



REPUBLIC OF KENYA



**Kariuki & another v Chege (Civil Appeal E226 of 2023)
[2024] KEHC 6145 (KLR) (Civ) (24 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6145 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E226 OF 2023

AN ONGERI, J

MAY 24, 2024

BETWEEN

GERALD NDIRANGU KARIUKI 1ST APPELLANT

ESTHER WANGARI NDIRANGU 2ND APPELLANT

AND

PETER NG'ANG'A CHEGE RESPONDENT

*(Being an appeal against the judgment and decree of Hon. L. L. Gicheha
(CM) in Milimani CMCC No. 5559 of 2001 delivered on 31/5/2022)*

JUDGMENT

1. The appellants were the plaintiffs in Milimani CMCC No. 5559 of 2001 where they filed a suit against the respondent seeking the following orders;
 - a. A declaration that the common boundary between the plots 1/243 and 1/244 is as set out and beacons by Nairobi City Council Surveyors and confirmed by private surveyors.
 - b. An order of permanent injunction restraining the respondents from entering into, demarcating, trespassing or interfering with the plaintiffs quiet occupation of plot no. 1/244 and 1/245.
 - c. Damages
 - d. Costs of the suit and interest.



2. The appellant's case in brief was that the 1st and 2nd plaintiffs were allotted plots no. 1/245, 1/244 and 1/243 which were adjacent to each other by Nairobi City Council at Kariobangi South Jua kali Industries.
3. The 1st appellant's case was that on 27/8/1996, the respondent together with their agents and servants and agents wrongfully and unlawfully and maliciously entered the 1st appellant's plot no. 1/245 and stopped the 1st appellant's workers from construction and also damaged construction works worth ksh.259,840.
4. The 1st respondent had sold his plot no. 1/243 to the 2nd respondent. The 2nd respondent said the 1st appellant had encroached on plot no. 1/243.
5. There was evidence that each of the parties were allotted their respective plots measuring 0.156ha each. The court found that the land on the ground was not enough for the 3 parties.
6. The trial court found that the issue could only be resolved by joining the allocating authority to give an explanation why there was disparity and also to compensate one of the parties.
7. The trial court dismissed the plaintiffs' case.
8. The two plaintiffs have appealed on the following grounds;
 - i. The Learned Trial Magistrate erred in law and in fact in that she framed the issues of the case before her the same being whether a permanent injunction should be issued to the defendants restraining them from trespassing into plots 1/244 and 1/245, and damages, and failed to include the most critical issue which was whether the boundary between plots 1/243 and 1/244 was as it was established by the Surveyors for the allocating authority and the plaintiffs or not and consequently arrived at a wrong conclusion.
 - ii. The Learned Trial Magistrate erred in law and in fact in that she wrongly concluded that the plaintiffs had failed to establish the location of their plots and that they could therefore not claim that the defendants had trespassed into their land when there was overwhelming evidence from PW 1, the licensed Surveyor from Ardhi Surveys Consultants and PW5 Stephen Mwangi, a Surveyor from Nairobi City County, that the locations and the boundaries of plots 1/244 (plot IAR No. 12062/942 upon final survey) and plot 1/245 (Plot 12062/941 upon final survey) were fully established and final survey had been carried out and their locations and boundaries had coordinate values and were final and permanent.
 - iii. The Learned Trial Magistrate erred in law and in fact in that she failed to take into account the professional evidence of the Surveyor PW I and ignored the evidence of PW5 Stephen Mwangi, the Surveyor from the Nairobi City County who were allocating authority, but believed the defendants' surveyor who stated that the location of the plots could not be established and was clear in her report that it was the only allocating authority who could establish and indicate the locations of the plots and failed to realize that the allocating authority had already done so and the evidence was again already before her and consequently arrived at a wrong determination.



- iv. The Learned Trial Magistrate erred in law and in fact in that she failed to consider and realize that given the totality of evidence before her, there were multiple encroachments of plots starting from plot 1/221 such that the defendants plot 1/243 was wrongly built up by a developer forcing the defendants to claim plot 1/244 was their plot.
 - v. The Learned Trial Magistrate erred in law and in fact in that she failed to appreciate that plots 1/243, 1/244 and 1/245 were all allocated on the basis of Part Development Plan (PDP) and even though surveyed and beacons they were subject to a final survey which would be based on coordinates and measurement values that would be final and permanent and failed further to appreciate that plots 1/244 had actually gone that process and consequently arrived at a wrong determination.
 - vi. The Learned Trial Magistrate erred in law and in fact in that she failed to find that the defendants had in fact encroached and trespassed into plot 1/244 and damaged the construction therein and that they were fully liable for the damages claimed by the plaintiffs.
 - vii. The Learned Trial Magistrate erred in law and in fact in that the case being a boundary and encroachment dispute she failed to evaluate all the surveyors evidence before her and consequently she misapprehended the case and thus made a wrong determination.
9. The parties filed written submissions as follows; The appellant submitted that the issue for determination at trial was on the on the boundary between plot No. 1/243 and 1/244. However, the trial magistrate ignored this critical issue and determined that the suit before her was about an injunction and damages only. She failed to realize that the injunction and damages were as a result of that encroachment.
 10. The appellant submitted that the trial court failed to correctly evaluate all surveyors evidence to enable her to make a correct determination as to the exact position of the boundary between the plots. After dealing with the issue of injunction the trial magistrate dealt with the report submitted by W.M Purity a surveyor from Earthscope survey services and completely ignored the evidence of David Gachanga Kaigu (PW1) a surveyor called by the appellants from Ardhi Surveyors Consultants. PW1 had found that the plot No. 1/243 had encroached on plot No. 1/244 by 1.7 meters.
 11. Further on the insistence of the trial court the appellant called a surveyor from the city council, the allocating authority. The surveyor S G Mwangi (PW5) produced a final survey plan which showed the permanent location of the boundaries. However in her judgement the magistrate did not mention discount or make any findings on PW5's evidence.
 12. The appellant further contended that PW1 was clear that there were multiple encroachments in the block where plots 1/243, 1/244 and 1/245 were situated particularly from plot No. 1/226 to 1/245. The witness testified that he took measurements of the plots in the block from plot No. 1/222 to plot No. 1/245 and found that there were multiple encroachments leading to plot No. 1/243 encroaching into plot No. 1/244 by 1.7 meters. PW1 produced a survey plan demonstrating the same.
 13. The respondent alternatively submitted that the pleadings and the evidence adduced by all the Parties was clearly and obviously a dispute in respect to location, extent and size of the Plots allotted to them by the Nairobi City Council vide letters dated 27/10/1996. It was therefore obvious that the dispute



