



**Kiarie v Pelia (Environment & Land Case 868 of 2017)
[2024] KEELC 5539 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5539 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 868 OF 2017
LC KOMINGOI, J
JULY 25, 2024**

BETWEEN

MICHAEL KIARIE PLAINTIFF

AND

SOIKAN PELIA DEFENDANT

JUDGMENT

1. By the Complaint dated 20th September 2017, the Plaintiff states that he is the registered owner of properties Kajiado/Kaputiei North/5696 and 5035 having purchased them for Kshs. 18.7 million on 16th September 2011 from one Frank Kamunde Mwangera. Further that parcel 5035 bordered parcel Kajiado/Kaputiei North/1168 belonging to the Defendant and there was a 9metre wide road separating the two properties. The Plaintiff then subdivided parcel 5035 to several parcels being Kajiado/ Kaputiei North/53764-53913 and sold them off although parcels 53904-53908 were still registered in his name. They were all using the existing road. On or about 30th August 2017, the Defendant fenced off and closed access to that road on grounds that it was part of his property. The Plaintiff reported this matter to the chief, Deputy County Commissioner and the Land Registrar and was ordered to open the road but he declined. The Plaintiff thus sought:
 - a. An order compelling the Defendant to immediately and forthwith open the road existing between title number Kajiado/Kaputiei North/1168 and Kajiado/Kaputiei North/53904-53908.
 - b. An order of permanent injunction restraining the Defendant from closing the road existing between Kajiado/Kaputiei North/1168 and Kajiado/Kaputiei North/53904-53908 and or interfering with the peaceful usage and access by the Plaintiff and other members of the public of the said road.



- c. General damages for the inconveniences, suffering and losses occasioned by the said closure of the road.
 - d. Costs and interest of the suit.
 - e. Any other relief that this Court may deem fit and just to grant.
2. The Defendant in his statement of defence contested the Plaintiff's claim on the grounds that he was the registered owner of Kajiado/Kaputiei North/4260 formerly 1894 measuring 53 hectares and that the said access road passes through his land. He stated that on 2nd June 2017, the Land Registrar summoned him and four other persons to resolve a boundary dispute between parcels 1168, 2034, 1707, 452 and 458 and a site visit conducted on 2nd July 2017 although the surveyor's report had not been availed. The defendant thus sought striking out of this suit on grounds that it was a boundary dispute which was not within his court's jurisdiction.

Evidence of the Plaintiff

3. PW1, Michael Kiarie adopted his witness statement as part of his evidence in chief and produced documents marked as P. Exhibit 1-9. He stated that upon purchase of his land, he fenced it according to the beacons and access road shown to him. He also went ahead to subdivide the 15 acres into 150 plots and they continued using the access road until it was blocked. They then created another access on one side of the posts used to barricade the road. He indicated that the sisal plant on the road marked a beacon where the road should be which should be on the left side of the beacon. PW1 produced several photographs showing the posts blocking the road, felled posts, soil dug out to hamper access, among others.
4. On cross examination he stated that he disputed the report produced by the Defendant's surveyor and land Registrar because their report was biased as it did not use any map in determining the boundary or beacons. He added that the Defendant could not point out where his beacons were and it was hard to tell the boundary between his land and the Defendant's. He also stated that the survey report emanated from a court order after the suit had been filed, after the defendant had blocked the road. He also added that there was a contempt application pending since the court ordered that the road be reopened but the Defendant had failed to comply.
5. On re-examination he stated that the road was yet to be opened noting that the Defendant had not filed any report in court.
6. PW2 Paul Musembi a surveyor, who is a registered member of the Institution of Surveyors of Kenya, testified in court regarding properties Kajiado/Kaputiei North/1168, 1034, 1707, 452, and 458. He submitted a survey report dated 11th January 2018 as Plaintiff's Exhibit 9. In his testimony, he explained that he visited the properties on three occasions: twice with the Land Registrar Kajiado and the District Surveyor Kajiado, and once alone.
7. The central issue concerned an access road intended to pass through parcels 451 and 459, with land 1168 being a subdivision of parcel 451. He confirmed that the boundaries of parcels 451 and 459 were identified by local elders. Specifically, they pointed out three beacons on the undisputed side of parcel 451 and one beacon on the disputed side, while no beacons were shown on the side of parcel 459 near the river.
8. The surveyor testified that they used a Global Positioning System (GPS), the demarcation map from the Kajiado Lands Office, and a scale to determine the boundary points and took the necessary measurements. According to the measurements and the demarcation map, the ground size of parcel



