



REPUBLIC OF KENYA



KENYA LAW
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Ogeto v Kenya Urban Roads Authority (KURA) (Environment & Land Case 1314 of 2015) [2025] KEELC 664 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEELC 664 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1314 OF 2015
OA ANGOTE, J
FEBRUARY 20, 2025**

BETWEEN

JEFITHA MOTAROKI OGETO PLAINTIFF

AND

KENYA URBAN ROADS AUTHORITY (KURA) DEFENDANT

JUDGMENT

1. Vide a Plaint dated 18th December, 2015, the Plaintiff seeks as against the Defendant the following reliefs:
 - i. A declaration that the Plaintiff is the rightful and/or legal owner of L.R No Nairobi/Block 60/518 and the Defendant should therefore be evicted therefrom.
 - ii. A mandatory injunction compelling the Defendants (sic), either by themselves, servants, and/or agents from continuing to excavate and/or trespassing on the Plaintiff's parcel of land L.R No Nairobi/Block 60/518.
 - iii. A perpetual injunction restraining the Defendants either by themselves, servants or agents from occupying, trespassing or in any other way interfering with the Plaintiff's quiet enjoyment of the subject parcel of land to wit L.R No Nairobi/Block 60/518.
 - iv. General damages for trespass.
 - v. Costs of the suit and interest thereon.
 - vi. Any other relief that this Honourable Court may deem fit and just to grant.
2. It is the Plaintiff's case that he is and was at all relevant times the lawful owner of L.R No Nairobi/Block 60/518, measuring approximately 0.0496HA (hereinafter the suit property) having purchased



- the same sometime in 1995 and that the Defendant has without any colour of right trespassed onto the aforesaid parcel which state of affairs has caused, and continues to cause him harm and loss.
3. According to the Plaintiff, the particulars of the Defendant's trespass include, without his consent, ploughing 5 meters into the suit property; ploughing the suit property with the intent to construct a road thereon; felling his fence, beacons, and boundaries; creating a road on the suit property and unlawfully occupying the suit property.
 4. The Plaintiff contends that his title to the suit property is a first registration and cannot be defeated by the Defendant's acts which have greatly prejudiced him and that despite demands, the Defendant has neglected and/or refused to cease interfering and trespassing on the suit property.
 5. The Defendant filed a Defence on the 5th July, 2019. Vide the Defence, it conceded to the Plaintiff's ownership of the suit property but denied trespassing thereon. It was contended that the Defendant, being the state corporation in charge of the National Urban Road Network was, in the financial year 2014/2015, overseeing the upgrading of the existing Ayany-Otiende Link Road which borders the Plaintiff's property.
 6. According to the Defendant, prior to commencing the aforesaid project, it organized and held various stakeholder meetings with the area residents including the Plaintiff, informing them of the ensuing link road upgrading project and its scope given that the area is densely populated and dotted with informal settlements and that following the aforesaid consultations, it set out the alignment and commenced construction works.
 7. The Defendant stated in the Defence that construction works proceeded smoothly until the contractor arrived at the area abutting the Plaintiff's parcel of land; that the contractor encountered the Plaintiff who had hurriedly fenced off the drainage and walkway section of the road corridor claiming it as his property and that in the face of such opposition, the Defendant omitted the drainage and walkway works in the area adjacent to the Plaintiff's property and proceeded on with the carriage way and the rest of the project until it concluded the project.
 8. It is the Defendant's case that it was only afterwards that they learned from the Plaintiff that angry members of the surrounding community had descended upon his property and destroyed the hording and fence that he had erected and placed on the walkway and drainage sections of the corridor blaming him for hindering completion of the road works.
 9. As a result of the foregoing, it was submitted, the prayers sought do not have any foundation and that the suit is in any event fatally defective for failure to comply with the provisions of Section 67(a) of the *Kenya Roads Act*, 2007 which mandates the issuance of a demand and a one month notice prior to the institution of the suit.

Hearing and Evidence

10. The matter first proceeded for hearing on the 17th February, 2022. The Plaintiff, PW1, adopted his witness statement dated 18th December, 2015 as his evidence in chief and produced the documents of an even date as PEXHB1-5.
11. It was his oral evidence that he witnessed people constructing a road in the area where he resides; that the District Officer, the Chief, and other individuals visited him and informed him of their intention to construct a road that would pass through his property which neighbors the road and that during the construction process, the Defendant encroached on his land by approximately 5 meters. He added that the road is in use to date, and as a result of the encroachment, he is now seeking damages.



