



**Kobia v Ikonga (Environment and Land Appeal E074 of 2022)
[2024] KEELC 1595 (KLR) (13 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1595 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E074 OF 2022**

CK NZILI, J

MARCH 13, 2024

BETWEEN

IBRAHIM KOBIA APPELLANT

AND

JOHN KIRIANKI IKONGA DEFENDANT

*(Being an appeal from the judgment of Hon. PM Wechuli – SRM
in Tigania ELC Case No. E0147 of 2015 delivered on 2.11.2022)*

JUDGMENT

1. The appellant, who was the plaintiff in the lower court, had, by a plaint dated 9.9.2015, sued the respondent for trespass to his L.R No. Kianjai/Kianjai/15xx. He sought eviction orders and demolition of the house built on his land. The respondent denied the claim by a statement of defense filed on 12.2.2019. He averred that he was occupying L.R No. Kianjai/Kianjai/17xx], which belonged to his uncle Maingi Kiunga, and was unaware of the locality of the appellant's alleged land on the ground. He denied any service with a notice to sue by the appellant.
2. From the record, it appears the trial court set aside an interlocutory judgment and made an order dated 12.11.2020 that the county land registrar and land surveyor to visit L.R No. Kianjai/Kianjai 15xx and 17xx to establish their location on the ground, mark their boundaries and file a report before the court.
3. Following this, a county surveyor report dated 22.1.2021 was filed by T.M. Limitiri on 26.1.2021, annexing a sketch map. The appellant filed an application dated 27.1.2021 disputing the said report was inaccurate since, from the registry index map, L.R No. 17xx appeared twice and was divided by an access road. He deponed that L.R No. 15xx was superimposed on his land, and therefore, the report did not reflect what was on the ground and the survey map. The appellant attached a copy of a letter dated 30.4.2014 by A.O Makori, a demarcation officer, that his land was 1.12 acres and a report by a district surveyor dated 17.8.2015 indicating anomalies of parcel L.R No. 15xx and a sketch map.



4. The appellant also filed an application dated 27.4.2021, seeking for the surveyor's report to be expunged from the court record and for a revisit to the suit parcels of land to establish the boundaries since the respondent was not the registered owner of the land. By a replying affidavit dated 5.5.2021, the respondent admitted that the valid owner of L.R No. 15xx was his grandfather. Through an order dated 2.7.2021, the court directed for a revisit of the parcels of land by another county surveyor and a district land registrar within 30 days of the order. A report was eventually filed by Raphael Riungu, county surveyor, dated 9.11.2021. It did not mention whether the district land registrar was involved in the exercise.
5. Be that as it may, the report confirmed that there was a brace, meaning L.R No. 15xx extended to the area in dispute constructed by the respondent. Further, the report said L.R No. 17xx appeared twice in the same sheet map, and there was a need for clarification by the District Land and Settlement Officer Tigania West. It attached a copy of a map showing the two parcels of land and the neighboring portions.
6. Following the report, the appellant filed an application dated 27.1.2021 for summary judgment based on the report dated 14.11.2021, cancellation of L.R No. Kianjai/Kianjai/17xx segment placed on and displacing his parcel of land, eviction or removal of any structures on his land and the OCS Tigania Police Station to provide security during the exercise. The application was opposed by the respondent's replying affidavit dated 2.12.2021, where he admitted that during the second scene visit, the land registrar, whose mandate is to establish and fix boundaries, was not involved. By a ruling dated 13.4.2021, the court declined to re-order the revisit terming it as futile. The trial court proceeded to adopt the survey report.
7. Further, by a ruling dated 22.6.2021, the court insisted there was no fault in the initial surveyor's report and the resurvey report which the court said shall remain as a record of the court. The court, nevertheless, as alluded to above, issued an order for a resurvey report to be conducted in 30 days. As to the 3rd application dated 25.11.2021, it was dismissed vide a ruling dated 3.2.2022. The court noted that the land registrar had not been involved in the report conducted by Mr. Riungu dated 9.11.2021. Nonetheless, the court said all the reports should remain on record for consideration alongside other evidence to be ventilated by the parties at the hearing. Subsequently, parties were directed to set down the matter for hearing within 30 days, instead of litigation through applications.
8. At the hearing, the appellant testified as PW 1 and adopted his witness statement filed on 5.9.2015 as his evidence in chief. He said he owned L.R No. Kianjai/Kianjai/15xx, but the respondent had trespassed into it without his consent and erected houses therein. He sought eviction and the demolition of the house. PW 1 produced his title deed dated 28.11.2014 as P. Exh No. (1), sketch map and demand letter and letter dated 30.4.2014 by the demarcation officer all filed alongside his plaint. He said his title deed indicated 0.37 ha while on the ground, his land was only 60 points, following which he wrote to the land registrar, who wrote a letter. PW 1 said the land showed the respondent was on half of his land.
9. The respondent testified as DW 1 and adopted his witness statement filed on 30.10.2019 as his evidence in chief. He said that in 1990, his uncle gave him L.R No. Kianjai/Kianjai/17xx, measuring approximately 0.42 acres to occupy and develop though registered under his name as per the search certificate and confirmation letter dated 18.5.2016, which he produced as D. Exh No. (1) & (2). In cross-examination, DW 1 said the surveyor had found no trespass on his part to the appellant's land. He admitted there was a road in between the portions.
10. Daniel Kanake, a land surveyor, testified as DW 2 and produced the report dated 22.1.2022 on behalf of Mr. Limiri. He said the land occupied by the respondent was 0.10 ha while L.R No. 15xx was 0.21 ha. He said an access road separated the two parcels of land. The report and map were produced as D. Exh No. 3 (a) & (b). In cross-examination, DW 2 said he was not aware of the revisit on the parcels



