



REPUBLIC OF KENYA



**Baikenda v Nkumbuku & 3 others (Environment and Land Appeal
E038 of 2023) [2024] KEELC 1233 (KLR) (6 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1233 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E038 OF 2023**

CK NZILI, J

MARCH 6, 2024

BETWEEN

JAMES KIREMA BAIKENDA APPELLANT

AND

KAINDA KAMUI NKUMBUKU 1ST RESPONDENT

NKUNJA KAMUI 2ND RESPONDENT

CATHERINE KOBIA ALIAS CIETERI 3RD RESPONDENT

FAITH NKUNJA KAMUI 4TH RESPONDENT

*(Being an appeal from the judgment of Hon. C.K Obara – Senior Principal
Magistrate Maua, delivered on 15.5.2023 in Maua ELC 224 of 2019)*

JUDGMENT

1. The appellant sued the respondents for trespass into his L.R No. Amwathi/Maua/9179 and commission of acts of wastage, destruction, and misuse without his consent, permission, and or authority. He termed the acts as malicious, negligent, or fraudulent and out to disrupt his peaceful use of the land.
2. The appellant prayed for a permanent injunction barring and restraining the respondents, their agents, servants, or employees from trespassing, constructing, surveying, subdividing and effecting any adverse activities on his land.
3. The respondents opposed the suit with a notice of preliminary objection dated 6.12.2019 and a statement of defense dated 6.12.2019. In the preliminary objection, the respondents averred that the suit was defective, the matter related to a boundary dispute and was offensive to the *Civil Procedure Act*. As to the defense, the respondents denied the alleged trespass, malice, negligence, or fraud. On the contrary, they averred that they requested and paid for a surveyor to survey and erect beacons on



- their L.R No's. Igembe/Amwathi/Maua/9161 and 9336, which the appellant ignored and continued interfering with their lawful right of access.
4. The respondents averred that the boundary issue between them had been dealt with by the area chief, local police, and the surveyors, but the appellant became difficult and failed to comply with the findings from the said officers. The respondents averred that they were in possession of their land and not that of the appellant, which the latter had interfered with by denying them access to their lands. They denied the jurisdiction of the court by dint of Section 26 (3) of the [Land Consolidation Act](#).
 5. The record of the lower court shows that the appellant filed, alongside the plaint, an application dated 28.11.2019 and obtained interim orders of a injunction. The trial court further ordered that the land registrar and surveyor visit the locus in quo and furnish their finding to the court. The report was filed before the court on 25.2.2020. The same was disputed by the appellant who requested for an independent private surveyor and maps from the Director of Surveys Nairobi.
 6. The Acting Director of Survey (Mr. Julius Kahindi) attended court on 8.2.2021 and informed the trial court that what they had in their records was a provisional map that he presented before the court. He subsequently attended court on 22.2.2021 and informed the court on oath that the map he had (Sheet No. 12 Amwathi Maua) was published on December 2018 and showed that there was an access road between L.R No's.9179 and 9336. He produced a certified copy of the map. Following the said developments, the appellant filed an application dated 18.3.2021 seeking for an independent surveyor to visit the land. The application was not prosecuted. Instead, another application dated 27.10.2021 was filed seeking to file a further list of documents, which was allowed by a consent on 24.1.2022. Parties were also ordered to comply with the filing of any documents before the hearing on 21.3.2022. Despite orders for a scene visit, none had been complied with.
 7. Therefore, on 18.7.2022, the court ordered the makers of the various reports to be called and the matter to proceed for hearing. The appellant testified as PW 1 and adopted his witness statement filed on 23.8.2021 as his evidence in chief and asked the court to visit the locus in quo. He told the court that he bought 0.20 acres from Ezekiel Ndubi Kamui by a sale agreement dated 22.9.1995 out of Parcel No.499 for Kshs.55,000/=. Further, PW 1 said that the wife to the seller witnessed the sale agreement, after which he immediately fenced off the land with concrete poles, barbed chain link, and iron sheets at a cost of Kshs.250,000/=.
 8. PW 1 told the court his immediate neighbor was a brother to the seller, Nkunja Kamui who owned 0.5 acres out of the land. He said that Parcel No. 499 measuring 0.5, ha subdivided into 9432, 9924 and 9336. PW 1 said there was an access road. He said Parcels No's. 9432 and 9324 were eventually sold and left an access road as per a sketch map during demarcation in 1997.
 9. Similarly, PW 1 said that he had been in occupation of the land for 25 years until 27.11.2019 when goons hired by the respondents unlawfully and without any reasonable cause damaged his entire fence, destroyed all his trees and crops, and stole his building materials, all assessed by the agricultural officer at Kshs.167,000/=. PW 1 said the respondents terrorized him for close to 1 ½ hours until he called the police for assistance since it was at wee hours of the night. He said he eventually made a report at the Maua Police Station on O.B. No. 08/27/11/2019. He said that the surveyor's report had shown that his land was reduced from 0.20 acres to 0.15 acres at the demarcation stage in 1997, alleging it was an access road. PW 1 said that for 25 years, the respondents had not utilized the alleged access road, for they had sold it together the Parcel No. 9924 and 9432, leaving Parcel No. 9336 with no access road. PW 1 said the area map must have been changed in 2018; otherwise all the other years it remained intact.
 10. PW 1 was stepped down for copies of the court administrator and surveyor's report to be availed to the respondent's advocate. When the appellant's testimony resumed, he told the court his claim was



