Nzyoka v Mativo & 3 others; Kibua (Interested Party) (Environment and Land Appeal 8 of 2017) [2023] KEELC 15940 (KLR) (22 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15940 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND APPEAL 8 OF 2017

A NYUKURI, J

FEBRUARY 22, 2023

(FORMERLY CIVIL APPEAL NO. 94 OF 2014 – MACHAKOS)

BETWEEN

ISAAC WAMBUA NZYOKA ..... APPELLANT

AND

DAVID KISILU MATIVO ..... 1ST RESPONDENT

NICHOLAS MUIA MATIVO ..... 2ND RESPONDENT

BONIFACE MUTUKU MATIVO ..... 3RD RESPONDENT

TIMOTHY MALINDA MATIVO ..... 4TH RESPONDENT

AND

THOMAS NZIOKI KIBUA ..... INTERESTED PARTY

(Being an Appeal from the Judgment of Chief Magistrate's Court at Machakos in Civil Suit No. 1006 of 2008 delivered on 25th April 2014 by Hon. L. Simiyu, Ag. Senior Resident Magistrate)

RULING

Introduction

1. This Appeal arises from the judgment delivered on April 25, 2014 by the Senior Resident Magistrate at Machakos (Hon L Simiyu) allowing the Respondents' claim as sought in the plaint dated September 25, 2008; resulting in orders for removal of a caution lodged by the Appellant on the Respondents' parcel of land, permanently injuncting the Appellant from placing a caution thereon and an award for nominal damages of Kshs 100/- for the Respondent.

Background

2. The Respondent filed a plaint dated September 25, 2008 in the Chief Magistrates Court at Machakos seeking the following orders;

    a. An order that caution lodged on February 1, 1994 with Machakos Land Registry is wrongful and unlawful and be removed.

    b. A perpetual order do issue against the Defendant by himself, agents and servants from lodging a caution against Machakos/Mua Hills/288 on the same alleged purchasers interest.

    c. General damages.

    d. Costs and interests.

3. The Plaintiffs contended in their plaint that they were the administrators of the estate of the late Mativo Kituu, who was the sole registered proprietor of all that parcel known as Machakos/Mua Hills/288 (suit property). Further that in 1990, the Defendant attempted to deprive the deceased of the suit property which led the deceased to file Machakos PMCC No 193 of 1990, which case was decided in favour of the deceased.

4. It was further averred by the Plaintiff that on February 1, 1994, the Defendant without any colour of right wrongfully and unlawfully lodged a caution at Machakos Land Registry over the suit property claiming a purchaser's interest. They also alleged that they filed Succession Cause No 375 of 2005 in respect of the estate of their late father which resulted in a confirmed grant dated 22nd May 2006 allowing the suit property to be registered in their names. That they cannot have the transfer effected in their favour due to the Defendants caution on the suit property. As far as the Plaintiffs were concerned, there was no sale transaction in respect of the suit property between their late father and the Defendant and argued therefore that the caution lodged by the Defendants was unlawful and without justification.

5. The Defendant entered appearance and filed defence dated October 29, 2008. He denied the Plaintiff's claim and averred that he purchased Plot Number 304 Mua Hills Settlement Scheme measuring 31.7 acres from one Flora Syokau Mukola in 1972 which plot borders the suit property. It was further his case that he filed Machakos HCCC No 174 of 1994 against the Commissioner of Lands and Director of Settlement where the court ordered that the Defendants reaffirm the fact that Plot No 304 Mua Hills Settlement Scheme exists in their records; that the Defendant marks out and identifies the boundary of Plot No 304 Mua Hills Settlement Scheme on the ground and that Plot No 304 Mua Hills Settlement Scheme is the property of the Defendant.

6. The Defendant admitted to lodging a caution in respect of the suit property but denied that the same was unlawfully and wrongfully lodged. He contended that on November 15, 1993, the late Mativo Kituu was issued with a Land Certificate for the suit property which unlawfully included part or the whole of Plot No 304 Mua Hills Settlement Scheme belonging to the Defendant. He lamented that he had been denied access and possession of Plot No 304 Mua Hills Settlement Scheme by the Plaintiffs.

7. The Defendant insisted that there can be no transfer, sale, subdivision, interference or transaction in respect of the suit property until the boundaries of Plot Number 304 Mua Hills Settlement Scheme are identified and clearly marked.

