



Kangethe v Manu alias John Ng'ang'a Manu & 2 others (Environment and Land Case Civil Suit 577 of 2016) [2024] KEELC 7274 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7274 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 577 OF 2016
MAO ODENY, J
OCTOBER 31, 2024**

BETWEEN

DAVID NDUNGU KANGETHE APPLICANT

AND

NG'ANG'A MANU ALIAS JOHN NG'ANG'A MANU 1ST RESPONDENT

DANIEL MWANGI GIKONYO 2ND RESPONDENT

ESTHER NJERI KIMANI 3RD RESPONDENT

JUDGMENT

1. By Originating Summons dated 18th December, 2016 which was subsequently amended on 17th May, 2023, the Applicant herein sued the Respondents seeking the following orders:
 - a. That the Honourable court do order the District Surveyor and District land Registrar Naivasha to point out beacons for land parcels No Gilgil/Karunga Block 6 (kikuyu) 415 & 416 and any resultant subdivisions thereof.
 - b. That the once beacons are shown and/or set, the affected parties be ordered to move to their respective portions of land.
 - c. This order be supervised by the chief Gitare location.
2. The 1st and 2nd Respondents filed Replying Affidavits dated 7th September, 2018 and 3rd May 2023 respectively in response to the summons.

Plaintiff's Case

3. PW1 David Ndungu Kangethe adopted his supporting Affidavit dated 15th December 2016 and the list of documents and stated that he has a title deed issued on 17th January 2001 in respect of Plot



- No. Gilgil/Karunga/BK6/416 (Kikuyu) measuring 1.924 Ha. He testified that he sued the defendants because he took possession of plot No. 419 which belongs to David Gachira.
4. It was PW1's evidence that he was informed in 2002 that the land was not his through a letter from Gitare Location Chief whom they went with to the parcels of land Nos. 416, 417 and 418. He further stated that he was given a letter to take to the Land Registrar who also gave him another letter to take to the Nakuru Land Surveyor.
 5. PW1 testified that the problem is with the location on the ground and not the title deed; is not the title that is the problem but the location. Further that Plot Nos 417 and 418 have no issues but Plot No. 416 is the one that has a problem as it is being used by the 1st Respondent whom he informed of the issue.
 6. According to PW1, the 1st Respondent owns plot No Gilgil/Karunga/Block 6/415 but he stays on plot No 416 and also occupies Plot No 415 and produced documents from the land and survey office. It was further his testimony that the Surveyor advised him to come to get an order to enable rectify.
 7. PW1 further testified that the 2nd Respondent was shown plot 415 but on the ground he was actually shown plot 416 and stated that he prays that each person to occupy their own plot. PW1 stated that Nganga Gichuhi has a house on Plot 416 and that a 3rd respondent who has no land in the area. PW1 finally stated that he wants to move to his plot as he is on plot No. 419.
 8. Upon cross-examination by Ms. Kimure, PW1 stated that they went to the suit land with the 1st Respondent, the chief and the Land surveyor who examined the boundaries and found the owners of plot 415 had overlapped into plot 416. He stated that the 1st Respondent and Njeri Manu are on plot 416 and that the surveyor had visited the suit land about four times being on 3rd September, 2015, 29th October, 2015, 7th June, 2016 and 6th September, 2016.
 9. PW1 stated that the surveyor's report confirmed that the dispute is not a land boundary claim but a land claim as PW1 was on another person's plot and that the Surveyor wrote a report and recommended that he come to court to get an order. PW1 stated that he has a title for plot 416 and the 1st Respondent has one for 415 and that the boundaries have no problem.

