



**Drumville Farmers Co-operative Society Limited & 2 others v Koto
Housing Kenya Limited & 3 others (Environment & Land Case
956 of 2016) [2023] KEELC 15879 (KLR) (6 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 15879 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 956 OF 2016**

**AA OMOLLO, J
JANUARY 6, 2023**

BETWEEN

**DRUMVILLE FARMERS CO-OPERATIVE SOCIETY LIMITED . 1ST PLAINTIFF
CATHERINE WANGUI MWANGI 2ND PLAINTIFF
SAMUEL MAINA NJARIA 3RD PLAINTIFF**

AND

**KOTO HOUSING KENYA LIMITED 1ST RESPONDENT
BONCO BUILDERS CONSTRUCTION LTD 2ND RESPONDENT
INSPECTOR GENERAL OF POLICE 3RD RESPONDENT
THE HONOURABLE ATTORNEY GENERAL 4TH RESPONDENT**

JUDGMENT

1. The three plaintiff brought this suit against the Defendants vide a plaint dated August 8, 2016 and filed on the same date. They pleaded that the 1st plaintiff is the initial owner of LR No Nairobi Block 118/1192 while the 2nd and 3rd plaintiffs are the current owners having purchased the same from the 1st plaintiff. The 1st plaintiff stated that on or about June 20, 2016, it sold the suit parcel and caused it to be transferred to the 2nd and 3rd plaintiffs.
2. The plaintiffs aver that the 1st and 2nd defendants who are contractors have encroached on LR. No Block 118/1192 and are causing malicious damage, destruction, uprooting fences and trespassing on the said land to their detriment as the registered owners. They listed the particulars of loss thus:
 - i. Loss of value of land.
 - ii. Loss of opportunity of investment.



3. The plaintiffs plead that the Court has jurisdiction to hear the matter. They prayed for judgment to be entered in their favour as follows:
 - a. A declaration that Land Parcel Number Nairobi Block 118/1192 belongs to Cathrine Mwangi and Samuel Maina absolutely.
 - b. A permanent injunction to restrain the 1st, 2nd, 3rd & 4th Defendants. Their agents, workers, employees or anyone acting on their behalf from encroaching, constructing, damaging, building, fencing or dealing in any manner whatsoever with the plaintiffs land Parcel Number Nairobi/Block/118/1192.
 - c. Costs of this suit be paid.
4. The 1st Defendant filed a statement of defence on 8th May 2018 denying the entire claim. The 1st Defendant pleaded that the 1st plaintiff lacks locus standi to institute the suit as they do not own the property and there is no proof that the 1st plaintiff has authority to bring the suit. The 1st defendant added that they are agents of known principals hence no action is maintainable against it and the 2nd defendant.
5. The 1st defendant pleaded further that:
 - a. At the time of the alleged trespass the land belonged to the Government and the 1st Defendant entered upon the said land by the command and authority of the Government through the Ministry of Lands, Housing and Urban Development.
 - b. The 1st Defendant was contracted as an agent by the Ministry of Lands, Housing and Urban Development (hereafter referred to as “the Ministry”) to construct the proposed National Police and Kenya Prisons Services Housing project at Kamulu.
 - c. The Ministry handed over the site to the 1st Defendant in March 2016 and thereafter the 1st defendant engaged a surveyor who identified the beacons. The 1st defendant thereafter sub-contracted the 2nd defendant to undertake construction works on behalf of the 1st defendant.
6. That no particulars of loss has been pleaded. The 1st Defendant urged that the suit against it be dismissed with costs.
7. The 3rd and 4th Defendants filed their defence on October 11, 2016 denying the plaintiffs’ claim and pleaded that they (plaintiffs) are not entitled to the prayers sought in the plaint.
8. On January 30, 2019, the parties entered a consent on the following terms:
 - “ 1. The suit against the 1st and 2nd Defendants is withdrawn with no order on costs.
 2. The Director of Survey in the presence of parties independent surveyors are directed to visit, identify and mark the legitimate boundaries of NBI Block 118/1192 and determine any encroachment and file their report.
 3. The 2nd and 3rd plaintiffs were to meet the costs of the Director of surveys.”
9. The Regional surveyor’s report dated January 17, 2020 was filed on January 23, 2020. The Regional Surveyor said that after she obtained the RIM and area list she observed that the area list and the title for 1192 tally which confirms that parcel No 1193 has encroached on parcel 1192. That the first report dated 9/10/2019 was prepared before she got the area list and the RIM.



