 1939 referred to in his conveyance.



37. He admitted the proclamation establishing Karura Forest was in 1932, way before the Deed Plan of 1958. He had no idea who canalized the Getathuru river.
38. PW1 averred that he had not seen any document from the Director of Survey or the Chief Land Registrar disputing his documents including the maps. He asserted that the Map marked as JB 13 was prepared on 7<sup>th</sup> September, 1932 and it shows the river passed outside the boundary by then and this aligns with the proclamation of 1932.
39. On his part, Dennis Awori, the 3<sup>rd</sup> Interested Party in this matter testified as PW2. He confirmed his supporting affidavit sworn on 3<sup>rd</sup> June, 2015 which he sought to rely entirely as his evidence in chief.
40. PW2 confirmed the dispute revolves around placement of boundaries between his land, the Petitioner's land and those of other neighbours. He confirmed being in occupation of his property L.R. No. 214/430/Nairobi measuring 1.25 acres where he has lived for the past 20 years. He reiterated that the canalized Getathuru river passes through his land.
41. It was PW2's testimony that the Respondents are claiming that the river is the boundary between their plots and that of the Karura Forest. He identified a letter dated 27<sup>th</sup> June, 2008 from the Provincial Forest Officer where they were invited to a meeting to discuss the boundary dispute between themselves and the Respondent.
42. PW2 asserted that he carried out surveys and confirmed that his land was well demarcated and the boundaries were in order. He confirmed that the Getathuru river passes through his land and that the land beyond the river is part of his land.
43. Upon cross-examination by the Respondent, he confirmed that the indenture of conveyance marked as DA2 described the boundaries and dimensions of the land. He stated that he did not have a direct claim against the Respondent in this case.
44. PW2 stated he was joined in the suit as an Interested Party since the river was canalized and cuts through his Land. He however did not know when and who changed the original course of the river. He also admitted he had never lodged any complaint to any authority about the canalization of the river.
45. On further cross-examination, PW2 stated that he has not seen any report contradicting that from the Director of Surveys.
46. The Petitioner's third witness was Kennedy Kubasu who testified as PW3.
47. In his testimony, PW3 stated that he was a Land Surveyor. He confirmed his affidavit sworn on 29<sup>th</sup> November, 2021 which was adopted as his evidence in chief.
48. PW3 stated that he has practiced as a Surveyor for over 36 years and produced his licence marked as Exhibit KK2 in this matter.
49. It was PW3's testimony that he prepared a report in regard to the Petitioner's property L.R. 214/432 which showed that the canalized part of Getathuru river passes through the Petitioner's land L.R. No. 214/432.
50. He stated that the original course of the river coincides with the boundary beacons of the property namely S2, Y & Z in the report. Relying on survey plans 38/51 and map number 124/40 (1969) of 1935, he stated that the canalization of the river happened around 1933.
51. PW3 stated that he also relied on the maps attached to the Petitioner's affidavit in his findings including maps, 79/181, 72/52 and 26/174.



52. It was PW3's testimony that in his final findings, he found that the old beacons were in their correct position as originally placed and that the canalized river was passing through the parcel of land and was correctly depicted on the Deed Plan 67617 of 1958.
53. He also confirmed that the Deed plans and the maps he relied upon were co-related. He asserted that the maps are technical plans for use by professional surveyors to define the location of beacons and that it bears the co-ordinates of the beacons. On the other hand, he defined the Deed Plan as an extract from the Survey Plans which when sealed by the Director of Surveys is used to define the Land defined in a title Deed. The Deed Plan amplifies the situation since it deals with one particular plot.
54. He stated further that LR. 214/32 clearly shows the forest reserve and where the parcel of land ends. He denied seeing any survey report in the response by the Respondent.
55. He asserted that the Replying Affidavit by the Respondent makes reference to a map No. F.R. No. 23/1 which shows the correct position of the river before canalization. He asserted that the river was the boundary between the forest reserve and the private property and further that, canalization is man-made and straight.
56. Referring to Map F.R No. 40/52 of 1952, he stated that it was not relevant as it had no co-relation to the suit property.
57. PW3 stated that Folio Reference No. 40/53 of 1932 showed the correct position of the river and it was consistent with the beacons of the suit property. He asserted that the map was in existence before canalization and that he did not know who canalized the river. He supposed that canalization was done to control flooding.
58. With regard to Map 124/40, PW3 stated that it shows canalization of the river at a neighbouring property (214/585) and that it does not follow the natural river course.
59. PW3 stated that the last map attached to the Respondent's Replying Affidavit was a Management Plan (Exhibit 4) which clearly shows that the river Getathuru is the boundary between the Forest and the adjoining parcels of land.
60. PW3 also confirmed he made a report in regard to the third Interested Party's property whom he said he shared a common boundary with the Petitioner.
61. He asserted that his findings in regard to the two properties were similar and that he had not seen a survey report to the contrary from the Director of Survey.
62. Upon cross-examination by Mr. Njenga, learned counsel for the Respondent, PW3 defined a Deed Plan as a plan which when sealed by the Director of Surveys is used to support Land transactions and that when attached to titles, it defines the land evidenced by the title.
63. He stated that he used Deed Plan No. 67617 of 1938 in his report. He confirmed that he was shown the title (conveyance) which also had a schedule and confirmed the schedule described as L.R. No. 214/432 comprising of 1.078 acres in the city of Nairobi as the one he was shown.
64. He however denied seeing the conveyance of 1939.
65. PW3 asserted that the purpose of his report was to verify the boundaries of the suit property whereby he had annexed several maps to his report.
66. He stated that although Map No. 38/51 of 1935 doesn't show the location of 214/432 (the suit property), it shows the co-ordinates of the beacons and that this was before the sub-division of the



