



**Mwangi v Kihara & another (Environment & Land Case  
E088 of 2022) [2024] KEELC 3527 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3527 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE E088 OF 2022  
LC KOMINGOI, J  
APRIL 11, 2024**

**BETWEEN**

**ABISHAGI WARUATHIA MWANGI ..... PLAINTIFF**

**AND**

**HON PETER KIMARI KIHARA ..... 1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR NGONG ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This is the Notice of Motion dated 22<sup>nd</sup> June 2023 brought under; Section 150 of the Land Act No. 6 of 2012, Order 1 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, Articles 60 and 159 of the Constitution of Kenya and all enabling provisions of the law.
2. It seeks Orders;
  - i. Spent
  - ii. That this Hon. Court be pleased to include and enjoin the registered proprietors of land parcels no. Kajiado/Olchoro-Onyore/79 (new numbers 7833-7838) and Kajiado/Olchoro-Onyore/1294 in this suit.
  - iii. That subject to order number ii above, the registered proprietors of land parcels no. Kajiado/Olchoro-Onyore/79 (new numbers 7833-7838) and Kajiado/Olchoro-Onyore/1294 be compelled to allow the Land Registrar and Surveyor Ngong' entry into the mentioned parcels for area confirmation and boundary determination.
  - iv. That the costs of this application be provided for.
3. The grounds are on the face of the application and are set out in paragraphs (a) to (f).



4. The application is supported by the Affidavit of Hon. Peter Kimari the 1<sup>st</sup> Defendant/Applicant, sworn on the 22<sup>nd</sup> June 2023. It arises from the determination of the Land Registrar dated 1<sup>st</sup> April 2022 and the survey report dated 22<sup>nd</sup> March 2023 in regard to this boundary dispute between land parcels Kajiado/Olchoro-Onyore/192 belonging to the Plaintiff and Kajiado/Olchoro-Onyore/193 to the 1<sup>st</sup> Defendant, mentions parcels no. Kajiado/Olchoro-Onyore/79 (new numbers 7833-7838) and Kajiado/Olchoro-Onyore/1294 but the owners are not parties to this suit. It would therefore be judicious to have them enjoined in the suit to enable the Land Registrar and the Surveyor to undertake a re-survey and generate a complete survey report.
5. The Plaintiff/Respondent in her Replying Affidavit contested the application for joinder on grounds that she did not have a claim against owners of parcels Kajiado/Olchoro-Onyore/79 (new numbers 7833-7838) and Kajiado/Olchoro-Onyore/1294. Additionally, the Land Registrar by consent of the parties in this suit made a determination dated 15<sup>th</sup> February 2023 and filed in court on 3<sup>rd</sup> April 2023 and the said determination was never challenged. Therefore, seeking for a joinder at this juncture and a re-survey was akin to irregularly setting aside the determination. Should the Applicant have any other dispute with the intended parties for joinder, then he should lodge a dispute against them with the Land Registrar who has original jurisdiction to hear and determine boundary disputes. The application is therefore incompetent and should be dismissed with costs.
6. This application was canvassed by way of written submissions.

#### **The 1<sup>st</sup> Defendant /Applicant's Submissions**

7. By the time of writing this ruling, Counsel for the 1<sup>st</sup> Defendant/Applicant had not filed their submissions.

#### **The Plaintiff/ Respondent's Submissions**

8. Counsel submitted that counsel for the Applicant proposed that the matter be referred to the Land Registrar for determination of boundaries between properties 192 and 193. Following this consent, a survey was conducted on 15<sup>th</sup> February 2023 in presence of the parties in this suit and the Surveyor's report dated 22<sup>nd</sup> March 2023 filed in court on 3<sup>rd</sup> April 2023. The Surveyor's findings recommended that the owner of property number 193 to lodge a dispute with parcel 1294 so that the boundary is straightened. The application was therefore incurably defective and ought to be dismissed with costs because the Applicant had neither demonstrated how the parties he wanted to be joined were necessary in the suit nor did the 1<sup>st</sup> Respondent have a claim against the intended parties to the suit. The applicant did not also show any prejudice that would be suffered by non joinder of the intended parties.
9. Counsel also submitted that the surveyor's report had already addressed the dispute between parties to the suit and adding more parties to the suit would amount to varying the consent order which can only be varied if obtained fraudulently as was held in *Flora N Wasike v Destimo Wamboko* Civil Appeal No. 81 of 1984. Counsel went on to add that the Land Registrar was clothed with jurisdiction to determine boundary disputes as espoused under Section 18 of the *Land Registration Act* and the report which was tabled in court was binding until legally challenged. The application for joinder was therefore an abuse of the court process which was unnecessarily denying the Plaintiff/ Respondent the right to her property. Further that the dispute between the 1<sup>st</sup> Defendant/Applicant and the other parties should be addressed separately.