12. In cross-examination, he stated that the letter of allotment given to him in respect of the property indicated that the property was unsurveyed land; that the letter of allotment makes reference to a plan; that the road is already in use and that the Defendant destroyed one of his residential houses situate on the property claiming that it was on the 5 metres road reserve.
13. PW2 was Stanley Omacheri Matende, a land surveyor, Practicing Certificate no 264. It was his evidence that he authored a report in respect to the suit property and that his instructions were to establish the beacons defining the land and determine if the structures are on the adjacent 15 metres reserve.
14. He stated that as per his findings, parcel number 518 belongs to the Plaintiff; that one side of his plot is adjacent to the land and that the developments are within his land which has been mistaken as part of the road reserve. He produced the report as PEXHB-2.
15. It was the testimony of PW2 on cross-examination that he first received instructions in 2022 which is when he visited the ground; that he had earlier on engaged with the property in 2015 having done a survey thereon; that he did not have a license at the time; that he has presented the report that he authored in 2015 and that whereas he signed the report as a licensed surveyor, he was unlicensed at the time.
16. PW2 stated that he has attached the survey plan FR No. 434/2 but cannot however give the date the plan was approved; that the property was sub-divided and then allocated but he did not confirm whether the allocation was as per the approved PDP and that he carried out a re-establishment of the boundary relying on independent points but he did not state the same in his report.
17. It was his further evidence on cross-examination that he issued a beacon certificate after re-establishing the beacons but does not have the same; that he should have re-submitted it to the Director of Surveys for re-checking and confirmation; that he did not submit his report to the Director of Survey and that the photos he has annexed do not show the encroachment.
18. DW1 was Abdukadir Ibrahim Jatani, the Defendant's Deputy Director of Survey. He adopted his witness statement dated 8th July, 2019 as his evidence in chief and produced the bundle of documents dated 6th July, 2020 as DEXHB1-2. It was the evidence of DW1 that the Defendant is the state corporation in charge of the National Urban Road Network and that in the financial year 2014/2015, it was overseeing the upgrading of the existing Ayany-Otiende link road which borders the suit property, the Plaintiff's parcel 518.
19. He stated that prior to commencing the aforesaid project, the Defendant held several stakeholder meetings with the area residents including the Plaintiff informing them of the scope of the link road upgrading project and that after the consultations, they commenced construction and all was well until they encountered the Plaintiff who had hurriedly fenced off the drainage and walkway section claiming it as his property.
20. In the face of opposition from the Plaintiff, he stated, they omitted the drainage and walkway works in the area adjacent to the property and proceeded on with the carriageway and the rest of the project until completion; that they later learned that members of the community had descended on the Plaintiff's property and destroyed the hording and fence placed on the walkway and drainage sections blaming him for hindering road works.
21. It was his evidence in cross-examination that whereas he undertook the survey for the plot, he did not indicate the distance from one beacon to the other and that he is aware of the letter by the Plaintiff regarding invasion of his property by goons but there was nothing he could have done about it because the said goons were not employees of the Defendant.



22. In re-examination, DW1 stated that the impugned road is complete; that the same is between Kibra and Otiende in Langata; that they never encroached on the Plaintiff's land; that currently, they have no structures on the property and that what was demolished was a holding mabati, not a stone wall.

Submissions

23. The Plaintiff filed submissions on 28th May, 2024. Counsel submitted that the Plaintiff, in agreement with the Defendant had the suit property re-surveyed as a consequence of which the beacons were re-established and the dispute settled and that however, on the 17th December, 2015, the Defendant's agents illegally invaded the parcel of land and started excavating ostensibly to construct a road.
24. It was submitted that public entities and officers are in the execution of their duties guided by the foundational principles set out in Article 232 of *the Constitution* and that in *Keroche Industries Limited vs Kenya Revenue Authority & 5 Others*[2007] 2 KLR 240, the court cited the decision in *Reg vs Secretary of State for the Environment Ex-parte Nottinghamshire County Council*[1986]AC which was categorical that a public authority must not be allowed by the court to get away with illogical, immoral or acts of conspicuous unfairness.
25. It was urged that the Defendant's actions have greatly prejudiced the Plaintiff's rights having encroached on the suit land by about a distance of 5 metres from the beacons; that the foregoing constitutes trespass which is defined by the *Trespass Act* as the entry, remaining upon or erecting of any structure on private land without the consent of the occupier and that the Plaintiff is entitled to permanent injunctive orders as well as costs.
26. The Defendant did not file submissions.

Analysis and Determination

27. Having carefully considered the pleadings, testimonies and submissions herein, the issues that arise for determination are:
- i. Whether the suit is competent?
 - ii. Whether the Plaintiff has established trespass as against the Defendant?
28. Vide the Defence, the Defendant seeks to impugn the present proceedings. It contends that no notice was served upon it as contemplated by Section 67(a) of the *Kenya Roads Act*, 2007 and consequently the proceedings are a nullity. The Plaintiff did not address this issue.
29. Section 67 of the *Kenya Roads Act*, 2007 provides as follows:
- “Where any action or other legal proceeding lies against an Authority for any act done in pursuance or execution, or intended execution of an order made pursuant to this Act or of any public duty, or in respect of any alleged neglect or default in the execution of this Act or of any such duty, the following provisions shall have effect-”
30. Sub-paragraph (a) thereof provides:
- “The action or legal proceeding shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim and of intention to commence the action or legal proceedings, has been served upon the Director-General by the plaintiff or his agent.”