10. In cross-examination by Mr. Njuguna the State Counsel, the witness stated that the survey plan gave area for suit plot at 0.806 ha while the area list gives the size at 1.5ha. That the area list and RIM should be used because they both tally with the ground position. That it was the responsibility of the Survey of Kenya to correct the discrepancy.
11. Under cross-examination by Mr. Wachakana learned counsel for plaintiffs, the Regional surveyor confirmed that parcel 1193 had encroached on parcel 1192. She could not ascertain the ownership of 1192 but the certificate of title in her hands read the names of the 1st plaintiff. In re-examination, the surveyor said there are septic tanks on the encroaching portion. That the RIM, area list and title depicts the ground position but not the survey plan.
12. The Court was then tasked to make a determination of the matter. From the report filed and the evidence during cross-exam of the Regional Surveyor, she confirmed that parcel No 1193 owned by the 3rd Defendant had encroached on the parcel No 1192 owned by the 2nd and 3rd plaintiffs. The surveyor attached the RIM and survey plan for the area in dispute. The documents show different boundary positions on facial observation. According to this witness, she said the Court should adopt the boundary as shown in area list and RIM which boundary tally with the ground position.
13. This Court is guided by the principles to be considered while relying on an expert evidence as was stated in the case of *Kagina Vs Kagina & 2 others* (2021) KECA which quoted *Stephen Kinini Wang'onddu Vs The Ark Limited* (2016) eKLR thus;

“It is trite principle of evidence that the opinion of the expert, whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts which are proved, exclusive the evidence of the expert, to the satisfaction of the Court according to the appropriate standard of proof. An expert gives an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based or state explicitly the assumptions as to fact on which the opinion is based.”
14. The Regional Surveyor who filed the report before this Court is a government surveyor. The consent order allowed parties during the regional surveyor's site visit to be accompanied by their independent surveyors. No party especially the defendants filed any survey report that was contradictory of the Regional Surveyor's report. Besides, the witness explained that she concluded there was encroachment by parcel 1193 onto parcel 1192 guided by the boundaries set in the area list, the R.I.M and the size of land as indicated on the certificate of title which 3 documents tallied with the ground position.
15. I am therefore persuaded to find that the expert's opinion evidence which affirmed the encroachment was corroborated with documents thus verifiable. Further, there is no document that was presented to contradict the findings of the Regional Surveyor hence the same is upheld by this Court. Consequently, this Court enters a finding in favour of the plaintiffs that parcel No 1193 has encroached on their land.
16. On account that parcel No 1193 is the property of the 3rd Defendant judgment is entered against it on the following terms:
 - i. An order of permanent injunction be and is hereby issued restraining the 3rd defendant, her agents, assigns or any persons acting on her behalf from encroaching onto, constructing damaging, fencing or dealing in any manner with any part of the plaintiffs land parcel No Nairobi/Block 118/1192.



- ii. An order be and is hereby issued to the Director of surveys of Kenya to amend the survey plan for Nairobi/Block 118/1192 and Nairobi/Block 118/1193 to conform with boundaries as provided for in the area list, certificate of titles and RIM for the two parcels.
- iii. Each part to bear their respective costs of the suit.

DATED, SIGNED & DELIVERED ONLINE AT MILIMANI THIS 6TH DAY OF JANUARY, 2023.

A. OMOLLO

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Wachakana for 1st Plaintiff

Mikwa holding brief for Gitonga for 2nd & 3rd Plaintiffs

Miss Njuguna for 3rd & 4th Defenddants

