



REPUBLIC OF KENYA



**Angwenyi & another v Michieka & 2 others (Environment & Land Case 559 of 2015) [2024] KEELC 1332 (KLR) (13 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1332 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 559 OF 2015**

**M SILA, J**

**MARCH 13, 2024**

**BETWEEN**

**JOSEPH ANGWENYI ..... 1<sup>ST</sup> PLAINTIFF**

**PETER KENNETH NDEGE ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ALICE KEMUMA MICHIEKA ..... 1<sup>ST</sup> DEFENDANT**

**FRANCIS KINGI MICHIEKA ..... 2<sup>ND</sup> DEFENDANT**

**OMWENGA MICHIEKA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. This suit was commenced through a plaint which was filed on 22 December 2015. The plaintiffs plead to respectively be the registered owners of the land parcels Central Kitutu/Mwamosioma/3164 and 3163 (the suit properties) each measuring approximately 0.23 Ha. Their complaint is that the defendants on diverse dates in November 2015 entered and encroached into their parcels of land and started cutting trees. In the suit, they seek a declaration that they are the owners of the suit properties, a permanent injunction to restrain the defendants from the said parcels of land, general damages, and costs.
2. The defendants filed defence and counterclaim. They contended that what the plaintiffs wish is to annex the land parcel Central Kitutu/Mwamosioma/1775, a subdivision of a parcel No. 1288, which belongs to the family of the defendants and which shares a common boundary with the plaintiffs' land. They averred that this desire to annex started in November 2015 when the plaintiffs registered a boundary dispute which they later abandoned and filed this suit. In the counterclaim they seek an order of permanent injunction against the plaintiffs from trespassing into the land parcel No. 1775 or any other parcel of land derived from the parcel No. 1288.



3. A reply to defence and defence to counterclaim was filed which more or less joins issue with the defendants.
4. The matter was initially being handled by Mutungi J who was of opinion that the parties may have a boundary dispute and on 21 April 2016, he directed the County Surveyor and County Land Registrar to proceed to the ground and make a report. It took a while for officers to go to the ground but they eventually visited the parcels of land on 12 September 2018 and a report dated 15 November 2018 was filed. The defendants had no issue with the report but the plaintiffs disputed it and the matter had to proceed for hearing.
5. PW – 1 was the 1<sup>st</sup> plaintiff. His evidence was that their land parcels No. 3163 and 3164 arose from subdivision of the land parcel No. 325. He owns the parcel No. 3164 jointly with his brother, whereas the parcel No. 3163 is owned by his uncle the 2<sup>nd</sup> plaintiff. According to him the parcel No. 3164 measures 0.27 Ha and the parcel No. 3163 measures 0.23 Ha. He testified that they are in possession of what is depicted as parcel No. 1775. He asserted that this parcel No. 1775 is superimposed on their land which discovery they made when they were subdividing the parcel No. 325 in the year 2013. Their two titles No. 3163 and 3164 were created on 3 June 2013 and it was affirmed that the parcel No. 1775 was created on 2 September 1999. This parcel No. 1775 emerged after subdivision of a land parcel No. 1288 into the parcels number 1773 – 1780. The parcel No. 1288 was in turn created after subdivision of a parcel No. 324 into the land parcels No. 1288 – 1292.
6. PW – 2 was Teresa Nyaboke Mageto, a sister of the 2<sup>nd</sup> plaintiff. Her evidence was that their parents owned the land parcel No. 325 which they subdivided into the parcels no. 3163 and 3164. She stated that the two subdivisions do not add up to the acreage of the original parcel No. 325. She testified that their parcel of land is separated from the defendants' land by a road. She elaborated that this road was not originally there. She averred that they have trees and graves of her twin brothers on the land (including the grave of the father of the 1<sup>st</sup> plaintiff). Cross-examined, it emerged that she last lived on the disputed properties in 2003 and she had no evidence of the presence of any graves. She also did not know the acreages comprised in the parcels No. 325, 3163 and 3164. She however thought that the parcel No. 1775 was created from the parcels No. 3163 and 3164. She did not know when the parcel No. 1775 was created.
7. PW – 3 was the 2<sup>nd</sup> plaintiff. He resides in Meru where he has a medical practice. He affirmed being the owner of the land parcel No. 3163. He testified that the defendants encroached into his land in the year 2015 and started cutting down trees. He testified that there is a road between his land and the land of the defendants. He was of the view that the parcel No. 1775 was carved out of his land. Cross-examined, it emerged that he has never carried out a search for the original parcel No. 325 and did not know when the parcel No. 1775 was created. His title deed was issued on 30 May 2013. He acknowledged not having presented any evidence that this land parcel No. 1775 was hived from the parcels No. 324 and 325. He stated that this parcel No. 1775 is fenced with the parcels No. 3163 and 3164 making them appear as one and is in their (plaintiffs) possession. He confirmed that he cut eucalyptus trees in the parcel No. 1775 as he believed they own them and complained that the defendants cut wattle trees on what he considered to be his land. He stated that his late father was buried in the current land parcel No. 3163 and that he left the area in 1997 after his father died. He had other brothers buried in the parcel No. 3164.
8. With the above evidence the plaintiffs closed their case.
9. DW – 1 was Omwenga Musa Michieka, the 3<sup>rd</sup> defendant. He is son to the 1<sup>st</sup> defendant and brother to the 2<sup>nd</sup> defendant. He is the registered owner of the parcel No. 1775. His evidence was that their