could not effectually and completely be adjudicated upon unless all those who would be liable to satisfy the judgment prayed for, are given a right to be heard.

14. Nairobi City Council, being the allotting authority, has an interest in all the three Plots that are the subject matter in the dispute. Its rights against or liabilities thereof, to any of the parties to the action in respect to the subject matter will directly be affected by any order or judgment which was to be made in the suit. Indeed, the Nairobi City Council was best placed to solve the dispute between the parties hereto.
15. The respondent submitted therefore the trial magistrate was absolutely correct when she found and held that "as the surveyors have stated, it is only the allocating authority that can explain why the remaining land is 0.037ha instead of 0.045ha. Joining allocating authority as a party to this suit would have helped as they would have given an explanation why there was disparity between the survey plan and the position on the ground, and may be, compensate one of the Parties."
16. This being a first appeal, the duty of the 1st appellate court is re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses.
17. The issues for determination in this appeal are as follows;
 - i. Whether the trial court misapprehended the evidence and arrived at a wrong decision.
 - ii. Whether the 1st appellant established the condition for granting an injunction against the 2nd respondent.
 - iii. Whether the appeal should be allowed.
18. On the issue as to whether the trial court misapprehended the evidence, the 1st appellant's case was that he underwent due processes and he established that he was on plot no. 1/245 which was allocated to him.
19. I find that the 1st appellant established from the surveyor and beacons /certificate that he was rightfully allotted the plot.
20. The respondents ought to have approached the allocating authority to help them ascertain their rightful plot or for compensation instead of damaging the 1st appellant's property.
21. I find that the 1st appellant established that he was the owner of plot no. 1/245 and that he was occupying his rightfully allotted space.
22. The respondent submitted that the trial court the trial magistrate was absolutely correct when she found and held that "as the surveyors have stated, it is only the allocating authority that can explain why the remaining land is 0.037ha instead of 0.045ha. Joining allocating authority as a party to this suit would have helped as they would have given an explanation why there was disparity between the survey plan and the position on the ground, and may be, compensate one of the Parties."
23. In the circumstances, the respondents ought to have approached the allocating authority to help them ascertain their rightful plots or to seek for compensation instead of damaging the 1st appellant's property.
24. On the issue as to whether the 1st appellant established the grant of an injunction, the law states that the following conditions must exist;
 - (a)An applicant must show a prima facie case with a probability of success.



(b) An injunction will not normally be granted unless the application might otherwise suffer irreparable injury.

(c) When the Court is in doubt, it will decide the application on the balance of convenience.

25. In *Nguruman Limited v Jan Bonde Nielsen & 2 others*, CA No. 77 of 2012; [2014] eKLR, the Court of Appeal reiterated the conditions to be met by a litigant who seeks injunctive relief as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- a. establish his case only at a prima facie level,
- b. demonstrate irreparable injury if a temporary injunction is not granted, and
- c. allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.”

26. I find that the 1st appellant established that he was the owner of plot no. 1/245 and that he was occupying his rightfully allotted space.

27. The trial court ought to have issued an injunction to stop the 2nd respondent from interfering with the occupation of the 1st appellant’s property since the 1st appellant established the grounds for issuance of the same.

28. I allow the appeal and set aside the trial court’s finding and substitute the dismissal order with the following orders;

- i. A declaration be and is hereby issued that the boundary between plots no. 1/243, 1/244 and 1/245 is set out beacons by Nairobi City Council.
- ii. A permanent injunction be and is hereby issued restraining the 2nd respondent from encroaching on the 1st and 2nd appellants plots.
- iii. The appellants are awarded ksh.259,840 in respect of costs of construction materials destroyed.
- iv. The respondents to approach the allocating authority for compensation and/or allocation of another parcel.
- v. The respondents to pay the costs of this appeal.

29. Judgment is entered in favour of the appellants against the respondents jointly and severally in the sum of kshs.259,840 with costs of the suit and interest at court rates from 29/7/2003 when they were pleaded until payment in full.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 24th day of May, 2024.

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A. N. ONGERI

JUDGE



In the presence of:

..... for the Appellant

..... for the Respondent