1st And 3rd Respondent's Case

10. DW1 Ng'ang'a Manu adopted his replying affidavit dated 7th September 2018 as his evidence and produced a surveyor's report dated 9th May 2014. He stated that the Plaintiff is his neighbor and does not know why he has been sued as he stays on plot No 415 measuring about 4 acres which he has occupied for more than 30 years since 1971 and was issued with a title deed in 2003.
11. DW1 further testified that the surveyor confirmed the boundaries and he was subsequently issued with a title. It was his testimony that he does not know Nganga Gichuhi but knows Daniel Mwangi and stated that he owns the whole of plot No 415. He testified that the Plaintiff lives on plot No 416 and plot No 414 belongs to another person.
12. Upon cross-examination by Mr. Njiraini, DW1 stated that plot No. 415 belongs to him and that Daniel owns plot No.s 416, 417 and 418. He further stated that he excised one acre from his plot and remained with 4 acres and that the 1 acre is plot No. 838 which he gave to his sister Beatrice Wanjiru.
13. The court asked DW1 questions for clarification and the court noted the following:

“The witness in the stand is very uncooperative and unwilling to answer any question in a straight manner and appears very evasive and untruthful.”



2Nd Respondent's Case

14. DW2 Peter Wanyama the Rift Valley Regional Surveyor stated that Nganga Gikonyo stays on plot A1 but he has documents for plot No 838, while Esther Njeri stays on portion A2 but she has a title for plot 907. He further stated that the boundary as per the RIM is between plot 415 and 416 and is marked line D-L. and that the portion A3 falls within 416 and is occupied by the 1st Respondent, Nganga Manu.
15. DW2 also testified that testified that portions 907 and 908 are subdivisions of parcel No 414 as per the RIM and was curious why subdivision took place on a different parcel while the actual occupation is on a different parcel. Further that parcel No. 838 does not exist as a result of any subdivision though parcels 907 and 908 exist but there is no record of how parcel 838 came about.
16. Upon cross-examination by Mr. Njirami, DW2 stated that plot 414 was subdivided and it is in the amendment box and became plot 907 and 908 whose owners occupy only part of plot 416. He stated that the owner of plot 415 also occupies a part of plot 416 and they never established if the owner of plot 416 has been pushed to any other part. He further stated that plot 838 consumes part of plot 416 and that plot No. 416 has never been sub-divided and that the boundaries can be aligned.
17. Upon cross-examination by Ms. Kimire, DW2 stated that the owner of plot No 415 occupies part of plot No 416 and he has shaded the area of encroachment. He stated that plot No 907 is developed and so are plots 908 and No A3. He further confirmed that plot No 908 is vacant and produced a revised sketch plan attached to the old one.
18. DW3 Daniel Mwangi Gikonyo adopted his statement dated 30th May 2023 and testified that he bought plot No Gilgil Karunga Block 6/838 and produced the sale agreement dated 8th April, 2015 as DExh No 11 together with the list of documents dated 30th May, 2023 as DExh 12 to 16.
19. DW3 stated that he was shown the boundary when he bought the land and later a subdivision of Plot No. 415 belonging to Ng'ang'a Manu was done. He denied trespassing on the plaintiff's suit land as the boundaries had already been marked. DW3 referred to the boundary sketch produced by the surveyor and testified that he does not agree with the sketch. He testified that the boundary is straight and not diagonal and that plot No 838 is a subdivision of plot No 415.
20. Upon cross-examination by Mr. Njiraini, DW3 stated that his plot number is Gilgil/Karunga/Block 6/838 and he did not buy it from Ng'anga Manu whose plot number is 415. He further confirmed that he does not know that plot number 415 has not been sub-divided and he brought a surveyor who confirmed that his plot was 1 acre and did not produce a mutation form.
21. DW3 stated that in his list of documents, the map does not have plot No 414 but has plot No 415 which has not been subdivided also that it has plot number 416 and does not have alternative survey report apart from the one in court. It was his testimony that he would not have a problem if the beacons are placed on the boundaries and that he will be ready to move if shown a place to move to.
22. Upon re-examination by Ms. Kimure, he stated that he did a search and found that the green card was in the name of Beatrice Wanjiru Manu and that the subdivision was from plot no 415. DW3 testified that if he is told to move to another plot, he will agree.

Applicant's Submissions

23. Counsel for the Applicant filed submissions dated 17th September, 2024 and submitted that the dispute had been heard by the Land Registrar Naivasha together with the Nakuru District Land Surveyor who established that the issue was not a boundary dispute but a land claim.