original parcel of land was the parcel No. 324 which was subdivided into the parcels No. 1288 – 1290. The parcel No. 1288 was then subdivided into the parcels No. 1773 – 1780. The subdivision was done in 1999. He pointed out that the original parcel of land of the plaintiffs was No. 325 and its subdivision was done in 2013. He testified that the parcel No. 325 was originally owned by his grandfather who allocated the grandfather of the 1<sup>st</sup> plaintiff some land in the area as he was his cook. He denied that the parcel No. 1775 is in the plaintiff's land. He mentioned that there was an error in the map which was corrected in 1998. On the eucalyptus trees, he stated that they are what marked the boundary between parcels No. 324 and 325 and were planted by his grandmother. He denied that anyone is buried in the parcel No. 1775.

10. DW – 2 was Yuvinalis Makori Omwenga. He owns the land parcel No. 1289. He denied that they have trespassed into the plaintiffs' land.
11. DW – 3 was Samuel Kenyoru. His evidence was that the land in issue was let to his mother to cultivate up to 1965 when they left. He stated that the land was fenced and the fence is there to date. He added that the plaintiffs' grandfather was given land which was separated by gum trees. Under cross-examination he affirmed not knowing the acreages of the land and that the land to the plaintiffs' grandfather was given in 1949.
12. With the above evidence, the defence closed its case. I was of view that the issues relate to the original boundaries of the parcels No. 324 and 325 and their subsequent subdivisions yet no party had called any surveyor to testify. I was of opinion that there was a gap in the evidence that needed to be filled by the evidence of a surveyor. I thus directed the Land Registrar and Surveyor to proceed and obtain the historical maps and the current subdivisions and give an opinion whether the parcel No. 1775 traces its origin from the parcel No. 324 or 325. The surveyor and Land Registrar visited the ground on 21 June 2023 and filed a report dated 21 July 2023. Mr. David Lemaiyan, the Surveyor, attended court to explain his report and he was questioned by both counsel for the plaintiffs and counsel for the defendants.
13. In his evidence in court, he testified that the parcel No. 1775 is fenced together with the parcel No. 3163 and 3164 making them appear as one. According to him, the parcel No. 1775 is not within the original parcel No. 325 and it comes from the parcel No. 324. He confirmed that this parcel No. 325 was subdivided into the parcels No. 3163 and 3164 but that it is the mutation that was prepared and the amendment of the map which caused misrepresentation on the ground. He testified that these parcels No. 3163 and 3164 lead one to the disputed portion. He stated that because of this the parcels No. 3163 and 3164 were expunged by the Land Registrar to revert back to the parcel No. 325. He stated that the parcel No. 325 bordered the parcel No. 328 but its boundary does not tally with the map as the parcel No. 328 has consumed part of the parcel No. 325. The map also had a road between the parcels No. 324, 325 and 326 but he stated that it has shifted on the ground. He explained that there was rectification of the boundary between the parcels No. 1288 and 326 which was done in 1999 but this did not touch on the parcel No. 325. This disputed parcel No. 1775 was within the parcel No. 1288. This led to part of the land parcel No. 326 being hived off and added to the parcel No. 1288 to align with occupation on the ground. The effect was to make the parcel No. 324 extend so that it came to be between the parcel No. 325 and 326. He explained that in the original map the disputed portion formed part of parcel No. 326. He stated that the disputed portion is triangular in shape and has trees. He thought that the genesis of the dispute may be the realignment done in 1999 but the owners of the parcel No. 326 are not complaining. He was categorical that the parcel No. 1775 has not interfered with the parcel No. 325 and the boundaries of the parcel No. 326 did not extend to the original parcel No. 325.