- 458 was found to be 280 meters, whereas the actual size shown was 292 meters. Similarly, on the other side, the actual size should have been 291 meters, but they were shown 293 meters.
9. He highlighted that pages 4 and 5 of his report depicted how the boundaries were as of 2010, noting changes between 2013 and 2017. The red line indicated how the boundary for parcel 459 had changed, and the green line showed the changes to the boundary for parcel 451.
 10. Regarding the survey report by the Kajiado Land Registrar and Surveyor dated 22nd May 2018, he concurred with version A of the report, which aligned with his findings. However, he disagreed with version B because it lacked points along the boundary, and he also did not agree with version C.
 11. He concluded that opening the road from the side of parcel 459 was acceptable, but the markings on the lower side would result in the road passing through parcel 451, which was a point of contention.
 12. Upon cross-examination, the surveyor acknowledged that he did not file his registration documents while submitting his report. He confirmed that he was instructed by the Plaintiff, who owned a parcel of land within parcel 451, and that he was not engaged by the other landowners. He testified that he utilized a GPS and a scale rule in his survey but admitted that the use of the scale rule was not mentioned in the report filed in court. He also confirmed referring to a demarcation map, which contained the same information as a Registry Index Map.
 13. Furthermore, the surveyor admitted that he did not reference the group ranch subdivision scheme and was unaware of the specific timeline for the land subdivision. He confirmed that he was shown beacons on the upper side of parcel 459 and only one beacon on parcel 451. He indicated that the access road between the two parcels extended from the upper side to the lower side and that the demarcation map he used clearly defined the boundaries. According to this map, the access road from parcel 459 measured 280 meters, and from parcel 458, it measured 291 meters. However, he noted that the 292-meter measurement from parcel 451 was not indicated on the map.
 14. The surveyor affirmed that boundary disputes are determined by the Land Registrar and clarified that Google Maps is not an authoritative source for boundary determination. He also confirmed that he could not assert with certainty that the beacon on the lower side was not positioned correctly. Additionally, he admitted that he was not present on the day the boundary points were placed on the ground in a straight line as depicted in version C of the Defendant's survey report.
 15. Upon re-examination, the surveyor clarified that when he prepared his survey report, both the Land Registrar and the District Surveyor had not prepared their reports. He emphasized that his report was based on actual measurements he took and the demarcation map, which was also used by the Land Registrar. He noted that the Land Registrar used similar instruments, including a handheld GPS and a scale rule.
 16. The surveyor confirmed that, while the Land Registrar is mandated to determine boundary disputes, the Registrar's decision can be challenged based on the integrity of the report. He reiterated that the access road on the upper side of the disputed area extends all the way to the river. He also reaffirmed that the correct measurement for the beacon at parcel 459 should be 280 meters, not the 292 meters indicated.
 17. This marked the close of the Plaintiff's case.

Evidence of the Defendant

18. DW1 Soikan Peliai adopted his witness statement as part of his evidence in chief and produced as evidence his documents which were marked as D. Exhibit 1-4. He stated that since he was given parcel



- land 459 by the group ranch and he had neither altered the boundaries, nor encroached on any land or the road. He stated that he did not close the access road but only fenced his portion of the land to keep away people and cattle.
19. On cross examination he confirmed that between his land and the Plaintiff's land, there was a road used by people, vehicles, and cattle being taken to the river. He confirmed that the road was closed on the upper side. He stated that his neighbor was not the Plaintiff but one Kunini, who had subdivided and sold part of the land. The closed part was no longer Kunini's but someone else's, and he was not sure if the new owner was aware of this suit.
 20. Upon re-examination, he stated that the Plaintiff's land was in the middle of parcel 451 and did not extend to the lower side, adding he did not have a boundary dispute with Kunini. He confirmed that the cattle trail was inside his land, and vehicles also used this road because the official road was in poor condition. Despite this, he wanted to fence all his land.
 21. DW2 Mukera Oloionde Olomuro, also known as Mrefu, the former chairman of the group ranch, adopted his witness statement as part of his evidence-in-chief. He confirmed that he knew the Defendant but not the Plaintiff. He stated that the group ranch was subdivided between 1984 and 1986, and each member was shown their boundaries. When the Defendant informed him of a boundary dispute with one of his neighbours, he visited the site and confirmed that the defendant's beacons were intact.
 22. During cross-examination, he stated that he became the chairman of the group ranch in 1978, although he had nothing to prove this. He explained that during the subdivision process, they created access roads throughout the land, and the surveyor placed beacons to mark these roads, which all members adhered to. He confirmed that the Defendant's and Plaintiff's parcels were separated by a road used by cattle to access the river.
 23. Upon re-examination, he confirmed that the beacons marking the road were still intact.
 24. DW3 Stephen Tipanko adopted his witness statement as part of his evidence in chief. He confirmed that there was a dispute and his presence during the site visits by the Land Registrar and the surveyor in 2015 and 2017.
 25. During cross-examination, he stated that he was the area chief and had been a resident of the area since birth. He confirmed, upon being shown the map of the group ranch, that there was a slight difference in the road access measurements, but the road was clearly defined. He had not seen the surveyor's report but knew that the access road between the Plaintiff's and Defendant's parcels should be 12 meters. He confirmed that the road was currently closed.
 26. Upon re-examination, he stated that the access road was in a straight line, but people had encroached upon it.
 27. DW4 Samuel Ndosho Tupet, similarly adopted his witness statement as part of his evidence in chief. He stated that he bought his land in 1992 from Kunini, whose land was separated from the Defendant's by a road with clear beacons. However, since the land on one side of the road was not fenced, people used it as an access road. He stated that the Plaintiff also purchased his land from Kunini and was aware of the boundary lines.
 28. During cross-examination, he stated that due to the road's condition of the road, people used private parcels as access roads. Although not a surveyor, he confirmed the presence of clear beacons showing the boundaries. When he purchased his parcel in 1992, there was an access road to the river, which had since been closed. He also confirmed that the Defendant and Kunini never had a boundary dispute.