for his land as 0.20 acres and not 0.15 acres. He produced a copy of his title deed sale agreement dated 22.9.1995 as a confirmation letter, official search certificate, rectification letter dated 29.11.2019, registry index map for February 2015, copy of damage assessment report, receipt for stolen property, county surveyors report dated 21.7.2020. The independent surveyor's report dated 24.1.2021 as P. Exh No's 1-10 respectively.

11. In cross-examination, PW 1 told the court he bought the land from Hezekiah Ndubi as per P. Exh No. (2) as a share of the land with his brothers, who identified to him the access road. He said the respondents had sold the access road to their parcels of land. PW 1 termed the map by the Director of Surveys as inaccurate and illegal. He denied that the county land surveyor report had indicated he had blocked an access road. In his view, it was James who closed the access road. The appellant denied that the map was an authority of the boundaries. He denied blocking any access road.
12. Hezekiah Ndubi Mbui testified as PW 2 and adopted his witness statement dated 23.8.2021 as his evidence in chief. He clarified selling the land to PW 1 with an access road from the main road. He said he witnessed the destruction of the property on 27.11.2019. PW 3, Benjamin Mose Kathiru confirmed he was a neighbour of the appellant who called him on the night of 27.11.2019 after the respondents invaded his land.
13. Joseph Mbai, a Land Adjudication and Settlement Officer testified as PW 4. He sought for more time to prepare a report due to late service with witness summons. Out of an objection by the defense, the trial court dispensed with the evidence and ordered that PW 4 could be recalled as and when need arose.
14. Michael Murimi Mwangi testified as DW 1. As the Land Registrar Meru North, he told the court that his office had never been involved in the case and the witnesses' summons served upon the office had no parcel numbers; hence, they had no report regarding the size of the land on the map and the ground. Further, he said he was not involved in the preparation of P. Exh No. (5) a survey report and that the stamp and signature appearing thereon were not his.
15. Peter Kimani testified as DW 2 as the County Land Surveyor Meru. He said that after receiving court summons, he visited the land and submitted a report. He said the area map was not an authority on boundaries for it gives only estimates. He denied that there was a blocked access road on the ground, for all the parties were accessing the Parcels of their land from the main road. He said parcel No. 9161 had a four-meter access road. He produced the report dated 14.7.2021 as D. Exh No. (1).
16. In cross-examination, D.W. 2 told the court he was guided by Sections 18 & 21 of the [Land Registration Act](#) in making the report; otherwise, the map was not an authority on boundaries. Additionally, DW 2 said he interrogated all the parties, including the seller of the land, measured the land, and established that the land should be 0.136 acres. He said the proprietor of Parcel No. 9336 had encroached on the road reserve. D.W. 2 said that they never involved the respondents or the land registrar during the site visit. He denied that parcel No. 9336 had an alternative access road.
17. In re-examination, DW 2 said the law did not obligate him to consult the land registrar since he was the custodian of all survey maps. He had all the necessary documents to undertake the process. He said he could not confirm the encroachment save to say that what was on the ground on the appellant's land was less than what was recorded for him in the adjudication record.
18. Judith Kianda Kamuo testified as DW 3 and adopted her witness statement dated 6.12.2019 as her evidence in chief. Testifying on behalf of the respondents, she told the court that they requested and paid for a surveyor to survey and erect beacons on L.R No's. Igembe/Amwathi/Maua/9161 & 9336, but the appellant continued to interfere with their rights of access despite the settlement of the boundary issue by the area chief, local police, and the surveyor.