8. The proceedings show that by application dated September 2, 2013, one Dr. Thomas Nzioki Kibua sought to be joined to the suit as an Interested Party, which was allowed. Thereafter, although the matter came up for hearing severally, the same did not proceed. Eventually, on November 14, 2013, all

the three counsel for the three parties in the matter appeared in court; with Mr Mugo holding brief for Mr Mutua Makau for the Plaintiff; Mr Wambola holding brief for Mr Kihara for the Defendant and Ms Thiongo holding brief for Mr Makundi for the Interested Party. On that date, Mr Mugo, counsel for the Plaintiff informed court that parties had agreed to have a common surveyor visit the suit property and that the surveyor's costs be shared. Mr Wambola holding brief for Mr Kihara for the Defendant confirmed that position. On November 28, 2013, Mr Makundi informed court that they had identified a surveyor and sought for two weeks for the report to be availed in court. That position was again confirmed by Mr Wambola who was present holding brief for Mr Kihara for the Defendant.

9. On December 5, 2013, Mr Mwaniki holding brief for Mr Kihara for the Defendant confirmed that they had agreed on a surveyor called Mr Musowa and that charges had been paid and they had agreed that he visits the land and files a report. The record further shows that on February 13, 2014, Mr Okoth appeared for the Defendant, Mr Makau Mutua for the Plaintiff and Mr Makundi for the Interested Party. The three counsel dictated a consent which was recorded by the court as follows;

    1. By consent the District Land Registrar in conjunction with the District Land Surveyor do visit Mua Hills and identify using the official maps and survey plans the said land Machakos/Mua Hills/288 and Machakos/Mua Hills/304.

    2. Parties to appear before the Land Registrar and Land Surveyor to agree on fees and dates.

    3. Costs of survey to be shared by parties.

4. Mention on February 26, 2014. The record also shows that the three advocates signed the consent in the court file.

10. Subsequently, on February 27, 2014, Mr Makau Mutua for the Plaintiff informed court that the surveyor was scheduled to visit the land on March 13, 2014. He therefore sought for more time. That position was confirmed by Mr Okoth, counsel for the Defendant. Therefore, on March 20, 2014, when Mr Njoroge held brief for Mr Kihara for the Defendant; Mr Orwanjo held brief for Mr Makundi for the Interested Party and Mr Mugo appeared for the Plaintiff; Mr Njoroge for the Defendant confirmed the position that the surveyor had visited the land and that the parties were seeking for another date to allow filing of the surveyor's report.

11. Subsequently, when the matter came up for further mention on April 3, 2014, it was only counsel for the Interested Party and the Plaintiff that were in court. The defence counsel was absent. On that date, counsel for the Plaintiff informed court that the surveyor's report had been filed and that it was clear from the report that Parcel No 304 Mua Hills Settlement Scheme does not border the suit property. He therefore sought for the adoption of the report and for the removal of the caution. Counsel sought for a judgment date.

12. In her judgment delivered on April 3, 2014, the trial court taking into account the totality of the evidence noted that the parties had consented to the surveyor and Land Registrar's visit of the suit property and having considered the Land Registrar and Land Surveyor's report plus the two Map Sheets filed, the court was of the view that that evidence was sufficient to settle the matter. The trial court on consideration of the said report noted that the two parcels in issue were separate from each other and they did not border each other as they were on separate map sheets. The court also noted that the findings in the report were consistent with the earlier findings in PMCC No 193 of 1990 which report stated that the surveyor could not mark out the boundary of Plot No 304 Mua Hills Settlement Scheme which was seven kilometres away from the suit property. Subsequently, the court found that in lodging the caution, the Defendant acted unreasonably. The trial court further pointed out that the Defendant had not attempted to enforce the decree in HCCC No 174 of 1994 by compelling the

Commissioner of Lands and Director of Settlement or their successors to map out or identify and mark the boundaries of his parcel.

13. The trial court further found that the Defendant had no valid claim on the suit property, as the two plots do not border each other hence the defence was baseless. The court therefore ordered the removal of the caution, nominal damages of Kshs 100/- and an injunction to stop the Defendant from lodging a caution on the suit property.

