



**Gilgil Cultural Association (Suing through its Officials) Harrison Waweru Nganga  
& another v Registrar & 6 others (Environment & Land Case 444 of 2016 &  
165 of 2019 (Consolidated)) [2023] KEELC 16992 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16992 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 444 OF 2016 & 165 OF 2019 (CONSOLIDATED)  
A OMBWAYO, J  
APRIL 27, 2023**

**BETWEEN**

**GILGIL CULTURAL ASSOCIATION (SUING THROUGH ITS OFFICIALS)  
HARRISON WAWERU NGANGA ..... PLAINTIFF**

**AND**

**NAIVASHA LAND REGISTRAR ..... 1<sup>ST</sup> DEFENDANT  
ELIZABETH NDITI NJOROGE ..... 2<sup>ND</sup> DEFENDANT  
SIMON PATRICK NJOROGE ..... 3<sup>RD</sup> DEFENDANT**

**AS CONSOLIDATED WITH  
ENVIRONMENT & LAND CASE 165 OF 2019**

**BETWEEN**

**PATRICK SIMON NJOROGE ..... PLAINTIFF**

**AND**

**HARRISON WAWERU NGANGA ..... 1<sup>ST</sup> DEFENDANT  
JAMES KIANJA KARANJA ..... 2<sup>ND</sup> DEFENDANT  
JOSEPH KIHARA ..... 3<sup>RD</sup> DEFENDANT  
GILGIL CULTURAL ASSOCIATION ..... 4<sup>TH</sup> DEFENDANT**



## JUDGMENT

### Introduction

1. There are two cases filed by the parties herein. In Nakuru Environment and Land Case number 444 of 2016, Gilgil Cultural Association suing through its official Harrison Waweru Ng'ang'a (hereinafter referred to as the plaintiff) has come to court against Naivasha Land Registrar, Elizabeth Nditi Njoroge and Simon Patrick Njoroge (hereinafter referred to as the defendant) claiming that at all material times relevant to this suit the plaintiff is the registered owner of the parcel of land known as Gilgil/Gilgil Block 1/27977 (Kekopey). The plaintiff avers that it has been in actual possession and use of the said parcel since it acquired it.
2. However, on or about the month of July, 2016, the 1<sup>st</sup> defendant, working in cahoots with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants caused mutation forms with the intention of illegally and fraudulently altering the boundaries of the parcel adjacent to the plaintiff's land and as a result encroached in the plaintiff's land.
3. The plaintiff states that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have earnestly encroached on its 2 acres out of its land and have poured concrete building materials with intention of developing it. The plaintiff further avers that the alterations have changed the common right of way to the plaintiff and the other owners of the adjacent parcel and was solely meant to be an advantage to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The plaintiff avers that it has suffered great prejudice since it cannot conveniently access its parcel and that the encroachment has deprived it of 2 acres of land.
4. The plaintiff has complained to the 1<sup>st</sup> defendant and has even issued a demand notice which have only been neglected and/or ignored. The plaintiff's claim is for cancellation of the entries made by the 1<sup>st</sup> defendant and a permanent injunction restraining the defendants from whatsoever trespassing and/or interfering with the plaintiff occupation and use of the parcel.
5. The plaintiff precisely prays for cancellation of entries made by the 1<sup>st</sup> defendant in respect to parcels known as Gilgil/Gilgil Block 1/27977 (Kekopey) and Gilgil/Gilgil Block 1(Kekopey Ranch)/9937.
6. The plaintiff further prays for a permanent injunction restraining the defendants either by themselves, their agents, servants and/or employees from trespassing, encroaching, alienating, developing and/or in any way interfering with the plaintiff's peaceful occupation and use of the parcel known as Gilgil/Gilgil Block1/27977 and costs of the suit.
7. Conversely, in Nakuru ELC No.337 of 2016 Patrick Simon Njoroge came to court against Harrison Waweru Nganga, James Kianja Karanja, Joseph Kihara and Gilgil Cultural Association claiming that at all material times, the plaintiff has been the registered owner of the land parcel known as Gilgil/Gilgil Block 1/9937 (Kekopey) measuring approximately 0.80 hectares.
8. The plaintiff has been in occupation of the said land having bought it from agricultural and industrial holding limited.
9. On or about 21<sup>st</sup> November 2016 the defendants by themselves, their servants, and/or officials entered upon the said parcel of land and pulled down part of the fence and demolished a temporary structure on land. The defendant's intention is to invade the said parcel of land and subdivide it to the detriment of the plaintiff.
10. The surveyor has clearly shown the boundaries and demarcated the portion belonging to the plaintiff. The action of the defendants is illegal and unlawful since the plaintiff is the registered owner of the



parcel of land. The plaintiff avers that there's no other suit pending and there have been no previous proceedings between the plaintiff and the defendants over the same subject matter.

11. Despite demand and notice of intention to sue having been issued the defendants have refused, failed, ignored and /or neglected to compensate the plaintiff rendering this action necessary. The cause of action arose within the jurisdiction of this honorable court.
12. The plaintiff prays for a permanent and temporary injunction to issue restraining the defendants by itself, its agents, officials, servants or otherwise from invading, subdividing and/or interfering with the plaintiff's/Applicant's land parcel known as Gilgil /Gilgil Block 1/9937 (Kekopey). The plaintiff prayed for costs of this suit.
13. The two matters were consolidated and the plaint in the latter case was treated as the defence and counter-claim in the former case and proceedings were ordered to be undertaken in the former case.