19. D.W. 3 said the appellant had come to court with unclean hands due to his interference with their land with a view of grabbing or unlawfully annexing it with no color of right. In addition, DW 3 produced a receipt dated 11.6.2014 for surveyor and boundary fees as D. Exh No's. 2 & 3, letters dated 3.6.2014, 3.6.2014, 27.3.2019, 23.3.2019 and 1.4.2019, D. Exh No. 4, 5, 6 and 8 respectively, survey map as D. Exh No. (9), copy of title deed for L.R No. 9161 & 9336 as D. Exh No. 11 & 10 and the map from the director of survey as D. Exh No. 12.
20. DW 3 said that after visiting the chief and the land surveyor, the boundary was shown, but the appellant has continued to block the access roads. She denied destroying the appellant's property as alleged. In cross-examination, D.W. 3 said that the boundary had been surveyed and fixed as per the evidence of the county surveyor. In line with D. Exh No. 12, she said L.R No. 9336 belonged to Hezekiah; the appellant was there during the boundary fixing and that the road of access to L.R No. 9336 was blocked yet the parcel had no other access road. At that juncture, Mr. Kurauka learned counsel for the respondents opted to close the defense case.
21. The trial court, however, made an order suo moto to visit the locus in quo on 27.10.2022. It made findings that the appellant's land was 0.0496 ha as per his title deed, which was 12 points as opposed to the 20 points he had bought from the respondent's brother. The court made observations that the disputed portion between L.R No's. 9336 and 9179 measured 5 points. Mr. Mbui, the DLASO who was present with Mr. Limiri, the Land Surveyor, told the court that the owner of a Parcel No. 93336 had sold a portion of his land to third parties and remained with 10 points only. Subsequently, the trial court directed the said DLASO and the Land Surveyor to bring to court the original record of the entire land and the map for the year 2015 and the parties to file their title deeds in court by 5.12.2022. Parties were, therefore, granted time on 5.12.2022 to peruse and analyze the filed reports before filing final written submissions. It is not clear how the said reports were introduced as evidence without calling the makers and the parties to produce them as exhibits.
22. The appellant has, through an amended memorandum of appeal dated 1.11.2023, urged this court to overturn the trial court's judgment dated 15.5.2023 for:
 - i. Finding that he had not proved his case to the required standards.
 - ii. For ignoring or misreading the report of the Sub-County Land Adjudication and Settlement Officer that the 2nd respondent occupied 0.15 acres in excess on the ground.
 - iii. By relying on the surveyor's report and provisional index map while ignoring the record of existing rights showing that the 2nd respondent had only 0.10 acres on the ground.
 - iv. For ignoring the independent expert opinion by a private surveyor who had raised issues of variance between the provisional Registry Index Map of December 2018 and that of April 2018, all sourced from the Survey of Kenya.
 - v. For not taking into account the circumstances under which the dispute arose.
 - vi. For proceeding to dismiss the suit when, in fact, she allowed the prayers sought, save that she forgot to capture his L.R No. as 9171 instead of L.R 9179.
 - vii. For failing to invoke the jurisdiction under Sections 16 & 79 of the *Land Registration Act* based on the evidence to direct the land surveyor and registrar to amend his land from 0.14 to 0.20 acres out of L.R No. 9336 whose ground was excessive by 0.15 acres, regard being had to the respondent forceful entry and removal of his fence.