14. It is that finding that provoked the current appeal. By a Memorandum of Appeal dated May 8, 2014, the Appellant expressed his dissatisfaction with the trial courts judgment based on the following grounds;

    1. The Learned Resident Magistrate erred in law and fact in failing to make pragmatic and substantive consideration to the fact that the Appellant is the registered proprietor of all that parcel of land known as Plot No 304 Mua Hills having purchased the same from one Mrs. Flora Syokam Muro in the year 1978.

    2. The Learned Resident Magistrate erred in law and fact in failing to make consideration to the fact that the official records at the Department of Lands had confirmed the existence of the subject parcel of land, namely Plot No 304 Mua Hills and more importantly that the same was inclusive of Plot No 288 hence necessitating a sub-division of the two parcels.

    3. The Learned Resident Magistrate erred in law and fact in failing to make consideration to the fact that vide a letter dated March 27, 1990, the then Senior Land Adjudicator/Settlement Officer Mr G. C. Mwairumba wrote to the Appellant and the late Mativo Kituu clearly confirming that Plot No 304 belonged to the Appellant and Plot No 288 belonged to the late Mativo Kituu.

    4. The Learned Resident Magistrate erred in law and fact in failing to make consideration on the fact that the Appellant had enjoyed peaceable and quiet possession of the subject land from 1978.

    5. The Learned Resident Magistrate erred in law and fact by adopting the surveyor's report without availing the Appellant's advocate chance to file objection to the same.

    6. The learned Resident Magistrate erred both in law and fact in ordering that caution lodged by the Appellant on 1st February 1994 with Machakos Land Registry is wrongful and unlawful and be removed.

    7. The Learned Resident Magistrate erred both in law and fact in finding that a perpetual order do issue against the Appellant by himself, agents and servants from lodging a caution against Machakos/Mua Hills/288.

    8. The Learned Resident Magistrate erred both in law and fact in finding for the Plaintiffs and awarding nominal damages for the sum of Kshs 100/- each by failing to appreciate sufficiently or at all that the Appellant did have a reasonable defence.

    9. The Learned Resident Magistrate erred in both law and fact by finding for the Plaintiffs and awarding costs to the Plaintiffs to be paid by the Appellant.

    10. The Learned Resident Magistrate erred in law and fact by failing to appreciate sufficiently or at all the evidence on record adduced by the Appellant.

11. The Learned Resident Magistrate erred both in law and fact in failing to put into consideration the fact that the said judgment and/or orders was setting a bad precedent by giving a judgment and/or ruling against the weighty evidence on record.

12. The Learned Resident Magistrate erred in law in finding on the basis of the District Surveyor's (Mr Symon Maina) report when the evidence was contrary to the applicable report that had always been available in court.

15. Subsequently, the Appellant sought the following orders;

a. That this Appeal be allowed with costs.

b. That the court re-evaluate the pleadings, judgment and/or orders of the Resident Magistrate delivered/or made on April 25, 2014 and the evidence on record and make a finding in favour of the Appellant.

c. That the court makes any such other or further orders that may deem appropriate and just in the circumstances.

d. That the costs of the appeal be paid by the Respondents to the Appellant.

16. This appeal was canvassed by way of written submission. On record are the Appellant's submissions dated May 12, 2022 and the Respondents' submissions dated September 27, 2022.

Appellant's Submissions

17. Counsel for the Appellant submitted on ground one of the Memorandum of Appeal that the Appellant presented sufficient evidence that he was the registered bonafide owner of Plot No 304 Mua Hills Settlement Scheme which had been previously included in Plot No 288. Counsel pointed out that among the documents produced by the Appellant was the Surveyor's report of July 19, 2001 which according to counsel, demonstrated that the land belonging to the Appellant was inclusive in the suit property and hence a subdivision thereof was required.

18. Counsel argued that the learned trial magistrate failed to take into account the judgment delivered in Machakos HCCC No 14 of 1994 where the court ordered that Plot No 304 Mua Hills Settlement Scheme was the property of the Appellant and ordered the Commissioner of Lands and the Director of Settlement to ascertain the plot exists and identify its boundaries. It was counsel's view that the Appellant had proved its case beyond the balance of probabilities by presenting sufficient evidence to support his claim that he was the bonafide owner of Plot No 304 Mua Hills Settlement Scheme that had erroneously been included in the suit property.