29. Upon re-examination, he stated that the Defendant and Kunini never had a boundary dispute, indicating that the Defendant had not encroached on any land. He confirmed from the map that the access road should be 13 meters from Kunini's land.
30. DW5 Kimani Rufus a surveyor who testified on behalf of the District Land Surveyor stated that having gone through the report filed by the surveyor which he produced as exhibit, the assignment was to determine whether there was an access road and where it was supposed to be. The findings showed that there was encroachment on the road.
31. On cross examination he stated that he was a surveyor although he is not the one who visited the site or prepared the report. He produced the report on behalf of his colleague. He stated that the report showed that some beacons were intact although point A did not have two beacons which under normal circumstances should be the case. He also confirmed that the map of the group ranch made reference to was not attached to the report. He also stated that the report showed that from the upper part of the road to the lower part ought to be a straight line and beacon F was used to define the boundary which was appropriate. He stated that other ways of confirming existing boundaries was use of rivers, fences, google maps, satellite photos etc. On being shown the Plaintiff's survey report, he stated that in his opinion, the green line represented the road and the 2010 map was similar to the one of 2017 where the road was on a straight line. He also stated that he was not aware if a dispute relating to the boundary in issue was filed.
32. On re examination he stated that the surveyor visited the site pursuant to a court order. He indicated that google maps could be used to determine a boundary in cases where the beacons were missing.
33. DW6 Rosemary Wamuyu Mwangi the Land Registrar Kajiado, also produced the Land Registrar's report dated 22nd May 2018 as exhibit and adopted the findings.
34. On cross examination she stated that she had not seen the order initiating the report and had not come across another dispute regarding the said road. She stated that google image was an applicable opinion on boundary issues although it could not used in isolation.
35. On re examination she confirmed that the private surveyor was present when the District surveyor visited the site. The private surveyor filed his report on 11th January 2018 and the Land Registrar filed the report on 22nd May 2018. She stated that the private surveyor's report made reference to google maps which was not necessary in this case.
36. This marked the close of the Defendant's case.
37. At the close of oral testimonies, parties tendered final written submissions.

The Plaintiff's Submissions

38. On whether closing the road was justified, counsel submitted that during the survey visit, one member stated that the road had been in existence for over 30 years, it was always open for the public to access the river and there had never been a dispute arising from its existence. Additionally, google images presented by the surveyor dating back to 15 years confirmed existence of the road the Defendant had closed. The blockage was therefore unlawful citing *Homescope Properties Ltd & another vs David Gachuki & Pamela Odera* sued as Chairman & Secretary of Karen Ngong view Estate & another [2014] eKLR.
39. On whether the Plaintiff was entitled to the prayers sought, counsel submitted that the Plaintiff ought to enjoy all rights that appertain to him being the legal owner of property 5696 and depriving him



of his right to land was a violation of his constitutional right. Counsel added that it was on record as testified by the surveyor that the road was hived from the parcels of land neighbouring it and as such no party could claim that it was on their parcel of land. The Plaintiff was thus entitled to prayers sought making reference to the cases of Kenya Power & Lighting Co. Ltd vs Sheriff Molana Habib [2018] eKLR and Bandari Investments & Co. Ltd vs Martin Chiponda & 139 others [2022] eKLR on issuance of permanent injunctive orders. Counsel added that the Plaintiff would suffer irreparable loss if the road was to be closed.

