



REPUBLIC OF KENYA



KENYA LAW
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Karanja v Kenya Power & Lighting Company Limited & another (Environment & Land Case 32 of 2014) [2024] KEELC 6211 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6211 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 32 OF 2014
MC OUNDO, J
SEPTEMBER 26, 2024

BETWEEN

JOHN KINYANJUI KARANJA PLAINTIFF

AND

KENYA POWER & LIGHTING COMPANY LIMITED DEFENDANT

AND

KENYA ELECTRICITY GENERATING COMPANY PLC THIRD PARTY

RULING

1. The suit herein was instituted by the Plaintiff vide a Plaint dated 14th July, 2014 and amended on 6th October, 2016 wherein he had sought for damages, mesne profits and loss of earnings, as a result of trespass by the Defendant onto his parcel of land No. Kericho/Kipsitet/851. He also sought for costs of the suit.
2. There arose a dispute in relation to the boundary of the suit land wherein vide a court order, the same was visited alongside Kericho/Kipsitet/851 and Kericho/Kipsitet/536 by the parties respective surveyors thus generating three reports filed in court; by County Surveyor, the Plaintiff's Surveyor and the 3rd Party Surveyor respectively. A hearing on their findings was subsequently conducted wherein the Kericho County Surveyor one Isaac Kibet's finding was as follows;
3. Upon his visit to land parcels No. Kericho/Kipsitet/851 and 536 in the company of the Land Registrar, area chief, the security officers, representatives of the Defendants, the Plaintiff and Kipkenda Advocate plus other members of the public, he had established that the Plaintiff, the Defendant and the 3rd Party herein had been claiming ownership to land Parcel Nos. Kericho/Kipsitet/851, 536 and 387 respectively, parcels which were contained in sheet 2 and 3 of the Registry Index Map to Kericho/Kipsitet and which map he had used as a guide.



4. That Parcel No. Kericho/Kipsitet/387 and 851 shared a common boundary line (as shown in figure 1 of the report.) That the boundary line as per the map was straight wherein both parcels of land were served by a tarmac road being Kisumu – Kericho highway. That whereas Land Parcel Nos. Kericho/Kipsitet/536 and 387 were separate on the map, there had not been a distinct fencing line on the ground. That further, at the time of their visit, there were structures on land parcel No. Kericho/Kipsitet/851 that looked like they had been vandalized.
5. That a barbed wire fence had been erected therein was not a straight line. That parcel No. Kericho/Kipsitet/851 had created an overlap situation on parcel Nos. Kericho/Kipsitet/1047, 1284 and part of the road.
6. That Parcel No. Kericho/Kipsitet/536 had gone beyond its marked boundary thus creating an overlap situation on parcel Nos. Kericho/Kipsitet/1052, 1051, part of 1047, part of 1284 and part of an unmarked parcel of land.
7. That whereas the ground area for parcel No. Kericho/Kipsitet/387 was 5.54 acres its registered area was 5.49 acres hence the area that land Parcel No. Kericho/Kipsitet/387 had encroached onto land parcel No. Kericho/Kipsitet/851 was 0.025 acres.
8. That on the other hand, whereas the ground area of land parcel No. Kericho/Kipsitet/851 was 8.65 acres, its registered acreage was 11.05 acres. That further, while the ground area of land parcel No. Kericho/Kipsitet/536 was 5.3 acres its registered area was 3.95 acres.
9. . That the variations on the ground areas to parcel Nos. Kericho/Kipsitet/851 and 536 could be attributed to map variations as compared to ground occupation.
10. He also confirmed that the boundary of land parcel No. Kericho/Kipsitet/387 was a straight line as compared to that of Land Parcel No. Kericho/Kipsitet/536 and 857 as had been represented in the map and on the ground.
11. His explanation on the variation between the acreage on the ground and on the title deed was dependent on how the survey had been carried out but which anomaly could be corrected with the starting point being a survey.
12. That the dispute could be resolved wherein the section indicated in their diagram as having been encroached, by land parcel No. Kericho/Kipsitet/387 could go to land parcel No. Kericho/Kipsitet/851 and the ground and RIM representation for land parcel Nos. Kericho/Kipsitet/ 536 and 851 could be corrected by themselves so as to tally.
13. That if a parcel of land had extended beyond the map section, it's ground area would be enhanced but if land parcel No. Kericho/Kipsitet/536 was marked as per the map, the area would drop and that he had no objection to all surveyors and the stake holders visiting the suit land to mark the ground. That the matter before court was a boundary related issue.
14. That from the combined sheet 2 and 3 of land parcel Nos. Kericho/Kipsitet/536 -851 did not share a common boundary as per the map. That from the emerging issues in his report, it could be observed that there had been encroachment by land parcel No. Kericho/Kipsitet/536 wherein it had extended beyond its map boundary to meet land parcel No. Kericho/Kipsitet/ 851. That whereas the two parcels of land shared a common boundary on the ground, they did not share the same on the map. That from the ground findings as had been indicated in bullet 3 of emerging issues in his report, the structures had been on the encroached section by land parcel No. Kericho/Kipsitet/851.