19. As regards grounds 2 and 4 of the Memorandum of Appeal, counsel argued that the same addressed the issue of ownership of Plot No 304 Mua Hills Settlement Scheme. It was submitted for the Appellant that the court failed to take into account the contents of the letter by the Senior Land Adjudicator/ Settlement Officer dated March 27, 1990 that clearly stated that Plot No 304 Mua Hills Settlement Scheme belonged to the Appellant while the suit property belonged to the late Mativo Kituu. Further, counsel argued that the court failed to consider the fact that he had enjoyed peaceful and quiet possession of Parcel 304 Mua Hills Settlement Scheme until July 14, 1993 when the Land Adjudication Officer erroneously declared that Plot No 304 Mua Hills Settlement Scheme was a church and not the land allegedly owned by the Appellant. In contending that courts ought to accord due respect to opinions of experts before making determinations, counsel referred the court to the case of *Arvin Singh Dhalary v Republic* Criminal Appeal No 10 of [1997] eKLR.

20. In arguing grounds 5, 6 and 7 of the Memorandum of Appeal, counsel for the Appellant contended that the trial court erred in adopting the District Surveyor's report without availing the Appellant a chance to file an objection to the same. Counsel insisted that the Appellant and his advocate had not consented to the said surveyor's report. Counsel stated that the only persons that consented to the report were the Respondents and an Interested Party and that the court adopted the surveyor's report in the absence of the Appellants. Counsel relied on Sections 18 (2) and 19 (2) of the *Land Registration Act* as well as the case of *Gichobo Farmers & 15 Others v Muiruri Gitito & 2 Others* [2020] eKLR, for the proposition that a surveyor should only visit the suit property after giving all the affected parties notice of their visit and thereafter file a consented report. Counsel relied on Article 159 of the *Constitution* and argued that the omission was not a technicality but touched on the substance. Reliance was placed on the case of *Raila Odinga v IEBC & others* [2013] eKLR.

21. In contending that the Appellant should be allowed to adduce additional evidence, counsel argued that he filed an application on April 4, 2017 seeking to adduce further evidence. Counsel submitted that if the Appellant is allowed to adduce further evidence in this Appeal, which was unavailable at the time of trial, then the surveyor who filed the report in the lower court would have appreciated the fact that official records at the Lands Department confirmed the existence of Plot No 304 Mua Hills Settlement Scheme and showed that the same was included in the suit property and that, therefore what needed to be done was a subdivision of the suit property. Counsel referred to the case of *Mohammed Abdi Mahamud v Ahmud Abdullah Mohamad & 3 Others; Ahmed Ali Muktar (Interested Party* Petition No 7 of 2018.

22. Further, submission was made for the Appellant that the Appellant proved his case beyond reasonable doubt that he was the legitimate proprietor of Plot No 304 Mua Hills Settlement Scheme. Reliance was placed on Sections 107, 109 and 112 of the *Evidence Act*. Counsel invited court to re-analyze, re-evaluate the evidence on record and arrive at its own independent conclusions. Reference was made to the cases of *Sotik Tea Highlands Estate v Omayo* [2007] eKLR, *Selle v Associated Motor Boat Co.* [1968] EA 123 and *Ephantus Mwangi & Another v Duncan Mwangi* Civil Appeal No 77 of 1982 [1982-1988] 1 KAR 278. Counsel argued that the surveyor's report filed was contrary to other evidence on record and therefore that the judgment set a bad precedent. The court was referred to the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334.

Respondents' Submissions

23. Counsel for the Respondent set out four issues for determination in this appeal as follows;

    a. Can an appeal lie on a judgment based on consents?

    b. Can a judgment/award made more than 12 years old be executed?

    c. Can new evidence be brought on appeal?

    d. Is a party bound by its pleadings?

24. It was submitted for the Respondent that pages 133 upto 136 and page 143 of the record showed that the basis of the judgment was a consent order, which mandated the County Surveyor to visit both suit properties and establish their existence. Counsel pointed out that the report was filed in court and formed part of the record but the same was missing in the record of appeal yet it was a very crucial document. Counsel stated that the report of the surveyor dated March 13, 2014 stated that the suit property was in map sheet 4 while Plot No 304 Mua Hills Settlement Scheme was on map sheet No 2 therefore the two plots do not share a boundary.

