



REPUBLIC OF KENYA



KENYA LAW
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**Mutuku v Kamutu & 2 others (Environment & Land Case
E036 of 2023) [2024] KEELC 7181 (KLR) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7181 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E036 OF 2023
A NYUKURI, J
OCTOBER 30, 2024**

BETWEEN

ELIZABETH NDUNGE MUTUKU PLAINTIFF

AND

TERESIA NDUNGWA KAMUTU 1ST DEFENDANT

ALICE MWONGELI NDOLO 2ND DEFENDANT

JOSEPHINE NZULA MUOKI 3RD DEFENDANT

RULING

Introduction

1. The plaintiff filed this suit by way of plaint dated 3rd May 2023 and alleged that he was the owner of Plot Number Block 7-257 in Muka Mukuu Farmers Cooperative Society (hereinafter referred to as Muka Mukuu), as he is member number 1882 at Muka Mukuu. He stated that the defendants are his immediate neighbours sharing a common boundary with the plaintiff. Further that the defendants have unlawfully encroached on parts of the plaintiff's land. He sought for general damages; a permanent injunction against the defendants from trespassing on his land; and an order of eviction and costs.
2. By a statement of defence and counterclaim dated 22nd May 2023, the defendants denied the plaintiff's claim and stated that they had lawfully and justly resisted fraudulent and illegal actions of police and Muka Mukuu who purported to curve out part of the defendants' land on the disguise that it forms part of the plaintiff's parcel. Further that the plaintiff in collusion with both private and public entities visited the disputed land, ignored the original beacons and boundary marks fixed in the 1980's at the time of land allocation by Muka Mukuu and purported to fix new beacons in the defendants' land. That the defendants had been in occupation of the parcels for over 50 years.



3. In their counterclaim, they sought a permanent injunction against the plaintiff to bar the plaintiff from interfering with their parcels of land Parcel No. Donyo Sabuk/Donyo Sabuk West Block 1 (Muka Mukuu) 2169, 2119 and 2122. They also sought costs.
4. When this matter came up for pretrial directions on 12th March 2024, Mr. Mutua, counsel for the plaintiff informed court that parties were fighting over the boundary. On his part, Mr. Muthomi for the defendant informed court that he had filed a survey report which contradicts the plaintiff's report. He contended that the dispute herein was a boundary dispute and that some of the land was registered under the repealed Registered *Land Act* Cap 300 Laws of Kenya. Further that the plaintiff had no title and some of the defendants had titles while others did not have title.
5. As both parties has stated that the dispute was a boundary dispute, the court noting that it appears that the dispute concerned boundary of registered and unregistered land, and that parties had not clarified on whether the court had jurisdiction or not, the court directed parties to file submissions and address the question of whether the court had jurisdiction to hear and determine the dispute herein. The defendants filed their submissions dated 26th March 2024 while the plaintiff filed his submissions dated 21st May 2024.

Defendants' submissions

6. Counsel for the defendants submitted that the averments in the plaint, defence and counterclaim confirm that there is no dispute as to ownership of the four parcels of land mentioned in the pleadings as the three parcels owned by the defendants are adjacent to the plaintiff's parcel. On that basis, counsel argued that the dispute herein is a boundary dispute disguised as a claim for general damages, loss of user, injunction and eviction.
7. It was further submitted that it was the 2nd defendant's land that was registered and that the boundaries thereof were not fixed. Counsel argued that where a statute has provided a mechanism for dispute resolution, the court cannot abrogate such mechanism. To buttress this argument, counsel referred the court to the case of Speaker of the National Assembly v. James Njenga Karume [1992] eKLR.
8. Counsel contended that Sections 18 (2) and 19 of the *Land Registration Act* placed the power of resolving boundary disputes in the Land Registrar. Reliance was placed on the case of Estate of Sonrisa Ltd & Another v. Samuel Kamau Macharia & 2 Others [2020] eKLR for the proposition that determination of boundary disputes is vested in the Land Registrar.

Plaintiff's submissions

9. Counsel for the plaintiff submitted that there is no boundary dispute herein as the boundaries of individual plots is known to all the parties herein. Counsel argued that the pleadings demonstrated that what was in court was an ownership dispute regarding parts of the plaintiff's plot and not a boundary dispute. Counsel submitted that according to Section 18 (3) of the *Land Registration Act*, and Section 23 (1) of the Surveyors Act, boundary disputes are resolved by surveyors.
10. Counsel submitted that the defendants have declined to accept the beacons placed by five different surveyors and used threats and actual force on the plaintiff. They submitted that the entire land in dispute formerly belonged to Muka Mukuu who subdivided the land and resolved all boundary disputes herein as seen from the letters from Muka Mukuu and that the defendants are aware of the boundaries. They submitted that the defendants had rejected decisions of Muka Mukuu.