## Analysis and determination

10. I have considered the Notice of Motion, the affidavit in support, the response thereto, the written submissions and the authorities cited. The issues for determination are:
  - i. Whether the application for joinder of parties in the suit is merited;
  - ii. Who should bear the costs of this application?
11. The 1<sup>st</sup> Defendant/ Applicant seeks joinder of the owners of land parcels no. Kajiado/Olchoro-Onyore/79 (new numbers 7833-7838) and Kajiado/Olchoro-Onyore/1294 in this suit on grounds that their presence in the suit would be necessary to dispense off with the dispute a ground that was contested by the Plaintiff.
12. The Plaintiff filed her suit on grounds that 1<sup>st</sup> Defendant had encroached on part of her land and sought eviction orders amongst others. By consent, the matter was referred to the Land Registrar to determine the boundaries between LR No.s Kajiado/Olchoro/192 and 193. Following this, the Surveyor's report dated 30<sup>th</sup> March 2023 was filed in court on 3<sup>rd</sup> April 2023.
13. The report reads in part:

“Finding:

According to ground pickings the area for parcel 192 compares well with the registered area.

The fence erected by the owner of parcel 193 has encroached into parcel 192 and the fences are not in line with the boundary of parcel 191 and 1294 thus distorting the boundary and the area of the land.

The areas picked on the ground compares well with the registered area.

Conclusion:

Parcel number 192 is in the right position and its beacons should be respected except the beacon marking the boundary with 193 and 194. It should be brought inside by 15m. The owner of parcel 193 should lodge a dispute with parcel 1294 so that the boundary is straightened from parcel 191 to the river.”

14. The 1<sup>st</sup> Defendant/Applicant seeks to have the owners of parcel Numbers Kajiado/Olchoro-Onyore /79 (new numbers 7833-7838) and Kajiado/Olchore-Onyore/1294 in these proceedings.
15. The Observations and or findings of the Land Registrar were;

“Land parcel No. 193 borders 1294 and 192 while 192 borders 79 and 193. Upon taking measurements it was found that NO.193 and 192 combined was less in acreage by 4.6Ha. Using RIM guide it was also established that neighboring parcel number Olchoro-Onyore/79 is much bigger on the ground one side by about 410m as compared to R.I.M i.e. 1560m ground against 1150m on the R.I.M.

Other lands surrounding number 193 i.e. Nos. 1294, 1295,1296 were found to agree with the ground and R.I.M. in terms of measurements and since the occupants of original number 79 had only sent a representative, it was decided that a later date be organized for the resurvey of the entire number KJD/Olchoro-Onyore/79.



Efforts to contact the owner for a discussion on how and when to conduct the exercise was met with hostility. It is for this reason that the office recommends court action so that the occupants of the parcel No. KJD/Olchoro-Onyore/79 can be compelled to allow the land registrar and the surveyor, entry into the land for area confirmation to enable determination of the extent of encroachment if any on land parcel number KJD/Olchore-Onyore/192.”

16. The Jurisdiction to determine boundaries falls squarely on the land registrar. The land registrar has recommended that for the dispute to be conclusively resolved the neighbouring land parcels ought to be resurveyed. This can only be done by bringing in the owners of those land parcels.

17. Order 1 rule 10 of the Civil Procedure Rule provides that;

“(1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.

(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.”

18. The Plaintiff/Respondent submits that the Notice of Motion is brought under Order 1 rule 6 of the Civil Procedure Rule which is the wrong provisions this may be true. However under Article 159 (2) (d) of the Constitution, this court is implored to administer justice without undue regard to procedural technicalities.

19. I find that in order for the dispute to be resolved, it is necessary to bring on board the owners of the adjacent parcels. The Court of Appeal in Estate Sonrisa Ltd & another v Samuel Kamau Macharia & 2 others [2020] eKLR.

“... It is the Land Registration Act that makes provisions relating to the determination of boundaries. Those provisions are found in sections 16 to 19. Specifically, for this dispute, the Registrar is empowered, after giving notice to all the affected parties, in this case, the 1<sup>st</sup> appellant and 1<sup>st</sup> respondent, indeed as well as any owner whose land adjoins the boundaries in question, and with the assistance of the surveyor, to ascertain and fix the disputed boundaries...”



20. It goes without saying that the owners of the adjacent parcels ought to be notified of these proceedings before the surveyor goes to the ground.
21. In conclusion I find merit in this application and the same is allowed in the following terms;
- i. That the registered proprietors of land parcels No. Kajiado/Olchoro-onyore/79 (new numbers 7833-7838) and Kajiado/Olchoro-onyore/1294 are hereby enjoined in these proceedings.
  - ii. That subject to Order No. (i) above, the registered proprietors of land parcels No. Kajiado/Olchoro-onyore/79 (new numbers 7833-7838) and Kajiado/Olchoro-onyore/1294 are hereby directed to allow the Land Registrar and Surveyor Ngong, entry into the mentioned parcels for area confirmation and boundary determination.
  - iii. That costs do abide the outcome of the main suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 11<sup>TH</sup> DAY OF APRIL 2024.**

**L. KOMINGOI**

**JUDGE.**

IN THE PRESENCE OF:

Mrs Mageto for the Plaintiff.

Mr. Mwiti for the 1<sup>st</sup> Defendant.

N/A for the 2<sup>nd</sup> Defendant.

Court Assistant – Mutisya.