15. The Plaintiff's Surveyor one Kipkirui Koros on the other hand testified that his visit to land parcel No. Kericho/Kipsitet/851 on 10th January, 2023 in the presence of the Plaintiff was to ascertain the boundaries and area in view of the fact that the Plaintiff had been displaced during the post-election violence of the year 2007.
16. He explained that using a GPS and tape measure he had found that the RIM measurements did not tally with the measurements on the ground. That along the boundary of land parcel No. Kericho/Kipsitet/387, the acreage was almost tallying with that in the RIM map.
17. That land parcel No. Kericho/Kipsitet/851 shared a boundary with land parcel No. Kericho/Kipsitet/357. That land parcel No. Kericho/Kipsitet /850 and a drainage and boarded land parcel No. Kericho/Kipsitet/357. That there was a live fence boarding land parcel No. Kericho/Kipsitet/850 and a drainage boarding parcel No. Kericho/Kipsitet/387. He confirmed that the boundary between land parcel Nos. Kericho/Kipsitet/387 and 851 was a drainage. His conclusion had been that the area and boundaries on the ground did not reflect the RIM and title thus there was need for the Land Registrar to arbitrate. He however confirmed that he was not a Licensed Surveyor.
18. The 3rd Party's Surveyor, one Erick Nduhiu confirmed that he had visited the suit site on 3rd February, 2023 to undertake a ground survey in relation to land parcel No. Kericho/Kipsitet/387 for the purposes of identifying the beacons of the said parcel of land, determining the boundaries of land parcel Nos. Kericho/Kipsitet/536 and 851, determining the size of land parcel Nos. Kericho/Kipsitet/387, 536 and 851, determining any encroachment onto land parcel No. Kericho/Kipsitet/851 by land parcel Nos. Kericho/Kipsitet/387 or 536.
19. That they had been provided with copies of the title deeds for land parcels Nos. Kericho/Kipsitet/387, 536 and 851 and had obtained the RIM of Kericho/Kipsitet sheet No.3 that showed the 3 parcels of land and part of land parcel No. Kericho/Kipsitet/356. That during the site visit, they had looked for the beacons defining the 3 parcels of land and mapped the boundaries as they had existed on the ground together with structures wherein they had noted a house and the extent of the Kisumu-Nairobi highway road reserve and mapped the pillars on either side of the road reserve.
20. That they had also observed that there was a Muhoroni gas power station on land parcel No. Kericho/Kipsitet/387 and 536 which parcels of land had no physical boundaries on the ground. That however, there had been a building on land parcel No. Kericho/Kipsitet/851 which was along its boundary with land parcel No. Kericho/Kipsitet/387. That whereas the boundary between land parcel Nos. Kericho/Kipsitet/387 and 851 was supposed to be a straight line, on the ground, the fence did not follow a straight line since the same had kinked at a drainage trench.
21. That they had noted an overhead power transmission line 132 KV line that had passed through land parcel Nos. Kericho/Kipsitet/387, 851 and the other parcels of land around the area. That they identified the boundaries of land parcel Nos. Kericho/Kipsitet/387 and 536, the common boundary between land parcel Nos. Kericho/Kipsitet/387 and 851 and computed the size of the said parcels of land. That land parcel No. Kericho/Kipsitet/387 measured 2.220 hectares which is 5.49 acres and the area that had been indicated on the title was 2.22 hectares hence there was no difference. That land parcel No. Kericho/Kipsitet/536 on the other hand measured 1.646 hectares while the title had indicated that it measured 1.60 hectares which is 3.95 acres. That whereas they had not been able to measure land parcel No. Kericho/Kipsitet/851 as they needed consent to access the land but the owner was not present during their survey, the title area was 4.47 hectares which is 11.05 acres.
22. He explained that land parcels Nos. Kericho/Kipsitet/536 and 851 did not share a common boundary hence there had not been encroachment between them. He explained that the boundary between land



