



**Karuri (Suing as the Legal Representative of James Karuri Kabui - Deceased) v Minister of Lands, Housing & Physical Planning of the County Government of Nyandarua & another (Environment and Land Case 65 of 2023) [2024] KEELC 3332 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3332 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA  
ENVIRONMENT AND LAND CASE 65 OF 2023**

**YM ANGIMA, J  
APRIL 18, 2024**

**BETWEEN**

**JOSEPH MUCHIRI KARURI (SUING AS THE LEGAL REPRESENTATIVE OF JAMES KARURI KABUI - DECEASED) ..... PLAINTIFF**

**AND**

**MINISTER OF LANDS, HOUSING & PHYSICAL PLANNING OF THE COUNTY GOVERNMENT OF NYANDARUA ..... 1<sup>ST</sup> DEFENDANT**

**THE COUNTY GOVERNMENT OF NYANDARUA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**A. Plaintiff's Claim**

1. By a plaint dated 21.01.2020 and amended on 10.10.2021 the Plaintiff sued the 1<sup>st</sup> and 2<sup>nd</sup> Defendants seeking the following reliefs:
  - a. A declaration that the Plaintiff's deceased father is the sole allottee of the property known and described as Nyandarua/Oiraimutia/180 measuring approximately 19.5 Ha. and that the said property belongs to his deceased father's estate.
  - b. Special damages of Kshs. 182,385.02.
  - c. General damages for trespass and exemplary damages.
  - d. Costs of the suit.
2. The Plaintiff pleaded that he was the legal representative of the estate of his late father, James Karuri Kabui (the deceased) who was at all material times the owner of Title No. Nyandarua/Oiraimutia/180 (parcel 180). It was pleaded that the Plaintiff had received a notice from the ward administrator of



Charagita Ward in 2019 requesting him to clear any obstacles encroaching on a road reserve adjoining Parcel 180 to facilitate intended road works thereon. The Plaintiff pleaded that he took no action because he had not encroached on the road reserve at all.

3. It was the Plaintiff's contention that on or about 29.07.2019 the Defendants agents illegally entered Parcel 180, cut down several trees thereon which were growing along the boundary between Parcel 180 and the road reserve without lawful justification. The Plaintiff pleaded that some of the trees were consequently stolen by unknown people.
4. The Plaintiff further pleaded that on or about 02.01.2020 the Defendants' agents again entered Parcel 180 and cut down some maize growing along the aforesaid boundary without lawful justification. The Plaintiff pleaded that upon causing the said destruction, the Defendants undertook roadworks by grading the portion of land on which they had cut trees and maize. It was the Plaintiff's case that the Defendants' actions constituted trespass and that the estate of the deceased had suffered loss and damage for which they were liable. The Plaintiff particularized special damages for the loss of trees at Kshs.182,386.02 which he claimed from the Defendants.
5. It was the Plaintiff's case that despite issuance of a demand and notice of intention to sue the Defendants had failed to make good his claim hence the suit.

### **B. Defendants' Defence**

6. The Defendants filed a joint statement of defence dated 28.02.2020 and amended on 18.11.2021 denying the Plaintiff's claim in its entirety and putting him to strict proof thereof. The Defendants admitted having served the Plaintiff with a notice to clear any encroachments on the road reserve prior to commencement of the roadworks and pleaded that he failed to comply therewith.
7. The Defendants pleaded that the land on which roadworks were undertaken was public land as it constituted a road reserve and that it was the Plaintiff who had encroached on the reserve. The Defendants, therefore, disclaimed liability for any loss the Plaintiff may have suffered as a result of the grading works.
8. It was also the Defendants' defence that the nature of the dispute before court was essentially a boundary dispute which should be handled by the land registrar as stipulated under the [Land Registration Act](#), 2012. As a consequence, the jurisdiction of the court to entertain the suit was denied and the court was urged to dismiss the suit with costs.

### **C. Trial of the Suit**

9. At the trial hereof, the Plaintiff testified on his own behalf as the sole witness. He adopted the contents of his witness statement dated 20.01.2020 as his evidence in-chief and produced the documents in his list of documents as exhibits. The gist of his evidence was that the Defendants had trespassed or encroached upon Parcel 180 and undertaken roadworks thereon. He, therefore, prayed for the reliefs sought in the amended plaint.
10. The Defendants, on their part, called one witness at the trial and closed their case. They called a land surveyor employed by the County Government of Nyandarua who disputed the Plaintiff's allegation of encroachment upon Parcel 180. He adopted the contents of his witness statement dated 24.01.2022 as his evidence in-chief and maintained that it was the Plaintiff who had encroached upon the 12m wide access road adjoining Parcel 180.