- of land after the report by Mr. Limiri. DW 2 said the report was based on a published map and not a provisional map. He denied any parcel had extended beyond the access road.
11. The last witness for the respondent was Jackson Gitonga, a businessman who adopted his witness statement dated 10.5.2022 as his evidence in chief. He said that he gave the respondent's cousin, L.R. No. 17xx, which his father, Maingi Kiunga, had bequeathed him measuring 0.42 acres and who passed on in 2013. He said the land was distinct from the appellant's land. In cross-examination, he confirmed he had no written lease agreement with the respondent. Further, that the appellant was problematic and would not even listen to him. DW 3 denied that he was unjustly utilizing a portion of the appellant's land.
 12. With this evidence, the trial court dismissed the appellant's case. He now appeals to this court on the grounds that the trial court:
 - i. Erred in finding that he had not proved his case to the required standard.
 - ii. For misapprehending his claim.
 - iii. Failing to find his parcel of land appeared thrice in the adjudication record contrary to Registered Land (Cap 300).
 - iv. For treating a case of trespass as that of ownership rights.
 - v. For dismissing the surveyor's report dated 9.11.2021 and the DLASO's report dated 30.4.2014 and therefore failing to peruse the map, which was a miscarriage of justice.
 - vi. For delivering a judgment against the weight of the evidence.
 13. To buttress his appeal, the appellant relied on written submissions dated 5.12.2023, ideally rehearsing the history of his suit. It was submitted that there was double registration of one parcel of land L.R. No. 17xx as per pages 8, 15 & 16 of the record of appeal and page 5 of the supplementary record of appeal, which the trial court did not adjudicate on. The appellant submitted that his claim was based on trespass and not on ownership of the land since dead people cannot trespass on his land, as was the case with the registered owner herein. Further, the appellant submitted that it was the respondent who had committed trespass to his land, not the respondents who, in any event, had no locus standi to advance a claim of ownership. The appellant termed the dismissal of the reports dated 15.10.2015 and 9.11.2021 as contrary to Section 1A, 1B of the Civil Procedure Act as read together with Articles 23, 43, 49, and 159 of the Constitution. Despite service with a hearing and a mention notice, the respondent failed to make any written submissions.
 14. The issues calling for my determination are:
 - a. If the court had jurisdiction to hear and determine the suit.
 - b. If the appellant proved his suit to the required standard.
 - c. If the appeal has merits.
 15. Jurisdiction refers to the power to adjudicate on matters before the court. It is everything and without which a court must down its tools as held by Nyaragi J in *Motor Vessel Lilian "S" vs Caltex Oil (K) Ltd.* In the suit before the trial court, the primary pleadings were on trespass to L.R No. 1502 by the owner of L.R. No. 17xx, Kianjai/Kianjai. The appellant claimed that his land, as per the title deed annexed to the plaint, was 0.37 ha, while what he was occupying on the ground was less. His pleading was that the respondent had unjustifiably occupied the remainder of his land on the ground as a tenant or lessee of the registered owner. He sought eviction and demolition of the structures erected on his land