- parcel Nos. Kericho/Kipsitet/387 and 851 did not match the RIM since there had been a deviation of 5.78 square meters.
23. That whereas the Kericho County Surveyor had found that an encroachment by land parcel No. Kericho/Kipsitet/387 on land parcel No. Kericho/Kipsitete/851 was 0.025 acres which is 101.17 square meters, their measurement for the same encroachment had been 5.78 square meter. That further, the sketch that had been attached to the report by the County Surveyor did not accurately show the existing fences thus the encroachment as determined.
 24. He explained that they had compared the sizes of the parcels and measurements as had been measured by the County Surveyor wherein they had found out that with regard to land parcel No. Kericho/Kipsitet/387, the County Surveyor had found the same to measure 2.242 hectares while they had measured it as 2.22 hectares a difference of 0.022 hectares. That the County Surveyor had indicated that land parcel No. Kericho/Kipsitet/ 536, measured 2.144 hectares while they had measured the same at 1.646 hectares a difference of 0.498 hectares. That whereas the County Surveyor had indicated that land parcel No. Kericho/Kipsitet/ 851 measured 3.50 hectares, the title area was 4.47 hectares.
 25. They thus recommended that the boundary between land parcel Nos. Kericho/Kipsitete/387 and 851 be aligned to follow the RIM. That further, while resolving the encroachment, the wayleave of the overhead power line be considered because the area in dispute was within the wayleave trace which was the boundary between land parcel Nos. Kericho/Kipsitet/851 and 387. That the encroachment had been because of a deviation from the boundary by 0.57 meters resulting in the area that had been computed as 5.78 square meters.
 26. He explained that for general boundaries, the maps and data they had did not give co-ordinates hence there was prone to be a mis-identification. That the reason why there had been variation was that the owners did not maintain their boundaries when they were surveyed. That such anomaly could be cured by the Land Registrar because he was the authority on general boundaries. That the way forward to solve the instance problem was for the 3 surveyors involved and the Land Registrar to first align on the boundaries and thereafter mark the proper boundaries in the presence of the owners.
 27. Parties thereafter filed their submissions in relation to the evidence given by the surveyors to which the 3rd Interested Party framed its issues for determination as follows:
 - i. Whether the matter is a boundary dispute.
 - ii. Whether the court has jurisdiction to handle a boundary dispute and proceed to the hearing of the matter.
 28. On the first issue for determination, it placed its reliance on the provisions of Section 21(1) of the Survey Act to submit that the County Surveyor had conducted a survey and presented his report before court pursuant to the said provisions wherein he had placed marks to demarcate the boundary line between land parcel Nos. Kericho/Kipsitet/851 and 387 occupied by the Plaintiff and the 3rd Party respectively the beacon being located on the LHS extent of land parcel No. Kericho/Kipsitet/851 when along Muhoroni-Kisumu Road.
 29. That it had been noted that the subject boundary line had been a straight line. That none of the developments on parcel No. 387 had encroached on parcel No 381. That the way leave trace for the Lessos-Chemosit via Muhoroni to Kisumu 132 KV Wayleave had been approved by the then District Commissioner on 3rd October, 1997 way before the title to the land parcel No. Kericho/Kipsitet/851 had been issued hence the 3rd party's rights superseded the Plaintiff's rights whose title deed had been issued on 22nd July, 2011.