14. I invited the parties to file submissions, which they did, and I have taken into account these submissions before arriving at my decision.
15. I will start by noting my observation that in his submissions, the 1<sup>st</sup> plaintiff urged that the report of the surveyor dated 21 July 2023 be disregarded on the ground that ‘it is malicious, ill motivated, carved with the sole purpose of changing facts and introducing falsehoods and misleading matters...’ . He also thought that the surveyor needed not have visited the ground afresh as he had earlier on visited the ground when he did the survey in 2018. I am actually taken aback by these submissions. The sole reason that a surveyor was sent to the ground is to establish the true position on the ground and the maps. I wonder why the plaintiffs argue that the surveyor ought not to have visited the ground a second time. If he thought it fit to revisit the ground to come up with an elaborate report what is wrong with that ? I also wonder where the allegations of malice come in. The surveyor went to the ground to execute an order of court. How can the plaintiffs now allege malice ? In fact the plaintiffs themselves, despite alleging that the defendants have encroached and taken over their land, brought no survey report and no expert report to demonstrate what they allege, and have nothing to contest the findings of the Government surveyor. I wonder on what basis they now say that the report of the surveyor is not a good report. Where is their report which contradicts that of the surveyor? That report by the surveyor is in fact illuminating and helpful not just to this court but also to the parties as it outlines the dispute and has very elaborate findings that assist this court in coming up with a concrete determination. I find that the survey report is a true reflection of what is in the map and ground. The bile and vitriol against the surveyor and his report is completely misplaced and ill founded.
16. The case of the plaintiffs is that the defendants have encroached on their land parcels No. 3163 and 3164. The evidence herein demonstrates that the land that the plaintiffs claim as being encroached is actually land which is registered as the parcel No. 1775. The title to that land is in the name of the 3<sup>rd</sup> defendant. In his submissions, Mr. O.M Otieno, learned counsel for the defendant’s pointed out that what the plaintiffs brought was a case of trespass against their land parcels No. 3163 and 3164 and they never made any pleadings that the land parcel No. 1775 was superimposed into the titles that they own. Mr. Otieno has a point. There is absolutely no pleading that the land parcel No. 1775 is superimposed on the land parcels No. 3163 and 3164. There is no pleading to have the title to this land parcel No. 1775 be nullified and that it be declared that the parcel No. 1775 falls within the parcels No. 3163 and 3164. I think the plaintiffs should have done better with their pleadings if they wished to have a declaration that the parcel No. 1775 is within their parcels of land. But I opt to look at the big picture, and I see no need of being too technical about the plaintiffs’ thin pleadings because in the defence and counterclaim the defendants introduced the parcel No. 1775, and asserted that they own it, and that the plaintiffs need to be kept away from it. There is a joinder of pleadings, meaning that this court must make a decision as to whether this parcel No. 1775 is an independent parcel of land or whether it forms part of the land parcel No. 3163, and 3164 which is exactly the task that I now embark on.
17. The undisputed facts are that the original parcels of land upon adjudication were the parcels No. 324, 325 and 326. The parcel No. 324 was owned by the family of the defendants. It was first subdivided into the parcels No. 1288 – 1292. The parcel No. 1288 was further subdivided to bring forth the land parcels No. 1773 – 1780. The parcel No. 325 was originally owned by the family of the plaintiffs. It was subsequently subdivided in the year 2013 to bring forth the land parcels No. 3163 and 3164 owned by the 2<sup>nd</sup> and 1<sup>st</sup> plaintiff respectively. The land parcel No. 326 was subdivided to bring forth the land parcels No. 1047 and 1048.
18. This parcel No. 1775 is a triangular parcel of land which on the map is now wedged between the original parcel No. 325 (where the plaintiffs’ two titles emerged from) and the original parcel No. 326. This disputed portion abuts what was originally the parcel No. 325 on the southern side but is