25. Counsel also pointed out that the surveyor's report of June 8, 1992, which was the subject of the 1996 judgment upon which the Appellant seeks to enforce, made findings that Plot No 304 Mua Hills Settlement Scheme is a church and its position is not anywhere near the suit property and that Plot No 304 Mua Hills Settlement Scheme was not shown on the Part Development Plan used in demarcating the suit property and the other plots in the scheme. Therefore counsel concluded that the two reports which were made many years apart, confirmed that the Appellant's land is nowhere near the Respondent's land.

26. Counsel relied on Section 67 (2) of the *Civil Procedure Act* to contend that no appeal shall lie from a decree passed by the court with the consent of parties. It was argued for the Respondent that this appeal should be summarily dismissed as provided for in Section 79 C of the *Civil Procedure Act*. To buttress this point, counsel relied on the cases of *Uasin Gishu Weekly Advertiser Ltd v Abdul Aziz Kanji & 2 others*, *Nicholas Kigo Wambugu v Miriam Nyawira Mwaniki* [ELCA 4 of 2016] and East African Portland Cement v Superior Homes.

27. Counsel also relied on the case of *Arvin Singh Dhalay v Republic* Criminal Appeal No 10 of 1997, for the proposition that an expert's report; in this case the surveyor's report needs to be given a lot of attention.

28. On whether a judgment/award that is more than 12 years can be executed, counsel argued that by an application dated March 27, 2017, the Appellant sought leave to adduce new evidence but the application was dismissed by the ruling dated September 28, 2018 and therefore that the attempt by the Appellant to reintroduce that matter amounts to asking the court to sit on appeal of its own decision. Counsel further argued that part of the Appellants documents at pages 52 to 54 is a judgment delivered in 1996 which judgment the Appellant sought to enforce. That as per that judgment the surveyor prepared reports dated June 8, 1992 and March 13, 2014 and stated in both reports that Plot No 304 Mua Hills Settlement Scheme was not anywhere near Plot No 288. Counsel therefore argued that Section 4 (4) of the *Limitation of Actions Act* barred execution of a judgment that was more than 12 years old. In that regard, counsel relied on the case of M'Ikiara M'Rinkanya and Malakwen Arap Maswai v Paul Kosgei Eldoret Civil Appeal No 230 of 2001.

29. It was further submitted by the Respondents' counsel that parties are bound by their pleadings. Counsel stated that this was not a boundary issue as the surveyor's report demonstrating that the two plots in issue did not share a common boundary. Counsel argued that the issue of the matter being a boundary issue never arose in the lower court and therefore it certainly cannot arise in this appeal. Reliance was placed on the case of *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 Others* (Civil Appeal No 219 of 2013).

Analysis and Determination

30. I have carefully considered the appeal, the parties' submissions and the entire record. I note that the claim filed in the lower court by the Respondent raised a single issue; as to legality of the caution lodged by the Appellant on the suit property. In the instant appeal, the Appellant's arguments are anchored on ownership and the position of Parcel No 304 Mua Hills Settlement Scheme. The Appellant's position is that he was the owner of Parcel No 304 Mua Hills Settlement Scheme measuring 31.7 acres and that official records at the Ministry of Lands demonstrate that the said plot exists, is owned by the Appellant and that the same was included in the Respondents Parcel Machakos/Mua Hills/288. Therefore, the main issue that this appeal ought to address is whether the Appellants claim that Plot No 304 Mua Hills Settlement Scheme was part of the suit property is justified and therefore a proper basis for the caution placed on the suit property.

31. It is not in dispute that the Respondent is the registered proprietor of Parcel No Machakos/Mua Hills/288 (suit property) and the fact that the Appellant lodged a caution on that property on 1st February 1994 claiming a purchaser's interest is not disputed. It is also not in dispute that there is no land purchase agreement between the Appellant and the Respondent. The Appellant submitted extensively that he proved his claim that he was the owner of Parcel No 304 Mua Hills Settlement Scheme based on the letter dated March 27, 1990 by one G. C. Mwairumba, the Senior Land Adjudication/Settlement Officer Machakos District. That letter stated that Mr Mativo Kituu was the owner of Parcel No 288 Mua Hills while the Appellant was the owner of Parcel No 304 Mua Hills Settlement Scheme. On that basis, the Appellant's position was that the evidence in the Land Surveyor Machakos report dated 13th March 2014 was inconsistent with evidence on record and that he was not party to the survey report which the trial court relied on in its judgment.