30. That while the Defendant owned title to land parcel No. Kericho/Kipsitet/387, the 3rd party owned title to land parcel No. Kericho/Kipsitet/536. That while the boundary line between land parcel Nos. Kericho/Kipsitet/851 and 387 was a straight line, the County Surveyor had deliberately altered the boundary to create kinks.
31. Regarding the Plaintiff's Surveyor's report, their submission was that the said surveyor, Mr. Koros could not defend the correctness and completeness of his Survey Report since he was not a Licensed Surveyor fully authorized to conduct the survey. Their submission was that the subject matter of the instant suit, being the encroachment and demarcation of land title Nos. Kericho/Kipsitet/387 and 851 which were bordering each other, this was a matter based on a Boundary dispute.
32. On the second issue for determination, the 3rd party's submission was in the negative to the effect that the two parcels of land having been registered under the repealed Registered Land Act and now under the Land Registration Act, 2012, the court lacked jurisdiction to entertain suits relating to boundary disputes unless the boundary dispute had been referred to the Land Registrar and the boundary in dispute fixed. Reliance was placed on the provisions of Section 18(2) of the Land Registration Act, Section 19 of the Land Registration Act as well as the decisions in the case of Sagalla Rancher Limited v Saumu Mwanganjoni & 99 others [2022] eKLR and Ali Farah v Moses Ole Nasisit & 9 Others [2016] eKLR.
33. In conclusion, the 3rd Party submitted that the nature of prayers that had been sought in the Amended Plaint could only be determined upon the Land Registrar complying with the provisions of Section 19 of the Land Registration Act.
34. On the other hand, the Defendant framed one issue for determination to wit; whether the matter as filed is a boundary dispute thus the court lacks the requisite jurisdiction to entertain the same.
35. The Defendant placed reliance on the provisions of Article 162 (2) (b) of the Constitution and Section 13 (2) of the Environment and Land Court Act, Section 21(4) of the repealed Registered Land Act and Sections 18 and 19 of the Land Registration Act to submit that the said provisions of the law barred the court from entertaining land boundary disputes.
36. That from the testimonies of the three surveyors it had been clear that there were glaring pertinent issues around the boundaries of the respective parcels of land herein and that unless and until such issues were resolved, and boundaries duly demarcated and properly aligned to ascertain any encroachment, determination of the matter herein as filed by the Plaintiff would immensely prejudice the party's proprietary rights.
37. That it was only the Land Registrar who had the statutory mandate and requisite expertise to avail an accurate plan of defined boundaries as was held in the cases of Azzuri Limited v Pink Properties Limited [2018] eKLR, George Kamau Macharia v Dexka Limited [2019] eKLR, Willis Ocholla v Mary Ndege [2016] eKLR and Estate Sonrisa Ltd & Another v Samuel Kamau Macharia & 2 Others [2020] eKLR. That it was therefore important for the court to let the Land Registrar deal with the general boundary dispute before the matter could be escalated to the court. That the matter had been prematurely brought to court before the adversarial claims on boundaries was resolved.
38. Lastly, the Plaintiff framed two issues for determination as follows:
 - i. Whether the matter herein is a boundary dispute.
 - ii. Whether the court has jurisdiction to handle a boundary dispute and proceed to hear the matter to its logical conclusion.



39. On the first issue for determination, the Plaintiff's submission was that although the County Surveyor had conducted a survey and presented his report to court pursuant to the provisions of Section 21 (1) of the Survey Act, yet the surveyor's report was not satisfactory as he had failed as a technical person to advise the court on the way forward but had on cross examination admitted that the instant dispute could only be resolved by all the parties concerned visiting the site a fresh with the assistance of the local community, so as to inspect and measure the relevant land parcels of land to ascertain the boundaries between them.
40. His submission on the second issue for determination was in the negative relying on the provisions of Section 18(2) of the Land Registration Act, 2012, to submit that indeed the court should direct that all parties together with the Land Registrar visit the site and do fresh investigation and measurement of the Plaintiff's parcel of land.