- by the intruder. He attached a copy of a letter of confirmation dated 30.4.2014 to the plaint by the demarcation officer and a land surveyor showing that his land was 1.12 acres and that L.R No. 17xx had been superimposed on his land.
16. The respondent, on his part, denied the alleged trespass or illegal developments on the appellant's land. He admitted in his statement of defense that he was a lessee or tenant in L.R No. Kianjai/Kianjai/17xx and not L.R No. Kianjai/Kianjai/15xx, belonging to his maternal uncle. The respondent averred that he did not know where the alleged L.R No. 15xx was situated on the ground. He attached a copy of a confirmation letter showing L.R No. 17xx belonged to Maingi Kianga, measuring 0.42 acres.
 17. The trial court set aside an interlocutory judgment entered on 3.12.2015. It further made an order for the land registrar and land surveyor to visit the disputed parcel of land to establish and erect the beacons on the ground.
 18. Under Section 14-18 of the *Land Registration Act* the power to establish and fix boundaries reposes with the land registrar. It is the land registrar, if the land is titled, who poses the statutory power to establish the boundaries guided by an existing record. In this appeal, even though the trial court rightly, in my view, made various orders for the land registrar to establish the boundaries and sizes of the two parcels of land, no such report was availed by the parties made by the land registrar. The reports made and filed in court by the land surveyors had no signature or input from the land registrar. None was based on the published survey map emanating from the Director of Surveys Kenya, for Registry Map Sheet No. 29, as indicated in the appellant's title deed issued on 28.11.2014.
 19. In *Azzuri Ltd vs Pink Properties Ltd (2018) eKLR*, the court said the resolution of general boundaries under Section 18 of the *Land Registration Act* falls under the land registrar, while disputes on fixed boundaries may be investigated and resolved by a land surveyor and that where there was a set or prescribed procedure for redress, that procedure must be strictly followed. In *Estate Sonrisa Ltd vs Samuel Kamau Macharia & others (2020) eKLR*, the court held that the ascertainment and fixing of a boundary in dispute involves three parties: the owners of the affected parcels, the surveyor and the land registrar under Sections 16 to 19 of the *Land Registration Act*. Specifically, the court said it was the land registrar who is mandated to give notice to all the affected parties and, with the assistance of the land surveyor to ascertain and fix the disputed boundaries by investigating the entries in the register and relying on the existing record or any other relevant document. The court said under Sections 79 3 (a), 80, 86 & 9 (a) of the *Land Registration Act*, any party aggrieved by the decision of the land registrar may challenge it before the court.
 20. In this appeal, the trial court rightly made findings in its rulings that the mandate to fix and ascertain the boundaries fell with the land registrar. Orders and directives were also made to have a report by the land registrar. Unfortunately, the land surveyors(s) arrogated the jurisdiction to themselves and made three reports which were never jointly signed by the land registrar. The land was already titled. It was unnecessary or illegal to call for the input of the district land adjudication and settlement officer or rely on sketch maps or other land adjudication maps when the two parcels of land were already titled.
 21. In my considered view, as much as the claim by the appellant was based on trespass, the same could not be determined and was never proved without a land registrar's report on the sizes, particulars and boundaries of L.R No. Kianjai/Kianjai/15xx and 17xx.
 22. Without the report, none of the parties, based on the three survey reports filed before the court and the evidence of DW 2, was competent to determine and ascertain the boundaries.
 23. For those reasons, I find the trial court arrogated to itself jurisdiction; it failed to enforce compliance with its orders and eventually erred in entertaining and determining a suit without jurisdiction and or



report from the land registrar, who has the sole mandate to determine and fix general boundaries. The upshot is that I find the judgment dated 2.11.2022 as made without jurisdiction. The court directs the Land Registrar Tigania Central to visit the two parcels of land after summoning the aggrieved or affected parties to ascertain and fix boundaries within 30 days from the date hereof. Parties shall be at liberty to adopt the report or challenge the decision as the case might be.

24. There will be no order of costs for this appeal.

Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON
THIS 13TH DAY OF MARCH, 2024**

In presence of

C.A Kananu

Appellant

HON. C K NZILI

JUDGE