24. It was counsel's submission that the Land Registrar determined vide a report dated 14th October, 2016 that there was an overlap of the plots. Further that the Registrar observed that the people involved were not co-operative as they knew they would be moved, hence advised the Plaintiff/Applicant to seek a court order.
25. It was counsel's submission that during the hearing, the court ordered for the surveyor's report which was presented, dated 9th January, 2022. The Defendants also agreed to call their surveyors but they failed to do so and by consent dated 24th January, 2024, the Defendants agreed to move out of the Plaintiff's parcel No 416 if found to have encroached. Counsel submitted that the defendants did not call any evidence to contradict the surveyor's report.
26. Counsel further submitted that in the Survey report it was noted that the boundaries were intact but the 1st Defendant's parcel 415, No 838 and 907 occupied part of plot No. 416 and also drew a sketch map of the extent of the encroachment. Counsel urged the court to allow the plaintiff's claim as prayed with costs.

Respondents Submissions

27. Counsel filed submissions dated 23rd August, 2024 and identified the issue for determination as whether or not the Respondents have encroached into the Applicant's parcel of land Gilgil/Karunga Block 6 (kikuyu) 416.
28. Counsel relied on Section 18 and 19 of the *Land Registration Act* and submitted that it is not in dispute that the Applicant owns parcels Gilgil/Karunga Block 6/416, 417 & 418 and the Respondents own 414 and 415. Counsel submitted that the court issued directions for the District Surveyor to visit the suit parcel in the presence of all parties and establish the boundary between Gilgil/Karunga Block 6/415 & 416 which were filed on 21st February, 2023 and 5th May, 2023 respectively.
29. Ms. Kimure submitted that the District Surveyor's report is erroneous as it does not depict the true position and relied on the cases of Azzuri Limited vs Pink properties Limited, Hezekiah Njuguna Mwangi vs Jamleck Chege Kanyi (2019) eKLR and Muiruri vs Ndegwa & 3 others (2024) eKLR.
30. Counsel submitted that the Plaintiff has failed to discharge the burden of proof by failing to state by what acreage the defendants have encroached into his land and urged the court to dismiss the Plaintiff's suit with costs to the defendants.

Analysis And Determination

31. The issue for determination is whether this court should order the District Surveyor and District Land Registrar Naivasha to point out beacons for land parcels No Gilgil/Karunga Block 6 (kikuyu) 415 & 416 and the affected parties be ordered to move to their respective portions of land.
32. It is the Applicant/Plaintiff's case that the parties herein own parcels of land; title No Gilgil/Karunga Block (Kikuyu) 415 & 416 which are adjacent to each other. It is further his case that the land was an allocation and settlement initiative by Naivasha Kikuyu Farmers' Co-operative Society limited which the applicant and the 1st Respondent were members and hence allocated the land.
33. The Plaintiff stated that the 2nd and 3rd Respondents occupy the land subdivided by the 1st Respondent and that during the settlement by the Society, there occurred a mix up of the parcels of land in which the Applicant was shown land parcel No Gilgil/Karunga Block 6 (Kikuyu) 419 while the 1st Respondent occupied land title No Gilgil/Karunga Block 6 (Kikuyu) 415 & 416.



34. It is the Applicant's case that he owns land title No Gilgil/Karunga Block 6 (Kikuyu) 416 while the 1st Respondent owns land parcel title No Gilgil/Karunga Block 6 (Kikuyu) 415. Further that he also owns Plot No Gilgil/Karunga Block 6 (Kikuyu) 414 which was subdivided to portions occupied by the 2nd & 3rd Respondents but part of the position on the suit parcel.