parcel of land into the Petitioner's parcel and that of the neighbouring parcels. PW3 stated that the map was approved by the Director of Surveys.

67. He asserted that before canalization the original course of the river was the boundary between the private land and the forest. The Boundary is the Centre-line but he had no evidence when exactly the canalization happened. He however confirmed that the details on the survey plans/maps are by the Surveyor who prepared them. PW3 opined that the canalization could have been done by the owners of land to control flooding.
68. Upon cross-examination by Mr. Muchiri, counsel for the Petitioner, PW3 stated that the Deed Plan's reference was the same as in the conveyance of 1939. PW3 maintained that the original course of the river was the boundary between the forest and the private property and not the canalized river.

#### **Evidence adduced for the Respondent:**

69. On his part, the Respondent called one witness only who testified as DW1. Evans Kegoda (DW1) stated that he works for the Respondent as Head of Survey and Mapping. He had filed a replying affidavit sworn on 2<sup>nd</sup> February, 2015 which he sought to rely on as his evidence in chief.
70. It was DW1's testimony that the boundary of Karura Forest as gazette, is a river known as Getathuru river clearly mapped on Folio Reference No. 23/1, a folio reference map prepared based on a survey done in the year 1923. Based on that survey, Karura forest was proclaimed as a Forest Reserve on 30<sup>th</sup> April, 1932.
71. Upon Kenya's independence, Karura Forest was gazetted as a forest via legal notice No. 174/1964 and that since then, he was not aware of any degazettment or alteration of that proclamation on the forest boundary being Getathuru River. According to DW1, the boundary still remains the same.
72. DW1 asserted he was not aware of any exercise by the Respondent to change the course of Getathuru river from being the boundary of Karura Forest.
73. According to DW1, there were attempts by the Petitioner and his other neighbours to extend their fences beyond the river but the Respondent prevailed upon them except the Petitioner who moved to court despite attempts at negotiations.
74. Upon cross examination, DW1 confirmed that he was a surveyor and was currently serving as the head of Survey at Kenya Forest Service. However, he admitted he was not a licensed surveyor and did not have his documents in court to demonstrate his experience as a surveyor.
75. Commenting on the proclamation of 1932, (DExh.1) DW1 stated he was not sure if Getathuru river had been canalized or whether L.R. No. 214 (Muthaiga Estate) had been subdivided by then. He admitted that he was aware that presently, Getathuru river is canalized.
76. DW1 confirmed that Karura forest was declared to be forest area pursuant to legal notice number 174/1964, by proclamation No. 44 of 1932 and as amended by proclamation No. 15 of 1951, 30 of 1954 and 289 of 1956. However, he did not produce the other three (3) proclamations that amended the 1932 proclamation.
77. DW1 asserted there was no mention of the canalization of Getathuru river in the 1923 maps marked as DExh.3, 3(b) and 3(c).
78. He admitted that it was possible that the course of Getathuru river was changed by canalization and that was why it passes through the Petitioner's property. He was however, not sure when the



canalization was done. He also acknowledged in his sworn affidavit that the Petitioner is the Registered owner of L.R. Number 214/432 (Muthaiga Estate).