31. Having considered the pleadings, there is no evidence of service of the demand as contemplated by Section 67(a) aforesaid. The question that lends itself is whether this failure renders the suit fatally defective. While appreciating that the Section is couched in mandatory terms, it is crucial to consider the broader context provided by subsequent legislative and constitutional developments.
32. Notably, the *Kenya Roads Act*, 2007, predates *the Constitution* of Kenya, 2010. With the promulgation of the 2010 Constitution, principles of substantive justice were given precedence, and procedural technicalities were subordinated to ensure fairness in the administration of justice.
33. In particular, Article 48 of *the Constitution* guarantees every individual the right to access justice, while Section 3(2) of the Environment and Land Court mandates the court to, in the discharge of its functions, give effect to the overriding objectives, to wit, the just, expeditious, proportionate and accessible resolution of disputes.
34. In the case of *Joseph Nyamamba & 4 others v Kenya Railways Corporation* [2015] eKLR, the Court of Appeal cited with approval the reasoning of Majanja J in *Kenya Bus Services Limited and Anor v Minister of Transport & 2 Others* [2012] eKLR where he discussed the import of Section 13A of the *Government Proceedings Act*, which, much like the impugned Section 67(a) of the *Kenya Roads Act*, required notice before filing of a suit against the Government. The court held as follows:

“By incorporating the right of access to justice, *the Constitution* requires us to look beyond the dry letter of the law. The right of access to justice is a reaction to and a protection against legal formalism and dogmatism...Article 48 must be located within the Constitutional imperative that recognizes as the Bill of Rights as the framework for social, economic and cultural policies. Without access to justice the objects of *the Constitution* which is to build a society founded upon the rule of law, dignity, social justice and democracy cannot be realized for it is within the legal processes that the rights and fundamental freedoms are realized. Article 48 therefore invites the Court to consider the conditions which clog and fetter the right of persons to seek the assistance of courts of law. Viewed against the prism of *the Constitution*, it also becomes evident that section 13A of the GPA provides an impediment to access justice. Where the state is at the front, left and centre of the citizens life, the law should not impose hurdles on accountability of the Government through the Courts. An analysis of the various reports from Commonwealth which I have cited clearly demonstrate that the requirements for notice particularly where it is strictly enforced as a mandatory requirement diminishes the ability of the citizen to seek relief against the government. It is my finding that section 13A of the *Government Proceedings Act* as a mandatory requirement violates the provision of the Article 48.”
35. Considering a similar objection, albeit with respect to Section 87(a) of the Kenya Railway Act, which similarly requires notice before institution of a suit, this court in *Catherine Njeri Majani vs Kenya Railways Corporation & Another* [2021] eKLR posited as follows:

“Considering the provisions of Article 48 of *the Constitution* which requires the state to ensure access to justice for all persons, and the pronouncement of the superior courts on the applicability of Section 87 (a) of the *Kenya Railways Corporation Act*, it is my finding that the failure by the Plaintiff to issue to the 1st Defendant a thirty (30) days’ notice, if at all, is not fatal to the suit.”
36. The upshot of the foregoing is that the failure by the Plaintiff to issue notice to the Defendant before institution of this suit is not fatal.



37. Vide the present suit, the Plaintiff seeks, inter-alia, a declaration that he is the legitimate proprietor of the suit property and the Defendant to be evicted therefrom; injunctive orders restraining the Defendant from trespassing and/or any interference with the suit property and general damages for trespass.
38. It is the Plaintiff's case that he is the legitimate proprietor of the suit property; that the Defendant has in constructing the Ayany-Otiende link road encroached approximately 5 metres into his property and that he should be compensated for the aforesaid trespass.
39. The Plaintiff adduced into evidence the letter of allotment dated 23rd June, 1995; lease and certificate of lease in respect of the suit property dated the 14th April, 2008; area map; letter dated 8th July, 2015 and the survey report dated the 6th August, 2022.
40. On its part, the Defendant denied trespassing on the suit property alleging that after resistance from the Plaintiff, they undertook the construction of the road away from the area adjacent to the property. The Defendant adduced into evidence a copy of the sketch analysis of the alleged encroachment on parcel numbers 518 and 519 and a copy of the sketch depicting the suit parcel.
41. As aforesaid, the Plaintiff alleges encroachment onto its property. As such, he bears the onus of proving his allegations. This finds footing in the elementary principle that he who alleges must prove as set out in Sections 107, 108, 109, and 112 of the *Evidence Act*, Cap 80, Laws of Kenya. Section 107 provides 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."
42. Whereas section 108 states as follows:
- "The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."
43. Section 109 provides:
- "109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."
44. Finally, it is provided under Section 112:
- "112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."
45. As aforesaid, the Plaintiff alleges trespass by the Defendant whom he contends has erected a road which has passed through his property. Trespass has been defined by the 10th Edition of Black's Law Dictionary as:
- "an unlawful act committed against the person or property of another; especially wrongful entry on another's real property."