Determination.

41. Having considered the testimony of expert witnesses herein being surveyors' as well as the parties submissions and the prayers sought in the Plaint herein, the common issue running through and through and which issue has been consented to by parties herein is that indeed there is a boundary dispute between proprietors of land parcels registered to the Plaintiff, the Defendant and the 3rd Party herein being Nos. Kericho/Kipsitet/851, 387 and 536 respectively.
42. The issue for determination therefor is whether the court is clothed with the requisite jurisdiction to hear and determine the instant case.
43. Section 18 of the Land Registration Act stipulates as follows:

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.
 - (3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:
44. Section 19 of Land Registration Act, 2012 is clear that the duty to fix boundaries to registered land is vested in the Land Registrar. It provides as follows:
 - (1) 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.
 - 2) 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.



- (3) 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.
45. By virtue of Sections 18 and Section 19 of the [Land Registration Act](#), the Land Registrar is empowered to fix boundaries.
46. That the provisions of Section 18 (2) of the [Land Registration Act](#) show clearly that the court is without jurisdiction on boundary disputes of registered land until after the land Registrar's determination on the same has been rendered.
47. Section 21(4) of the [Land Registration Act](#) Cap 300 (now repealed) deprived this Court the power to entertain any action or other proceedings relating to disputes on boundaries of registered land unless the boundaries have been determined as provided in that section.
48. The jurisdiction of this Court flows from Art 162(2) (b) of [the Constitution](#) as read with the provisions of Section 13(2) of the Environment and [Land Act](#). The latter provides as follows;
- “In exercise of its jurisdiction under Article 162(2) (b) of [the Constitution](#), the Court shall have power to hear and determine disputes—
- a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b) relating to compulsory acquisition of land;
 - c) relating to land administration and management;
 - d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e) any other dispute relating to environment and land
49. For avoidance of doubt, Section 13 of the Environment and [Land Act](#) in my view does not oust the jurisdiction of the court to determine boundaries. However when it comes to general boundaries Section 18(2) of the [Land Registration Act](#) provides in mandatory terms that the dispute should be submitted to the Land Registrar and it is only after the Land Registrar had determined the dispute that the matter can be escalated to this Court.
50. What came out clearly in the present scenario is that there was a discrepancy on the position of the boundaries of the parcels of land herein on the ground and the Registry Index Map which then resulted into the discrepancies on the measurements on the ground vis a vis the titles deeds held by the parties herein because the boundaries were general in nature.
51. In *Azzuri Limited vs Pink Properties Limited* [2018] eKLR, the court of Appeal at paragraphs 21 and 22 observed as follows:
- “.....It is common ground that the suit land is in a general boundary area (as opposed to a fixed boundary area). Resolution of disputes in a general boundary area is provided for under section 18 (supra) which states:.....
- This means that under the aforesaid provisions, boundary disputes pertaining to lands falling within general boundary areas must be referred to the Land Registrar for resolution;



while disputes pertaining to lands with fixed boundaries may be investigated and possibly resolved simply through a surveyor.

From this analysis of the law, it should be clear from the above that, we are in agreement with the learned Judge's conclusion that the dispute ought to have been heard by the Land Registrar as stated in the statute. Jurisdiction is everything. It has been said many times before, that, without it a court has no powers to make one more step, irrespective of the strength and nature of evidence in the parties' possession."

52. To this effect, the court therefore directs that within the next 60 days, the County Land Surveyor and County Land Registrar together with the parties' independent surveyors shall undertake a joint inspection and survey on the suit parcels of land herein being Kericho/Kipsitet/851, Kericho/Kipsitet/387 and Kericho/Kipsitet/536 and thereafter fix boundaries as provided for under Section 19(3) of the *survey Act*. It is only after the said boundaries have been fixed that this matter would proceed for hearing and determination.
53. Costs shall abide the final outcome of the matter.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 26TH DAY OF SEPTEMBER 2024

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