32. I must point out at this stage that the Appellant was not forthright on the issues he raised on the Machakos Land Surveyor's report. To begin with, although the Appellant's appeal was substantially in regard to the said report, the said report was omitted in the record of appeal. I have perused the lower court record and the hand written proceedings thereof and I not that the surveyor's report was dated 13th March 2014. That report was filed pursuant to the parties consent wherein the Appellant was party to the said consent. The record clearly shows that the Appellant took part in the negotiations that led to an agreement to have one surveyor visit the suit property to establish the allegations made by the Appellant that his parcel was inside the Respondents' parcel.

33. Further, the trial court record shows that on March 20, 2014, the defence counsel confirmed to the court that he took part in the visit done on the suit property by the Land Registrar and Land Surveyor, Machakos. This is confirmed by the surveyor's report which stated that on the date of the visit on March 13, 2014, those present were the Land Registrar, one George Njoroge, the Land Surveyor, the area Chief one Julius Ndasini, the Plaintiff, Defendant and the Interested Party. The Appellant therefore only decided to take an about-turn after the visit and the filing of the report which clearly showed that his allegations that his land was merged with the Respondent's land were not correct. This realization must have been the reason the Appellant was absent in court on 3rd April 2014 when the parties appeared in court to confirm filing of the report. Therefore, his argument that he was not party to the surveyor's report is a dishonest position on his part, as the consent on the trial court record in the handwritten proceedings of the court to have both the Land Registrar and the Land Surveyor visit the suit property; was signed by the Appellants advocate. Even when the Appellant was aware of the next mention date to confirm filing of the surveyor's report, he failed to attend court and therefore his argument that he was not given opportunity to object to the said report are baseless as he never sought for such opportunity. In any event, he took part in the surveyor's visit and cannot object the report merely because it did not favour him.

34. While the Appellant had obtained a judgment vide Machakos HCCC No 174 of 1994 directing the Commissioner of Lands and the Director of Settlement to establish whether Parcel 304 Mua Hills Settlement Scheme exists and also to mark out and identify the boundaries of the said plot, no attempt had been made by the Appellant to have those orders executed. Even at the point of lodging a caution on the Respondent's parcel on the premises that his land was subsumed in the Respondent's land, no Government Surveyor had ever established the existence and boundaries of Parcel No 304 Mua Hills Settlement Scheme. Therefore, it was only proper for the Land Registrar and Land Surveyor to obtain the official Registry Index Maps (R.I.Ms) in their custody and to visit the suit property so as to establish whether the Appellants allegations against the Respondent's title were correct. The surveyor attached the (R.I.M) and visited the suit land in the presence of the Land Registrar, the area Chief and the three parties in the suit. The Appellant was present. He has not faulted the process taken by

the surveyor or raised an issue on whether the surveyor took into account irrelevant matters or failed to take into account relevant matters. He has not given any basis for the objection he says he was not allowed to raise. The Appellant having subjected him self and agreed to the surveyor's determination of the question as to the position of Parcel No 304 Mua Hills Settlement Scheme cannot now distance himself from the surveyor's report just because the report is not in his favour. He had a judgment that required establishment of boundaries of his property. Both the Land Registrar and Land Surveyor using the Registry Index Maps were well placed and are the proper Government officials to answer the question raised in the Appellants defence in regard to the position of Parcel 304 Mua Hills Settlement Scheme. It is therefore my finding that the trial court did not error in taking into account the report filed by the Land Surveyor as that was the only logical and rational expert evidence necessary to unravel the dispute.

35. The Appellant also argued that the court ignored the other evidence on record which demonstrated that Parcel No 304 Mua Hills Settlement Scheme was subsumed in Parcel No 288. He relied on the letter dated March 27, 1990 by one G. C. Mwairumba, the Senior Land Adjudicator/Settlement Officer Machakos District, which letter stated that the Appellant owned Parcel 304 Mua Hills Settlement Scheme and the Respondent owned Parcel 288. According to the Appellant, the letter ought to supersede the surveyor's report. I do not agree with this position because the Government of Kenya and more specifically the Lands Department is the custodiam of all records showing land ownership and maps for all the registered land. It is not lost on this court that no document of ownership was produced by the Appellant. The letter by the Land Adjudication/Settlement Officer herein was merely a letter and was not based on any Government record. The author did not refer to any official records upon which his conclusions were premised. On the other hand, the Land Surveyor did not just visit the land in issue. He compared the ground with the records kept by the Government, which records are the R.I.M, which was attached to his report. That report showed that Parcel No 288 was on Map Sheet No 4 and Parcel No 304 Mua Hills Settlement Scheme was on Map Sheet No 2 and the findings were that the two parcels did not border each other. The report also showed that Parcel No 304 Mua Hills Settlement Scheme was reserved as a church. It is therefore my finding that the letter dated 27th March 1990 by the Land Adjudication Officer could not be proof of ownership and location of Parcel No 304 Mua Hills Settlement Scheme and the same could not supersede the surveyor's report.