79. DW1 also confirmed that he was aware the dispute has been in existence since the year 2008 and that there is an admission in one of the Respondent's letters dated 26<sup>th</sup> May, 2009 that the river was canalized inside the private plots rather than at the edge of the forests.
80. He also admitted that the officers of the Respondent had previously pulled down an erected fence without notice in a bid to protect the forest.
81. On re-examination, DW1 denied that the course of Gatathuru river was canalized by the Respondent. He admitted that the 1932 proclamation indicates that the boundary of Karura Forest is at the intersection with Land Reference No. 214 (Muthaiga) and that the maps produced did not make any reference to notices amending the boundaries of Karura Forest.
82. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Interested parties did not call any witness.

#### **Court's Directions:**

83. This Court directed the parties to file their respective submissions which the court has had occasion to consider in making its determination.

#### **Issues for Determination**

84. The issues in this matter are clear cut. In my opinion the issues are as hereunder:
  - i. Whether the petition herein meets the threshold of a constitutional petition.
  - ii. Whether the boundary of the suit property and Karura Forest is a general boundary.
  - iii. Subject to the finding in (i) above, whether the dispute between the Petitioner and the Respondent is a boundary dispute that falls within the mandate of the Land Registrar under Section 18 of the Land Registration Act.
  - iv. Whether the Getathuru river is canalized and passes through the Petitioner's property.
  - v. Subject to the finding in (iv) above, whether the portion of land after the canalized stream belongs to the Petitioner or forms part of the forest reserve.

#### **Determination:**

##### **A. Whether the petition herein meets the threshold of a constitutional petition.**

85. Article 22 of the Constitution of Kenya, 2010 guarantees the right of every person to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. The same article at sub-article (3) obligates the Chief Justice to make rules providing for Court proceedings which shall satisfy the criteria stipulated there-under which includes limiting formalities and technicalities.
86. The contemplated rules were made in the year 2013. The Constitution of Kenya 2010 (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, popularly known as the "Mutunga Rules" provide for the filing of Constitutional Petitions.



87. The Environment and Land Court is empowered to deal with issues relating to Constitutional Interpretation and enforcement of Constitutional remedies subject to Article 162 (2) of the Constitution and Section 13(3) of the ELC Act.
88. The Court is moved by way of a Petition which amongst other issues is required to disclose the Constitutional Provision(s) violated, the nature of the injury caused or likely to be caused. The Courts of this Country have pronounced that in matters involving a Constitutional reference, a Petitioner must set out with a reasonable precision the nature of the alleged violation, the person, authority or institution responsible for the violation, the manner of the violation or likely infringement and the provision of the Constitution which creates and gives the Constitutional right that is under violation or threatened violation.
89. This is the first test that a petition is subjected to.
90. Having carefully read the petition by the Petitioner herein, it leaves no doubt in my mind that the petition meets the above threshold.

**B. Whether the boundary of the suit property and Karura Forest is a general boundary.**

91. I will tackle this issue together with the issue number iii.
92. The Respondent in its submissions trivializes the Petition herein and refers to it as a boundary dispute that is couched and presented as a Constitutional Petition. It urges the Court to defer to the Dispute Resolution Mechanism provided for boundary disputes by Law as set out at Section 18 (1) of the Land Registration Act (LRA), 2012.
93. As already stated earlier on, the Petition before me meets the threshold of a Constitutional Petition. However, even if it were a boundary dispute, the boundary of the Petitioner's Land is a fixed boundary.
94. There is a clear distinction between general boundaries and fixed boundaries. Section 18 of the LRA gives the Land Registrar the mandate to determine disputes relating to general boundaries only. There is a clear exception at Subsection (3) on fixed boundaries.
95. In the case of *Azzuri Ltd –vs- Pink Properties Ltd* [2018] eKLR, Angote, J made reference to a paper by Peter K. Wanyoike, titled “The Role of Registry Index Map (RIM) in Land Management in Kenya”, where he defined general boundaries as,

“A boundary of which the precise line is undetermined in relation to the physical features which demarcate it. However, it is clear on the ground where the parcel is situated and where the boundaries are for they are clearly visible and unmistakable physical features, though they don't indicate the exact of the line within the breadth which such physical features necessarily process.”

