



**Mwanthi v Muoka & another (Both being sued on behalf of the Estate of Kavini Muoka Masku - Deceased) (Environment & Land Case E016 of 2022) [2024] KEELC 4606 (KLR) (5 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4606 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE E016 OF 2022**

**TW MURIGI, J  
JUNE 5, 2024**

**BETWEEN**

**FRANCIS MUSYOKA MWANTHI ..... PLAINTIFF**

**AND**

**MULI MUOKA ..... 1<sup>ST</sup> DEFENDANT**

**MUTUKU MUOKA ..... 2<sup>ND</sup> DEFENDANT**

**BOTH BEING SUED ON BEHALF OF THE ESTATE OF KAVINI MUOKA  
MASKU - DECEASED**

**RULING**

1. By a Notice of Motion dated 13<sup>th</sup> April 2023 brought under Article 162(2) (b) of the [Constitution of Kenya 2010](#), Order 40 Rule 1 and 4 and Order 51 Rule 1 of the [Civil Procedure Rules 2010](#), the Applicant seeks the following orders:-
  1. Spent.
  2. An order of temporary injunction restraining the Defendants, their agents, servants, employees and such persons acting through them from encroachment and/or interfering with the Plaintiff's land parcel number Kisau/Sakai/522.
  3. An order of permanent injunction restraining the Defendants, their agents, servants, employees and such persons acting through them from encroachment and/or interfering with the Plaintiff's land parcel number Kisau/Sakai/522.
  4. The Honourable Court be pleased to order the Makueni Land Registrar and the Government County Land Surveyor to visit the two land parcels Kisau/Sakai/522 and Kisau/Sakai 425 and establish and demarcate the boundary between them respectively.



5. The resultant survey report be submitted before the court within 7 days.
  6. An eviction order against the Defendants, their agents, servants, employees and such persons acting through them from interfering with land parcel number Kisau/Sakai/522 or a port of it thereof.
  7. The County Commander Makueni County to provide security for effective compliance of the order (4) above.
  8. Costs of the application be in the cause.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Francis Musyoka Mwanthi sworn on even date.

### **The Applicant's case**

3. The Applicant averred that he is the registered proprietor of land parcel No Kisau/Sakai/522 while the Defendants are the beneficial owners of land parcel No Kisau/Sakai/325. He further averred that the Respondents have encroached on his land and excised a portion measuring 20 meters within the boundary between the two parcels of land and erected a permanent house.
4. He further averred that after he reported the matter to the relevant authorities, they were summoned to appear at the site on 9/3/2023 with a view to establish the boundaries between the two parcels. That efforts to have the County Surveyor verify the boundaries between the two parcels of land bore no fruits since the Defendants violently refused to have the boundaries verified. He urged the court to allow the application as prayed.

### **The Respondents' Case**

5. The Respondents opposed the application through the affidavit of Mutuku Muoka sworn on his own behalf and on behalf of the 1<sup>st</sup> Respondent. The deponent denied the Plaintiff's allegations that they have encroached onto his land. The Respondents asserted that there is no boundary dispute between the two parcels of land as there were beacons clearly demarcating the two parcels of land. He further averred that the Applicant's sister in law one Stella Mueni Ngumbi had trespassed on their parcel of land. The deponent denied the allegations that they had constructed a permanent fence which has encroached on the Plaintiffs land and insisted that they had fenced their land on the inner side 5 meters leaving the boundary. He also denied having being invited for a meeting to establish the boundary between the two parcels of land and stated that the meeting was attended by Stella Mueni Ngumbi, a sister in law to the Plaintiff, Gabriel Maingi the surveyor and Mwanzia Ngumbi, a nephew to the Plaintiff.
6. The Respondents relied on the letter dated 14<sup>th</sup> March 2013 to state that the Land Surveyor, Gabriel Maingi is biased in favour of the Plaintiffs. He insisted that they would suffer prejudice if the application is allowed and urged the court to dismiss the same with costs.
7. The Applicant filed a further affidavit and reiterated the contents of the affidavit in support of the application.
8. The parties were directed to canvass the application by way of written submissions.

### **The Applicants Submissions**

9. The Applicant's submissions were filed on 27<sup>th</sup> November 2023.



10. On his behalf, Counsel identified the following issues for the court's determination:-
  - a. Whether the Plaintiff is entitled to the reliefs sought in the application?
  - b. Who bears the cost of the application?
11. As regards the first issue, Counsel submitted that the Surveyor's report dated 14/3/2023 clearly shows that the Defendants have encroached onto the Plaintiff's land. Counsel submitted that the boundary between the two parcels of the land is a fixed boundary and as such it does not fall within the jurisdiction of the Land Registrar.
12. Counsel further submitted that Section 15-17 of the *Land Registration Act* empowers the Director of Surveys to alter and rectify a boundary line based on a cadastral map, the subdivision plan, combination plan or any other approved plan necessitating the alteration of the boundary. Counsel submitted that the Respondents are not opposed to the boundary verification as long as the County Surveyor is not involved.
13. Counsel urged the court to award the Applicant costs of the application.
14. As at the time of writing this ruling, the Defendants had not filed their submissions as directed.

### **Analysis And Determination**

15. Having considered the application in light of the pleadings, the respective affidavits and the Applicant's written submissions, the only issue that arises for determination is whether the Applicant has met the threshold for the grant of an order of injunction.
16. The principles applicable in an application for an injunction were laid down in the celebrated case of *Giellla v Cassman Brown & Co Ltd* [1973] EA 358 as follows:-First the applicant must show a *prima facie* case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.
17. The first issue for determination is whether the Applicant has established that he has a *prima facie* case with a probability of success.
18. A *prima facie* case was defined by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) eKLR as follows;
 

“a *prima facie* case in a civil application includes but is not confined to a genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
19. It is not in dispute that the Applicant is the registered proprietor of land parcel No Kisau/Sakai/522 while the Respondents are the beneficial owners of land parcel No Kisau/Sakai/425.
20. From evidence presented by the parties herein, it is crystal clear that the boundary between the two parcels of land is fixed and as such it does not fall within the jurisdiction of the Land Registrar. Section 19 of the *Land Registration Act* deals with fixed boundaries. It provides as follows:-
  - i. If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise



position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

- ii. The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.
  - iii. Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.
21. It is crystal clear that a dispute has arisen as to whether the Defendants have encroached on the Plaintiff's parcel of land. The Defendants denied the Plaintiff's allegations that they have encroached onto his parcel of land and erected a permanent structure on the boundary between the two parcels of land.
22. It is not in dispute that the boundary between the two parcels of land is fixed. Section 15-17 of the [Land Registration Act](#) empowers the office responsible for the survey of land to rectify the line or position of any boundary shown on the cadastral map based on an approved subdivision plan or any other approved plan necessitating the alteration of the boundary.
23. Having confirmed that there is a dispute between the parties herein, I will in the interest of justice grant order No 4 of the application.
24. In the end, the application is allowed in terms of order No 4 of the application. Each party to bear its own costs.

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**HON. T. MURIGI**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 5<sup>TH</sup> DAY OF JUNE, 2024.**

In the presence of:

Onesmus Masua for the Defendant

Ms Muvindye for the Plaintiff

Court assistant Alfred.