36. The Appellant further relied on a document at page 61 of the record arguing that, it was the evidence that was contrary to the surveyor's report and which the trial court ignored. That document is handwritten and referred to as a Surveyor's report. It was dated 19th July 2001. The same is as follows;

> 19/7/2001
>
> Report – Mua Hills 288 VS 304
>
> Refer letter Tel. 16/MKS/VOL. II/119 of 5/4/1993
>
> Its shown that No 304 is a separate registered number.
>
> After visiting the site (visited 5/4/1993 and letter written) its found that a piece of land belonging to Mr Isaac Nzioka is inclusive of Plot 288; therefore a normal sub-divisions is required.
>
> Measurements made by the Surveyor (on 5/4/1993) shows Plot 288 comprises two people – Nzioka + Mativo.
>
> 288. – A – 76.16 – Mativo
>
> – B – 10.73 – disputed for Isaac Nzioka

Cost of survey is – 38,408/-

Signed

37. A look at the purported report shows that there is no indication who wrote the same and the basis for the conclusion that the Appellants land was inclusive of Plot 288 is not disclosed. As earlier stated, the question as to whether Plot No 304 Mua Hills Settlement Scheme existed or was part of the suit property could not be determined by visiting the suit property without reference to official Government Survey Plans and Registry Index Maps from the Lands Department. As there is no indication as to the identity of the author of the report dated 19th July 2001 or whether he had any expert knowledge and skill to establish whether the suit property bordered Parcel No 304 Mua Hills Settlement Scheme or whether the report was premised on any Government records, that report has no probative value in this matter. Therefore the Appellants argument that the trial court was wrong to consider the report by the Surveyor and Land Registrar dated 13th March 2014 when the same was contradictory to evidence on record, is untenable as there was no evidence on record by an expert backed up with official records contradicting the report which the court adopted. What the Appellant refers to as official records from the Lands Office are merely opinions and not records. Official records that show the position of any property are official maps and survey plans. I therefore find that there was no other expert evidence that would have guided the trial court apart from the surveyor's report of 2014.

38. An expert ought to give evidence that is objective as relates to the matters in question within their expertise, to assist the court in making its independent conclusions. In the case of *Christopher Ndaru Kagina v Esther Mbandi Kagina & Another* [2016] eKLR, the court quoted with approval and holding in the case of *R.V. Harris and Others* [2005] EWCA Crim.1980, where it was held that the duty of an expert witness is to provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within their expertise. This being the duty that is owed to the court and overrides any obligation to the party from whom the expert is receiving instructions.

39. A court must form its own independent opinions based on the entire evidence even after considering an expert opinion. The court must consider the following four elements while considering expert evidence, as was stated in the case of *Stephen Wang'ondu v The Ark Limited* High Court Civil Appeal No 2 of 2014;

    i. Expert evidence does not trump all other evidence, hence it ought to be tested against known facts.

    ii. Expert evidence must not be considered in a vacuum; it ought not be artificially separated for the rest of the evidence. There must be an interaction between the facts and the expert opinion.

    iii. Where there is conflicting expert opinion, it is the responsibility of the court to test it against the background of all the other evidence for the court to decide which expert evidence is to be preferred.

    iv. The court ought to consider all the evidence in the case, including the expert evidence before making findings of fact.

40. In comparing the surveyor's report dated July 19, 2001 and that of the Machakos Land Surveyor of 13th March 2014, I note that the former did not disclose the author and or his qualifications, the basis of his conclusions and the finding that Parcel 288 was supposed to be subdivided to give the Appellant 10.73 Ha was irrational. Therefore, in my view, the expert opinion of the Land Surveyor Machakos was

admissible as it was based not only on the findings on the site but most importantly on Government official records kept at the Lands Department.