46. Section 3(1) of the *Trespass Act*, provides:
1. Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
47. In determining trespass, the first port of call is whether the party alleging so has established ownership of the property. The evidence before the court shows that the Plaintiff is the registered proprietor of the suit property, having been so registered on the 14th April, 2008 pursuant to the provisions of the retired Registered *Land Act*.
48. By dint of the provisions of Section 107 of the *Land Registration Act*, 2012, as well as Section 162(1) of the *Land Act*, 2012, the law applicable to the title held by the Plaintiff is the Registered *Land Act*, (now repealed).
49. The rights of a registered proprietor of land were set out in Sections 27(a) and (b) of the Registered *Land Act*(repealed) as follows:
- a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
 - b. The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.”
50. Whereas Section 28 thereof provided:
- “The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.”
51. The indefeasibility of title was also provided in Section 143 of the RLA which stated thus:
1. Subject to sub-section (2) of this section, the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.”
52. In the circumstances, there is no contest as to the legitimacy of the Plaintiff’s title. The Defendant conceded that the Plaintiff is the owner of the suit property, which ownership has been duly demonstrated by the lease and certificate of lease.
53. In contending that the Plaintiff has trespassed onto the suit property, the Plaintiff relied on the evidence of PW2, a surveyor who produced the survey report dated the 6th August, 2022.
54. As per the report, its intent was to re-establish the beacon numbers AK, AL, AH and AJ that define the boundary of the plot as well as determine whether some of the Plaintiff’s structures/developments were on the adjacent 15m road reserve.
55. PW2’s findings as set out in the report were as follows:All the Plaintiff’s structures and developments are within the plot and none has been found to be on or within the road reserve.A wall has been put up round the plot but the owner has left out a piece of land measuring 9m by 8m, 9m being the width



- of the plot. This piece is adjacent to the 15m wide road that is part of the suit property and seems to have been mistaken for part of the 15m road reserve. The 15m road reserve needs to be re-surveyed respecting survey plan 434/2 which plan was used to give the suit property and neighboring plots their titles. Some members of the public have built on the road reserve causing uncalled for bends and shifts.
56. The report noted in conclusion: Otiende Ayany road needs to be surveyed/aligned properly respecting the survey plans that gave the neighboring plots titles. Those who have built on the road reserve should be moved.
57. On its part, the Defendant has adduced a copy of a sketch analysis of the alleged encroachment of the suit property and parcel 519 as well as a copy of the sketch depicting the suit parcel.
58. Having keenly considered the evidence, the court considers that PW2 did not advance the Plaintiff's case. The report by PW2 conceded that he was unsure of when, if at all, the survey plan he relied on was approved. Further, he admitted that in the re-establishment of beacons, he did not comply with Section 48 of the *Survey Act* which provides as follows:
1. If a surveyor is required to re-establish a missing beacon he shall submit his field notes, computations, and report, to the Director."
59. In any event, the report adduced by PW2 does not categorically speak of encroachment by the Defendant and to what extent. The closest to this is the contention that a wall has been put up round the plot but the owner has left out a piece of land measuring 9m by 8m, 9m being the width of the plot. This piece is adjacent to the 15m wide road that is part of the suit property and seems to have been mistaken for part of the 15m road reserve.
60. Indeed, PW2 admitted that he did not indicate in the report that there was encroachment on the suit property, nor is the same demonstrated on the photos attached to the report. What the report is clear on is the need for a re-survey of the road reserve.
61. It must also be noted that it is unclear why the Defendant, rather than provide a survey report, chose to file a sketch map which was not attached to any registered map. Nonetheless, having alleged that the Defendant has encroached on his land, it was the onus of the Plaintiff to prove the same. In this respect, he failed to do so.
62. Ultimately, it is the finding of the court that the Plaintiff has not established trespass on the suit property on a balance of probabilities.
63. In the end, the court finds that the suit partly succeeds and grants the following reliefs:
- i. A declaration does hereby issue that the Plaintiff is the rightful and/or legal owner of L.R No Nairobi/Block 60/518.
 - ii. A declaration is hereby issued that there is no evidence of encroachment on the suit property.
 - iii. Each party shall bear its/his own costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF FEBRUARY, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

No appearance for Plaintiff



Mr. Allan Kamau for Defendant

Court Assistant: Tracy