23. With leave of court, parties opted to canvass the appeal by way of written submissions to be filed by 27.11.2023 however none were filed in compliance with the court directives.
24. As a first appellate court, the mandate is to re-evaluate, re-analyze, and re-assess the entire lower court record and come up with independent findings as to facts and the law while mindful that the trial court had the benefit of seeing and hearing the witnesses firsthand. See *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, *Gitobu Imanyara & 2 others v Attorney General* [2013] eKLR.
25. The issues calling for my determination are:
 - i. If the trial court had jurisdiction to hear and determine the suit.
 - ii. If the appellant proved trespass to his land by the respondents.
 - iii. If the respondents were justified in entering, destroying and re-opening an alleged access road blocked by the appellant.
 - iv. If the trial court erred in law and in fact in calling for a scene visit and the production of documents or reports after the closure of the defense case.
 - v. If the appeal has merits.
26. It is trite law that parties are bound by their pleadings, and issues flow from them. In *IEBC & others v Stephen Mutinda Mule* [2014] eKLR, the court cited *Malawi Railways Ltd v Nyasulu* [1998] MWSC 3 that in an adversarial system, parties are the ones who set an agenda for the trial by way of pleadings that the court has no right to engage in any other business save for what parties have pleaded and that a party may not lead evidence at variance with his earlier pleadings, unless with amendments thereto.
27. In this suit, the parties delineated the issues for the court's determination through the plaint and statement of defense dated 3.12.2019 and 9.12.2019. Despite various land adjudication and survey reports, maps and documentation, none of the parties sought and applied for the amendments of their respective pleadings to reflect the facts both on the ground and on the land adjudication record and subsequent survey maps.
28. Even after the defense closed its case on 22.8.2022, a report dated 18.12.2022 was filed by the Land Adjudication and Settlement Officer Igembe Central North and South Sub-Counties, respectively. Further title deeds for L.R No. Igebme/Amwathi/Maua/9336 & 499 were filed after the respondents had testified.
29. The appellant, in his written submissions dated 14.2.2023, relied on the new facts extracted from those reports yet he never sought for the recall of PW 4 to tender the documents and be cross-examined. On the other hand, the respondents produced D. Exh No's. 9 & 12 without calling their makers to produce them. D. Exh No. 12 had a disclaimer that it was not an authority as to boundaries. Title deed produced as P. Exh No. (1), D. Exh No. 10, 11, and those for L.R No. 9336 and 499 were clear that the title numbers were registered land falling on Map Sheet No. 4/12.
30. Julius Kahindi, the acting Director of Survey from the Survey of Kenya on 22.2.2021, clarified that Map Sheet No. 12 had Parcel No. 9179 with clear access for L.R No. 9179, 9336, and 9161. He indicated that the map was published in December 2018. He said on oath that there was no other map for the area. That evidence prompted the appellant to seek an independent surveyor through an application dated 18.3.2021. The independent surveyor was not called to produce his report dated 24.7.2020. He purported in his report to contradict the report by Mr. Julius Kahindi on the publication of the map



in December 2018. If he had been called, he would have stated on oath the basis of his report, its source and the relevance of registry index maps dated 2015. His name and qualifications were not indicated in his report.