40. On the issue of general damages, counsel submitted that having determined that the Defendant had blocked a public road, the Plaintiff was entitled to general damages of Kshs. 10,000,000 for the infringement of his rights and inconvenience caused together with costs as per Section 27 of the Civil Procedure Act as prayed.

The Defendant's submissions

41. Counsel submitted that the Defendant's land was Kajiado/Kaputiei North/4260 and not 1168 or 1894 as claimed by the Plaintiff. Additionally, parcel 5035 was non-existent since it had been subdivided to parcels 53764 to 53913. Therefore, the Plaintiff did not have locus standi in this suit.
42. On whether the Defendant had encroached the claimed road, counsel submitted that the survey report, the Land Registrar and the Surveyor's testimonies all showed that it was the Plaintiff who had encroached on the public road and was now illegally encroaching the Defendant's land to create an illegal access road.
43. On the jurisdiction of this court in determining this dispute, counsel submitted that Section 18(2) of the Land Registrar Act outlined that the jurisdiction lay with the Land Registrar and the suit should be struck out. Reference was made to several cases in which courts also upheld that prerequisite: Willis Ocholla vs Mary Ndege (2016) eKLR, Ezekiel Mairura vs Johnson Anyega Oigara & another (2017) eKLR and Sagalla Rancher Ltd vs Saumu Mwanganjoni & 99 others (2022) eKLR among others.
44. Counsel added that it was evident that it was the Plaintiff who had encroached on the land and as such the orders sought should not be granted, and the suit be dismissed with costs to the Defendant.

Analysis and Determination

45. I have considered the pleadings, the evidence on record, the written submissions and the authorities cited. The issues for determination are:
- i. Whether the Plaintiff is entitled to the reliefs sought in the plaint.
 - ii. Who should bear costs of the suit?
46. The Plaintiff claims that the Defendant has encroached on the access road and closed it off thus hampering access by members of the public. The Defendant contested this claim stating that the portion fenced was part of his land. He had fenced it because the plaintiff had encroached his land and was thus scheming to have the road extended to the Defendant's land.



47. From the pleadings, evidence and testimonies, this is clearly a boundary dispute. Sections 16, 17 and 18 of the Land Registration Act stipulate that determination of boundary disputes lies in the jurisdiction of the Land Registrar.

“Section 18 (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.”

48. From the court record, I note that justice Christine Ochieng’ in a ruling dated 10th December 2018 ordered the access road to remain open pending the outcome of the suit. On 22nd June 2021 the learned Judge issued an order for the parties to undertake a site visit of the disputed boundary and file a report. Other than the reports dated 2018, no other report was filed. Therefore, this court has two survey reports on the same dispute. Summons were also issued to the land registrar and the district surveyor who all indicated that the dispute was in relation to the position of the access road.

49. The plaintiff’s surveyor report dated 11th January 2018 showed that the access road measurements on the demarcation map and on the ground were different with parcel number 459 having exceeded the ground measurement by 12 metres. These findings were arrived at by picking beacons along parcel number 1035, 451 and 459 as shown by the owners and elders and image analysis using google earth. The surveyor found that “the boundaries of parcels 451 and 459 along the disputed road seem not to have changed. However, a straight line joining beacons PT6 and BCN PT3 indicates a shift from the existing hedges. The recommendation was: Boundary of parcel number 451 along the disputed road remain the same as it is on the ground and secondly, the front boundary of parcel number 459 to be made 280m to open the access road.”

50. The Defendant’s survey report dated 22nd May 2018 used the following to identify the boundaries: Olkinois Group ranch RIM, Olkinois Group ranch subdivision scheme, hand held GPS machine, ranging rods, total station and 100 metre tape measure. In this report, there was also an observation that there was a 12metre road passing between original parcel No. 451 and 459. Therefore, the issue of the 12metre road is a common factor in both reports. However, the District surveyor’s report has three versions: version A, B and C each clearly outlining what pickings were made on the ground based on the disputed and undisputed boundaries. And the recommendation was that an offset of 12 metre road be made from line connecting beacons G, A and F and marked along parcel 459 and directed the court and parties to observe and maintain the access road boundary as per this report.

51. Having established that the Land Registrar is the body mandated with determination of disputes, the Plaintiff’s prayers are hereby moot and cannot be granted.

52. I therefore find that the report dated 22nd May 2018 is binding on all parties.

53. As the parties are neighbours I order each party to bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 25TH DAY OF JULY 2024.

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:



Mr. Kirimi for the Plaintiff.

Mr. Sankale for the Defendant.

Court Assistant – Mutisya.

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