96. In the case of *Ali Mohammed Salim –vs Faisal Hasan Ali* [2014] eKLR, the court held that,

“The type of survey that generated the RIM is what is known as “general boundaries” which has been defined in Sec. 18(1) of the LRA., 2012, to mean, the approximate boundaries and the approximate situation only of the parcel. Indeed, most of the titles under the repealed Registered Land Act were issued on the basis of the general boundaries, meaning that such parcel of Land had no fixed beacons. On the other hand, Land registered under RTA required a cadastral survey to be prepared which is based on a fixed boundary principle. Such a Survey has an accurate linear and angular measurements to aid the registration of a title



of a plot. The boundaries of Land registered under the RTA can easily be identified by any surveyor because of the fixed nature of its beacons.”

97. In this case, and as confirmed by the Surveyors who testified before the court, the boundary of the suit property is a fixed boundary which has an accurate linear and angular measurements. The jurisdiction of the Land Registrar is on general boundaries only. This dispute therefore squarely falls within the jurisdiction of this court.
98. With this in mind, this Court exercising its authority under Section 22(b) of the Civil Procedure Act and Section 73 of the Evidence Act and indeed its inherent authority as a court of Law, for purposes of the just and conclusive determination of the dispute herein, summoned the Director of Surveys to shed light on the dispute in this matter.

**C. Whether the Getathuru river is canalized and passes through the Petitioner’s property.**

99. I will handle issues number (iv) and (v) together.
100. The Director of Surveys is the repository of all survey records in this Country. As described in paragraph 10 of this judgement, the Respondent in its replying affidavit too alluded to survey records maintained by the Director of Surveys. It was therefore extremely necessary that the Director of Surveys therefore presents the records in his custody in regard to the suit property to assist the court in arriving at fair and just determination of the dispute herein.
101. It is noteworthy that the proviso at section 18 of the LRA has an explicit provision that where boundaries are defined (read ‘fixed boundaries’), the determination of any uncertain boundary shall be done as stipulated in the Survey Act, Cap 299.
102. On 14<sup>th</sup> November, 2023, the Director of Surveys sent one Rogers Gachewa, a Principal Surveyor in his office who testified before the Court. He made reference to a Deed Plan No. 67617 dated 10<sup>th</sup> March, 1978 and the Survey Plan No. F.R. 79/18/- both official records in custody of the Director of Surveys. He confirmed the boundaries of the Petitioner’s property and its acreage making reference to the two documents. He was explicit that Getathuru River has been canalized and passes through the Petitioner’s property. The portion of Land after the canalized stream therefore belongs to the Petitioner. As per the 1932 map, the Getathuru River was meandering and was outside the undivided Land (Muthaiga Estate).
103. In the Court’s considered opinion, the evidence of the Director of Surveys corroborated the Petitioner’s case.
104. It is clear as day that the course of Getathuru River was changed by ‘human hands’ through the canalization.
105. The proclamation of Karura Forest surely meant the original course of Gethathuru River.
106. Having Considered the evidence before the Court, I allow the Petition in terms of all the prayers sought. I further award the costs of the Petition to the Petitioner against the Respondent.
107. I need to add that, the Respondent is at liberty to reroute the river to its original course, of course without interfering with the Petitioner’s property.

**Conclusion**

108. The conclusion of this matter is that the Petitioner’s Petition is allowed in the following terms: -



- A. That a perpetual mandatory injunction be and is hereby issued restraining and/or prohibiting the Respondent either by itself or through its officers, agents and/or servants from tearing down the fence on the Petitioner's Property and which fence forms the boundary between the Property (and which term "Property" is defined above) and Karura Forest.
- B. A perpetual mandatory injunction be and is hereby issued restraining and/or prohibiting the Respondent either by itself or through its officers, agents and/or servants from appropriating any portion of the Petitioner's Property.
- C. That a perpetual mandatory injunction be and is hereby issued restraining and/or prohibiting the Respondent either by itself or through its officers, agents and/or servants from interfering with the Petitioner's Property in any form or manner and especially as relates to the boundary between the Property (and which term "Property" is defined above) and Karura Forest.
- D. A declaration be and is hereby made that the boundary demarcating between the Property (and which term "Property" is defined above) and Karura Forest is as delineated on the Deed Plan being Land Survey Plan Number 67617.
- E. The Petitioner is awarded the costs of this petition against the Respondent.

It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. Muchiri for the Petitioner & 3<sup>rd</sup> Interested Party

Ms Swaka holding brief for Mr. Njenga for the Respondent

No Appearance by the Attorney General

Court Assistant: Yvette

**M. D. MWANGI**

**JUDGE**