31. There was no dispute that at the time the suit was filed, title deeds for the disputed parcels of land were already out. Therefore, any dispute arising out of acreage, boundary fixing, encroachment and or rectification of maps or boundaries was governed by the [Land Registration Act](#) and the [Survey Act](#). The suit land did not fall under the Land Consolidation or Adjudication Acts. The preliminary objection by the respondents was misguided. In *Estate Sonrisa Ltd & another v Samuel Kamau Macharia & 2 others* [2020], eKLR, the court said the ascertainment and fixing of a boundary in dispute under Sections 16-19 of the [Land Registration Act](#) fell under the jurisdiction of a Land Registrar who may rely on any relevant documents and other existing records in accordance with Section 14 thereof. The court said the jurisdiction of the land registrar was to conduct proceedings to determine the extent of the parties' respective parcels and the precise position of the boundaries in question and that any aggrieved party by the decision thereof could challenge it under Sections 79 (3) (a), 80, 86 & 91 (a) of the [Land Registration Act](#), as held in *Lawrence Kairu Nyambura v Symon Kabugi Kinyuru* [2015] eKLR.
32. In this appeal, the Land Registrar testified as DW 1. He was categorical that his office was never involved in the dispute by any of the protagonists. D.W. 2 told the court he had no obligation in law to involve the Land Registrar in the dispute. The jurisdiction to ascertain, fix, and establish boundaries falls with the Land Registrar under Sections 18 (2) & 19 of the [Land Registration Act](#). In *Azzuri Ltd v Pink Properties Ltd* (2018) eKLR, the court said a dispute falling under Section 18 of the [Land Registration Act](#) has to be heard by the Land Registrar. In *George Kamau Macharia v Deka Ltd* [2019] eKLR Kemei J held that a Land Registrar must fix general boundaries and that a registry index map only indicates approximate boundaries and the situation on the ground, and that even if the court were to hear the suit the input of a Land Registrar was critical since it was the office with the technical advice and the resources to determine and ascertain the boundaries.
33. In *Willis Ocholla v Mary Ndege* [2016] eKLR Kibunja J said that before the dispute was escalated to court, the land registrar was the first port of call. The exact position was reaffirmed in *Estate of Sonrisa Ltd vs Samuel Kamau Macharia* (supra), that the Land Registrar, under Sections 16 – 19 thereof, after issuing a notice to all affected parties adjoining the boundaries in question, with the assistance of the surveyor, had to ascertain and fix the disputed boundaries, who carries out the exercise without restrictions, since a title deed was only a prima facie evidence on matters shown therein. Therefore, going by the holding in the speaker of *National Assembly v Karume* [1992] KLR 21, I think there was a good reason why the law indicated that the Land Registrar ascertains and fixes the boundary.
34. On 3.12.2019, the then-trial court, before allocating the matter to the Senior Resident Magistrate, made a directive that the Land Registrar and surveyor visit the land to establish the boundary. The order was not followed to the letter to involve the Land Registrar. The land registrar did not, therefore, prepare any report in accordance with the order until he came to testify at the tail end of the trial. He did not produce any report. He did not accompany the trial court for the scene visit after the conclusion of the defense case. No land registrar's reports were filed before the judgment was read and delivered. Without the report the trial court had no jurisdiction to hear and determine the matter or make any finding as to who among the parties had encroached on the land of the other or blocked the access road.
35. The court acted without jurisdiction, and therefore, the judgment was a nullity abinitio. The court administrator's report and the court's findings were also made without jurisdiction, for the mandate falls under the land registrar. It is the land registrar who could have considered all the documents by the parties to help it ascertain the boundary, its extent and size of the respective disputed parcels of



land and establish if there was any encroachment or need for rectification or realignment of the titles with the land adjudication records.

36. The upshot is that I find the judgment by the trial court a nullity. The same is set aside or vacated. The Land Registrar of the affected parcels is directed to visit the locus in quo within two weeks from the date hereof and undertake its mandate in line with Sections 14 – 19 of the [Land Registration Act](#), after which parties herein are to appear before the trial court for further directions on 25.4.2024. Issues numbers 1, 3 & 4 have become moot in view of the determination in issue number 1.
37. There will be no orders as to costs for this appeal since the parties were all aware of the initial orders but failed to follow them up to this appeal.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU
ON THIS 6th DAY OF MARCH, 2024**

In presence of

C.A Kananu

Appellant

Kerubo for appellant

Kurauka for the respondent

HON. CK NZILI

JUDGE