41. The trial court's judgment shows that the court did not only adopt the expert evidence, but she tested that evidence against other evidence on record by taking into account an earlier report that corroborated the surveyors report of 2014. The court also noted that although the Appellant had a judgment in respect of HCCC No 174 of 1994, at no time was his parcel's boundaries marked out on the ground.

42. Having considered the surveyor's report of March 13, 2014, I note that the report was by a surveyor agreed upon by all the parties in the suit, they witnessed the process undertaken by the surveyor who had the survey plans during the visit and the report was rational in the circumstances.

43. Although courts are not bound by expert evidence, expert evidence is to be given high regard by the courts, and unless there is cogent grounds, that evidence ought not be rejected. In *Juliet Karisa v Joseph Barawa & another* Civil Appeal No 108 of 1988 (unreported), the Court of Appeal observed that;

> " Expert evidence is entitled to the highest possible regard and though the court is not bound to accept and follow it as it must form its own independent opinion based on the entire evidence before it, such evidence must no be rejected except on firm grounds.

I find that the trial courts reasons given for adopting the report of the Land Surveyor are cogent and I have no reason to interfere with her discretion.

44. It is therefore my finding that the trial court properly guided itself in considering the totality of all the evidence by taking also into account the surveyor's report of March 13, 2014, in arriving at its independent conclusion that Parcel No 304 Mua Hills Settlement Scheme did not border Parcel No 288. I therefore find no reason to interfere with the trial courts finding in that respect.

45. On whether the Appellant demonstrated that he was justified to lodge a caution on the Respondent's land, I must point out that the Appellant's basis for the caution was that his land was included in the Respondent's land. Since there was no evidence produced by the Appellant to prove that allegation, as the evidence of the Land Surveyor Machakos demonstrated that the two parcels are in different locations, it is my finding therefore that the caution is baseless and ought to be removed.

46. The subsistence of a caution placed by a person on another's land can only be justified where there is lawful and reasonable cause. In the case of *Maria Ngangi Gwako v Charles Mwenzi Ngangi* [2014] eKLR, the court held as follows;

> When a caution is objected to by a proprietor of land affected thereby, the onus is upon the cautioner to justify the lodging of the said caution and the need for it to remain in place. ... In the absence of any reasonable cause shown by the Respondent as to why the said caution should not be removed, the application for the removal of the same must succeed.

47. As the caution was lodged by the Appellant on the Respondents title on the unverified basis that the Parcel 304 Mua Hills Settlement Scheme was part of the suit property, and since the surveyor's report dated March 13, 2014, displaced that argument, there is no justification for the caution to subsist on the Respondent's title. Therefore, the trial court was justified to order the removal of the caution based on the evidence that Parcel No 304 Mua Hills Settlement Scheme did not border the suit property as contented by the Appellant.

48. On whether this matter is a boundary dispute as argued by the Appellant, I note that the issue was never raised before the trial court and therefore the same cannot be raised in this court at this stage.

In any event the issue before the trial court was the legality of the caution lodged by the Appellant. The issue of whether or not the suit property shared a boundary with Parcel 304 Mua Hills Settlement Scheme although raised by the Appellant, the findings of the surveyor was categorical that there was no common boundary between the two parcels. I therefore find and hold that that issue does not arise before this court.

49. The Appellant further raised an issue to be allowed to adduce further evidence. I do not find any justification for that argument and prayer as the Appellant filed the application dated March 27, 2017 seeking for leave to adduce fresh evidence. On September 28, 2018, this court delivered a ruling dismissing that application. Therefore, asking this court at this stage to allow him to adduce fresh evidence is merely mischievous. This court will not revisit that matter as it is *functus officio* on that question.

50. For the above reasons, I find and hold that the trial court properly guided itself in taking into account the surveyor's report dated March 13, 2014 in the determination of the dispute. There is no reason therefore for this court's interference in the trial court's findings. I therefore find and hold that the appeal herein lacks merit and the same is hereby dismissed with costs to the Respondent.

51. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 22ND DAY OF FEBRUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr Muthama holding brief for Mr Mutua Makau for the Respondents

Mr Kiluva holding brief for Mr Makundi for the Respondents

No appearance for the Appellant

Josephine – Court Assistant