35. On 9th November, 2022, this court issued the following directions:

“The County Surveyor Nakuru shall visit the parcels Nos Gilgil/Karunga Block 6/415 (Kikuyu) and Gilgil Karunga Block 6/416 (Kikuyu) and establish the proper boundaries of those parcels and also indicate the ground occupation of those parcels and by whom and to what extent. In particular, the County Surveyor shall establish whether the 1st Respondent Nganga Manu or any other person is in occupation of Plot No Gilgil/Karunga Block 6/416. The findings of the County Surveyor shall be availed to this court within 14 days from today. The expenses shall be paid by the Applicant and the 1st Respondent only in equal shares. If one party does not pay his share, the other may summarily pay and report to this court at the next mention and the sum paid shall be recoverable from the party in default by way of execution in the normal manner costs are executed on against parties upon certification by such payment on behalf by the Deputy Registrar. Mention on 24th November 2022 for further orders. The County Surveyor shall file his report before 24th November, 2022.”

36. On 11th May, 2023, Peter Wanyama, the Regional Surveyor, Rift valley testified as DW2 and on re-examination, he produced a revised sketch map and an unchanged report with shaded areas showing the occupation. On the court record is a report signed by Patrick K Rotich and received by court on 5th May, 2023 which had the following findings:

- a. The parcels Gilgil/Karunga Block 6/419, 418 and 417 were intact and ground measurements tallies with Registry Index Map (Rim).
- b. A1 (see sketch plan) is the ground position occupied by the owner of parcel 838- Nganga Gikonyo.
- c. A2 is the ground position occupied by the owner of parcel 907-Esther Njeri.
- d. The map position of the two parcels is elsewhere as indicated on the extract of the Registry Index Map. The owners of the parcels claim that they were shown those ground positions by the Defendants.
- e. John Nganga Manu the owner of parcel 415 and the 1st Respondent is in occupation of portion A3, which is part of parcel 416 as shown in the diagram attached.
- f. The parcel Gilgil/Karunga Block 6/907 is a resultant number of the subdivision of parcel Gilgil/Karunga Block 6/414 and it is curious why the owner took possession of part of parcel 416.
- g. Parcel 416 borders parcel 415 and not 838 as per the Registry Index Map.
- h. DL is the boundary between parcel 416 and 415.

The report makes the conclusion that “from the diagram it's apparent that the three owners of parcels 838, 907 and 415 are in occupation of a portion of parcel 416 which belongs to the plaintiff...”



37. It is the Respondents' case that the District Surveyor's report is erroneous as it does not show the true position but they were given an opportunity to bring their own independent surveyor to counter the Survey report that was presented in court but they failed to do so. They cannot speak from the bar and state that the report is erroneous without substantiation.
38. The matter came up in court on 24th January, 2024 and the following consent of the parties was adopted as an order of the court:
1. By consent, the parties agree that a surveyor one Mr Kimathi do visit the suit parcel No Gilgil/ Karunga/ Block 6/414 Block 6/415, 416, 417 and 418 on 1st February 2024 to re-establish the boundaries of the said parcels in the presence of both the Plaintiff and the Defendant.
 2. If the Defendants are found to have encroached on parcel number Gilgil/Karunga Block 416, they shall move to their respective portions.
 3. The survey fees shall be paid by the Defendant.
39. On 23rd July, 2024 when the matter came up, this court found that the Defendant had been given several opportunities to file a survey report and being the last mention date, parties were directed to file submissions.
40. This case should not have taken many years to resolve. The land Registrar together with the Surveyor had given their reports, which have not been controverted by any evidence. The defendant also stated that if the Survey is done and it is found that he has encroached on the plaintiff's land, he would be ready to move when shown where to.
41. There is a consent on record, which was recorded after all the parties, had testified, but the defendant did not fulfil his part of the consent hence the submissions and this judgment.
42. I have considered the pleadings, the evidence on record and the submissions by counsel and find that the Plaintiff/Applicant has proved his case and thus issues the following orders:
- a. It is hereby ordered that the District Surveyor and District Land Registrar Naivasha shall point out beacons for land parcels No Gilgil/Karunga Block 6 (kikuyu) 415 & 416 and any resultant subdivisions thereof within 30 days from the date of this Judgment.
 - b. It is hereby ordered that after compliance with order (a) above, the affected parties shall move to their respective portions of land within 45 days.
 - c. This order shall be supervised by the Chief Gitare location.
 - d. Costs are awarded to the Applicant.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 31ST DAY OF OCTOBER 2024.

M. A. ODENY

JUDGE

