



**Ichura v Wanjohi (Environment & Land Case 23 of 2014)  
[2024] KEELC 5950 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 5950 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 23 OF 2014  
JO OLOLA, J  
SEPTEMBER 20, 2024**

**BETWEEN**

**KARIUKI ICHURA ..... APPELLANT**

**AND**

**KARIUKI WANJOHI ..... RESPONDENT**

**RULING**

1. By the Notice of Motion dated 1<sup>st</sup> December 2023, John Ichura Kariuki (the Appellant) prays for orders:-
  2. That the Honourable Court be pleased to set aside, vacate and /or annul the consent Order herein dated 24<sup>th</sup> October 2023 for grave irregularities and anomalies;
  - 3 ....
  - 4 .....
  5. That the Honourable court be pleased to order a resurvey of the boundaries (in) dispute and the Applicant (to) have the benefit of a private surveyor;
  6. That the Honourable court do order the Respondent to compensate the Applicant for any loss incurred by the felling and or sale of the blue gum trees as will be assessed/valued by Wamagana Forest Service Department; and
  7. That costs be provided for.
2. The application is supported by an affidavit sworn by the Applicant and is premised on the grounds inter alia:-



- a). That the Applicant did not have the benefit of an independent private surveyor during the survey exercise carried out on 22/6/2023 as was required by the orders of 26/4/2010 issued in Nyeri CMCC Award No. 10 of 2003;
  - b). That the Applicant and his Advocate are not surveyors and they were hence unable to interpret the Government Surveyor's Report dated 22/6/2023;
  - c). That the Respondent has gone ahead and started cutting the Applicant's tress worth millions of shillings;
  - d). That it was an innocent oversight on the part of the Applicant not to call in an independent private surveyor during the survey exercise; and
  - e). That it is the best interest of justice that the said consent Order/Judgment/Decree issued on 3<sup>rd</sup> November 2023 be vacated, set aside and/or annulled.
3. John Kariuki Wanjohi (the Respondent) is opposed to the application. In his Replying Affidavit sworn on 20<sup>th</sup> December 2023, the Respondent avers that the application is unmerited and that the same is an abuse of the court process meant to waste the court's time.
  4. The Respondent asserts that the Applicant's request cannot be granted as the issue was finally settled when the lands office visited the premises in the presence of all the parties and carried out the survey of the properties that were in dispute, planted beacons and prepared and filed a report which was adopted as an order of the court by the consent of all the parties.
  5. The Respondent further avers that the court order referred to by the Applicant did not make it mandatory that a party should have a private surveyor and that it merely stated that each party was at liberty to appoint a private surveyor to accompany the land Registrar during the exercise.
  6. The Respondent denies having cut any trees belonging to the Applicant and asserts that the trees that were cut were on the Respondent's portion of land.
  7. I have carefully perused and considered the Motion as well as the response thereto. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties herein.
  8. By his application before the court, the Applicant urges the court to be pleased to set aside, vacate and/or annul the consent order recorded by the parties herein on 24<sup>th</sup> October 2023 for what he terms as irregularities and anomalies. Consequently, the Applicant wants the court to order a resurvey of the boundary in dispute with the Applicant having the benefit of a private surveyor. In addition, the Applicant urges the court to order the Respondent to compensate him for the loss incurred by the felling and sale of blue gum trees which he claims to be his own.
  9. As Hancox J.A (as he then was) stated in *Flora Wasike –vs- Destimo Wamboko* [1988] 1KAR 625:-  

“It is now settled law that a consent Judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled which are not carried out.”



10. The Court of Appeal dealing with the same issue earlier on in Brooke Bond Liebig –vs- Mallya [1975] EA 266, similarly held as follows:-

“ A consent Judgment may only be set aside for fraud, collusion or any reason which would enable the court to set aside an agreement.”

11. Arising from the foregoing authorities, it was clear that the variation of a consent Judgment can only be done on the grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, and an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts.

12. In the matter herein, it is submitted by the Applicant that the consent recorded by the parties on 3<sup>rd</sup> November 2023 was issued without sufficient material facts or in misapprehension or ignorance of such facts in general. It was the Applicant’s case that at the time the Government Surveyor was conducting the survey exercise on the disputed boundary, the Applicant had not consulted and /or had an independent surveyor to guide him on the said exercise and that when the surveyor’s Report dated 22<sup>nd</sup> June 2023 was issued, he had thought that the redline on the report meant that that was where the boundary of his parcel of land reached.

13. The Applicant avers that he later came to find out that it is the black RIM line that demarcated where his piece of land had reached and that the said ignorance arose from the fact that he had not benefited from the advise of an independent surveyor.

14. From the material placed before the court, the dispute herein rolls back some 20 years. In the year 2002, it is the Applicant who moved the Tetu Land Disputes tribunal seeking for the determination of a boundary dispute between himself and the Respondent. In a determination made on 8<sup>th</sup> April 2003, the Tribunal recommended that a Government Surveyor should visit the disputed boundary and rectify it.

15. That order was further affirmed in a consent order recorded in court on 26<sup>th</sup> April 2010 as follows:

It is Hereby ordered by consent

1. That the district Land Registrar Nyeri do visit and fix the correct boundary with the assistance of the District surveyor;
2. Each party at liberty to appoint a private surveyor to accompany the District Land Registrar.
3. Report to be filed in court.

16. With the parties continuing with their wrangles and filing all sorts of applications before the court, the Land Registrar was not able to visit the land until some 13 years later. On 22<sup>nd</sup> June 2023, when the Land Registrar visited the disputed boundary and marked the boundary with the help of three (3) surveyors in the presence of the parties herein.

17. On 24<sup>th</sup> October 2023, the parties appeared before this court whereupon their Advocates on record adopted a consent order making the matter settled in terms of the Report.

18. That being the case, it was clear to me that as early as the year 2010, the Applicant was aware that he had the option of seeking the services of an independent surveyor. The Applicant has not told the court what prevented him from doing so. At any rate, the Applicant does not state how the views of



his private surveyor would affect the findings of the Land Registrar who is the one mandated under Section 18 of the *Land Registration Act* to fix boundary disputes.

19. As the Court of Appeal long stated in *Hirani –vs- Kassam* [1952] 19 EACA 131:-

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties, and on those claiming under them...and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court...or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable to court to set aside an agreement.”

20. In the matter before me, I was not persuaded that there was any basis upon which to set aside the Judgment. The boundaries were clearly marked and beacons placed showing where each parcel of land bordered with the other in the presence of all the parties and failure to properly interpret the marking in the survey map could not amount to the material ignorance contemplated by the rules.

21. It follows that I did not find any merit in the Motion dated 1<sup>st</sup> December 2023. The same is dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT NYERI THIS FRIDAY 20<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

In the presence of:

Mr. Kibicho for the Applicant.

Ms. Nderitu for the Respondent.

Court Assistant: Michael

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**J. O. OLOLA**

**JUDGE**