#### **D. Directions on Submissions**

11. Upon conclusion of the trial the parties were given timelines within which to file and exchange their respective submissions. The record shows that the Plaintiff filed written submissions dated 19.12.2023 whereas the Defendants filed submissions dated 14.02.2024

#### **E. Issues for Determination**

12. The court has noted that the parties did not file an agreed statement of issues for determination. Instead, they filed separate issues. The Plaintiff filed a list of 5 issues whereas the Defendants' list contained 4 issues. In the premises, the court shall frame the issues for determination as stipulated under Order 15 rule 2 of the Civil Procedure Rules, 2010.
13. Under the said rule, the court may frame issues from any of the following:
  - a. The allegations contained in the pleadings.
  - b. The allegations made on oath by or on behalf of the parties.
  - c. The contents of documents produced by the parties.
14. The court has perused the pleadings, evidence and documents on record in this suit. The court is of the opinion that the following issues arise for determination herein:
  - a. Whether the Plaintiff has proved his claim of trespass and encroachment against the Defendants.
  - b. Whether the Plaintiff is entitled to the reliefs sought in the suit.
  - c. Who shall bear costs of the suit.

#### **Analysis and Determination**

##### **a. Whether the Plaintiff has proved his claim of trespass and encroachment against the Defendants**

15. The court has considered the evidence and submissions on record on this issue. The Plaintiff submitted that although the affected trees and maize were on the boundary between Parcel 180 and the road reserve, they were planted on the side of parcel 180 and had not encroached on the road reserve to warrant their removal. It was contended that the Defendants were the ones who had encroached on Parcel 180 for the purpose of grading the access road adjoining Parcel 180. In a bid to prove the alleged trespass, the Plaintiff produced a surveyor's report dated 22.11.2019 from Afrigate Surveyors.
16. The Defendants, on their part, contended that there was no credible evidence of trespass and encroachment upon Parcel 180 since the dispute was in the nature of a boundary dispute and there was no determination of the boundary by the land registrar as required under Section 18 of the [Land Registration Act](#), 2012. The Defendants further contended that their surveyor's report dated 20.09.2021 in fact showed that it was the Plaintiff who had encroached on the 12m wide road reserve.
17. The court is aware that the burden of proof in this suit squarely rests with the Plaintiff as stipulated under Section 107 of the [Evidence Act](#) (Cap.80). The said section stipulates as follows:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

18. The Plaintiff having pleaded that the Defendants were the ones who had encroached on Parcel 180 is bound to prove the alleged encroachment and trespass. The court has noted that the location of the actual boundary between Parcel 180 and the road reserve is disputed. That is why the Plaintiff considered the trees and maize to have been on the side of Parcel 180 whereas the Defendants considered them to have been on the road reserve. There is no evidence on record to demonstrate that the boundary was ever determined by the land registrar as required under Section 18 of the [Land Registration Act](#), 2012. There is no doubt from the material on record that the boundaries in the Registry Index Map were merely general as opposed to fixed boundaries hence if there is uncertainty on their location the competent authority to determine the same is the office of the land registrar.
19. The court has further noted from the Plaintiff’s survey report dated 22.11.2019 that the same is merely a sketch not drawn to scale. In the report the Plaintiff’s surveyor makes the following damning admissions:
- “...One cannot determine the true width of the road if its 10 metres or 12 metres by scaling and therefore the contractor or the person responsible for the road expansion program should have sought guidance from the Director of Survey.”
20. It is thus clear that the Plaintiff’s surveyor was unable to establish whether the road in question was 10m or 12m wide and he did not bother to seek guidance from the director of surveys on the same. Such an inconclusive report cannot be a basis for holding the Defendants liable for encroachment and trespass. The court is of the opinion that the Plaintiff has failed to prove his claim of encroachment and trespass against the Defendants on a balance of probabilities as required by law.

#### **b. Whether the Plaintiff is entitled to the reliefs sought in the suit**

21. As the court has found and held that the Plaintiff has failed to prove his case against the Defendants on a balance of probabilities it would, therefore, follow that the Plaintiff is not entitled to the reliefs sought in the suit, or any one of them.

#### **c. Who shall bear costs of the suit**

22. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the [Civil Procedure Act](#) (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Jannobamed & Sons – v- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the Defendants shall be awarded costs of the suit.

#### **G. Conclusion and Disposal Order**

23. The upshot of the foregoing is that the court finds and holds that the Plaintiff has failed to prove his claim against the Defendants on a balance of probabilities as required by law. As a consequence, the court makes the following orders for disposal of the suit:
- a. The Plaintiff’s suit be and is hereby dismissed in its entirety.
  - b. The Defendants are hereby awarded costs of the suit.



It is so decided.

**JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 18<sup>TH</sup> DAY OF APRIL, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

**In the presence of:**

Ms. Wahome holding brief for Mr. Mathea for the Plaintiff

Ms. Njeri Wanjiru for the Defendants

C/A - Carol

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**Y. M. ANGIMA**

**JUDGE**