11. It was further submitted that as the suit property was originally registered as Donyo Sabuk/Donyo Sabuk West Block 1, the resultant subdivisions do not fall under the Registrar of Lands and that Sections 79, 80, 86 and 91 of the [Land Registration Act](#) do not apply.
12. Relying on the cases of Owners of Motor Vessel “Lilian S” v. Caltex Oil Kenya Ltd [1989] KLR 1 and Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others [2012] eKLR, counsel submitted that jurisdiction is everything and it only flows from the law. The court was referred to Section 13 of the [Environment and Land Court Act](#) and it was submitted for the plaintiff that the prayers sought by the plaintiff was within the court’s jurisdiction. Counsel argued that Section 16 of the [Land Registration Act](#) 2012 which relates to boundary disputes does not apply to the current suit which is about encroachment, trespassing and loss of user rights. Further that the process under Section 16 is not mandatory and a party can choose to subject themselves to that process or seek redress in a court of competent jurisdiction. Counsel cited the case of Republic v. Firearms Licensing Board & Another Ex parte Boniface Mwaura [2019] eKLR to buttress his argument that where the word “may” is used it means that compliance is not mandatory.

Analysis and determination

13. The court has considered the pleadings and parties rival submissions. The only issue that arise for determination is whether this court has jurisdiction to hear and determine the dispute herein.
14. Jurisdiction is everything and the moment the court finds that it has no jurisdiction, it must down its tools. In the case of Motor Vessel “Lilian S” v. Caltex Oil (Kenya) Ltd [1989] KLR 1, the court held as follows;

I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.
15. A court cannot arrogate itself jurisdiction it does not have. A court’s jurisdiction flows from [the Constitution](#) or statute or both, and therefore, before a court embarks on trying any dispute, it must be satisfied that it has jurisdiction which is anchored in law to hear and determine such dispute. In the case of Samuel Kamau Macharia & Another v. Kenya Commercial Bank Ltd & 2 Others [2012] eKLR, the Supreme Court of Kenya held as follows;

A court’s jurisdiction flows from either [the Constitution](#) or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by [the Constitution](#) or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.
16. Section 18 of the [Land Registration Act](#) provides for jurisdiction to determine disputes concerning general boundaries as follows;
 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.



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:

Provided that where all the boundaries are defined under section 19 (3), the determination of the position of any uncertain boundary shall be done as stipulated in the [Survey Act](#), Cap. 299.
17. Therefore, it is clear that this court has no jurisdiction to entertain a claim relating to a boundary dispute of registered land for unfixed boundaries as that jurisdiction is vested the Land Registrar who has the power to receive evidence and make a determination.
18. All the land registered under the repealed Registered [Land Act](#) Cap 300 Laws of Kenya had general boundaries. Those boundaries are not fixed boundaries, like the ones of land registered under the Registration of Titles Act and therefore, until the boundaries have been determined (by the Land Registrar) a surveyor has no jurisdiction to determine a dispute on undefined, general and or unfixed boundaries. A surveyor can only determine a dispute under the [Survey Act](#) Cap 299, where the boundary has been defined under Section 19 (3) of the [Land Registration Act](#). Section 19 (3) of the [Land Registration Act](#) provides thus;
 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.
19. I now turn to the pleadings to ascertain the nature of the dispute herein. In the plaint, the plaintiff avers that the defendants herein who are his neighbours, have encroached on parts of his land. In defence, the defendants maintain that it is the plaintiff who has been curving out or excising part of the defendants' land. Although the plaintiff argued that this is not a boundary dispute, it is clear that his allegation of encroachment of part of his land by the defendants and their denial insisting that the land is theirs and it is the plaintiff interfering with the beacons; point to no other dispute but a boundary dispute. At any rate, the plaintiff's own documents has several survey reports, one by the County Surveyor Machakos; another by Muka Mukuu; and another by Boma Surveys. There is also a letter dated 20th April 2021 from Muka Mukuu referenced as boundary dispute, other letters from Muka Mukuu dated 5th June 2021 and 12th February 2020 both on survey exercise. In addition, it is the plaintiff's counsel who pointed out to court on 12th March 2024 that the dispute herein was a boundary dispute, and indeed having considered the pleadings, witness statements and exhibits, the dispute herein is clearly a boundary dispute.
20. Are the boundaries herein general or fixed boundaries? I have considered the title deeds for parcels Donyo Sabuk/Donyo Sabuk West Block 1/2119 and it is clear that the registration of the 2nd defendant was on 8th June 2017, but the title was opened on 13th May 2014, the registration section indicating the mother Block being Block Sabuk/Donyo Sabuk West Block 1. It is apparent that the title was first registered in the name of Muka Mukuu before being transferred to the defendant. Muka Mukuu identified the plots as P/No. 7 – xxx but the same are in regard to a bigger parcel registered under the repealed Cap 300 Laws of Kenya. As the suit property is registered but with general boundaries, I find and hold that the boundaries thereof have not been determined under Section 19 (3) of the [Land Registration Act](#) and therefore the dispute herein can only be determined by the Land Registrar since the defendants' titles are registered in their names while the plaintiff's title is apparently still in the name of Muka Mukuu.
21. For the above reasons, I find and hold that this court lacks jurisdiction to hear and determine this dispute and the same is hereby struck out with costs to the defendants.



22. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 30TH DAY OF OCTOBER 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Ms. Kitang'a holding brief for Mr. Mboya for plaintiff

Mr. Muthomi for defendant/respondent

Court assistant – Josephine