- separated from the original parcel No. 326 by a road. This dispute is easily resolved by finding out whether the disputed triangular portion was ever originally part of the land parcel No. 324, 325 or 326.
19. According to the original map prepared in 1965 upon adjudication, the parcel No. 325 and 326 were abutting each other with the parcel No. 325 being on the southern side of the parcel No. 326. The parcel No. 324 was on the right side of these two parcels with its length abutting both the parcels so that the parcel No. 326 was on its top left and the parcel No. 325 on its lower left. However, in the year 1999 or thereabout there was a dispute between the parcels No. 1288 (which had already been produced following subdivision of the original parcel No. 324) and No. 326. It was contended that on the ground the owners of the parcel No. 1288 had even prior to adjudication occupied part of the parcel No. 326 and deserved to have the map amended so that this portion is hived off the parcel No. 326 and added to the parcel No. 1288. Their claim succeeded, leading to the hiving off of some land from the parcel No. 326 and it was added to the parcel No. 1288. This land that was hived off the parcel No. 326 is the disputed land. It was never was part of the parcel No. 325 as alleged by the plaintiffs. After the land parcel No. 1288 was subdivided, this portion became the parcel No. 1775. Thus it cannot be said that this parcel No. 1775 is superimposed on the former land parcel No. 325 or any of its subdivisions which are now owned by the plaintiffs.
  20. The emptiness of the allegation of the plaintiffs is discernible from the fact that the plaintiffs never brought any survey report which would support their claim. There was no report presented by the plaintiffs to show that on the ground, their combined land parcels is smaller than the land that the original parcel No. 325 covered. The mutation form presented by the plaintiffs shows that the parcel No. 325 was 0.5 Ha. The subdivisions which are owned by the plaintiffs are 0.23 Ha and 0.27 Ha and if you add these you will get 0.5 Ha. The parcel No. 1775 is 0.15Ha. The effect of the plaintiffs taking over this land is that it will expand their land on the ground which they are not entitled to. As I have said, the plaintiffs never brought any evidence of what their land on the ground is and I think this was deliberate in order to hide the fact that if they succeed in this case they will end up with land which is more than a combined 0.5 Ha.
  21. The plaintiffs cannot also hang on the old adjudication map to say that their land ought to abut the old parcel No. 326 for I have shown that the parcel No. 326 was hived off and given to the defendants.
  22. If there was anybody to complain about this parcel No. 1775 it would be the owners of the neighbouring parcel No. 326, for the survey report does demonstrate that there is a partial encroachment into the said parcel No. 326 by a measure 0.02 Ha, but they are not complaining. That survey report is clear that it is the plaintiffs who are illegally occupying part of the parcel No. 1775. They certainly have no right to be there.
  23. In his submissions, Mr. Otieno did urge that the suit of the plaintiffs is time barred since the parcel No. 1775 was created in 1999. I need not even address this point because the plaintiffs' suit fails on merits.
  24. From the foregoing it will be seen that I do not find any substance in the plaintiffs' suit and it is hereby dismissed with costs.
  25. The evidence shows that it is the plaintiffs who have encroached into the land of the defendants. They are to give vacant possession forthwith of the disputed portion and they are barred by an order of permanent injunction from interfering with it. The defendants will have the costs of the counterclaim jointly and/or severally against the plaintiffs.
  26. Judgment accordingly.

**DATED AND DELIVERED THIS 13 DAY OF MARCH 2024**



**JUSTICE MUNYAO SILA**  
**JUDGE, ENVIRONMENT AND LAND COURT**  
**AT KISII**

Delivered in the presence of:

Mr. Angwenyi 1<sup>st</sup> plaintiff acting in person and holding brief for Mr. Mainga for 2<sup>nd</sup> plaintiff

Mr. O.M. Otieno present for defendants

Court Assistant – David Ochieng<sup>3</sup>