### **Evidence**

14. When the matter came up for hearing, Harrison Waweru Nganga, the chairman Gilgil Cultural Association adopted his statement as evidence in chief whose gist was that they were given land number Gilgil/Gilgil Block1/27977(Kikopey) by Hon Njenga Karume for traditional practices and that they decided to build a home for cultural practices. There were neighbours adjacent to the said land. However, the land was subsequently unlawfully subdivided by the land registrar and the surveyor and they were awarded 20 acres. The mutation form was prepared and registered without their consent. The mutation for the land was signed by Elizabeth Nditi Njoroge without following the lawful procedure.
15. On cross examination by Mr Konosi learned counsel for the defendants, he states that they were given the land on 15/3/2022 by the Agricultural Holdings Ltd. Their land was adjacent to parcel number Gilgil/Gilgil Block1/5391, Gilgil/Gilgil Block1/431, Gilgil/Gilgil Block1/399, and Gilgil/Gilgil Block1/9937. Parcel number Gilgil/Gilgil Block1/9937 was in existence when they were allocated theirs and was adjacent to Gilgil/Gilgil Block1/22633. On 9/6/2016 they went to the parcel of land when there was a dispute. He does not remember the people who attended the dispute. Derrick Kihugi Nganga who was employed by Agricultural Holdings limited and mandated to give out the land showed them the land and the boundaries. He denied having entered the defendant's Land.
16. Pw2 Gibson Wahome Weruga a licensed private land surveyor since 1994 who graduated in 1971 and worked in Kenya from 1971 to 1994, and was once the Provincial Surveyor Rift Valley from 1980 to 1994 when he retired, testified that in 2010 GEMA Agricultural holding Ltd contracted him to survey and give numbers to all parcels of land within Kikopey Ranch that had not been numbered. He was mandated to survey No. Gilgil/Gilgil Block1/22633(Kekopey). and did so. The parcel number was subdivided and created Gilgil/Gilgil Block1/27977(Kekopey). upto Gilgil/Gilgil Block1/27986(Kekopey). The former was allocated to the plaintiff.
17. He visited the ground and measured the plot in 2013 and after completing the work, he found that they were on the wrong plot thus Gilgil/Gilgil Block1/9937. He showed them their new boundaries. Later, he was told that there was a dispute which he went to resolve. He was summoned by GEMA. The session was attended by the land registrar and land surveyor in 2016. The land Registrar ordered the land surveyor to move parcel number Gilgil/Gilgil Block1/9937 near Gilgil/Gilgil Block1/398. He saw the mutation that changed the boundary. When boundaries are changed the registered owners are called to witness. The mutation was signed by Elizabeth Njoroge.
18. On cross examined by Mr Konosi, he states that he obtained the relevant maps from the survey of Kenya. The maps are neither sealed nor stamped unless the court requires it. He was shown the original



map which shows that parcel number Gilgil/Gilgil Block1/9937 was next to Gilgil/Gilgil Block1/396. There is a cliff near the parcel of land. The cliff starts from one edge all round and is half of 9937. Half of the plots were comprised of the cliff. They beacons the land with the cliff. The land is rocky and rough. He established the boundary of Gilgil/Gilgil Block1/9937 using the plan. They were putting the boundaries as shown on the map on sheet number 11. The land allocated bordered Gilgil/Gilgil Block1/396, Gilgil/Gilgil Block1/399, Gilgil/Gilgil Block1/398 and Gilgil/Gilgil Block1/431. When he met the plaintiffs, they had stated bulldozing a road through plot number Gilgil/Gilgil Block1/22633 and encroached into the old parcel. They were doing the road on edge of Gilgil/Gilgil Block1/396,399,431,398. There was no road beyond Gilgil/Gilgil Block1/22633. He provided a road on the lower part of the cliff. The letter dated 15/3/2011 would make sense if parcel number Gilgil/Gilgil Block1/9937 is adjacent to Gilgil/Gilgil Block1/398.

19. When it came to defence hearing, the defence counsel called Max Njuguna, the District Surveyor Naivasha as DW1. He stated that his duties as a surveyor were to assign new numbers after Gilgil/Gilgil Block1/registrar in boundary disputes. He would take measurements and give physical boundaries and should there be any dispute the Land Registrar would call for the maps.
20. He is aware of a boundary dispute between the owners of Gilgil/Gilgil Block1/9937 and Gilgil/Gilgil Block1/27977. There was an issue that parcel number 9937 was wrongly placed on the map contrary to the land owners wish. The land owner of Block Gilgil/Gilgil Block1/9937 was Elizabeth Nditi Njoroge. A ground survey was conducted on 9/7/2016. The registrar advised the surveyor to review the properties and place the boundaries on the map accordingly. It was decided that the land surveyor draws mutation to cover the ground position. The surveyor drafted mutation showing where the lower property was located. He produced a sketch map showing that the owner of the Gilgil/Gilgil Block1/27977 had used a portion of Elizabeth Nditi by constructing a road.
21. On cross examination by M/S Kamau, learned counsel for the plaintiff, he stated that he has been at the lands office for the last 10 years. He knows that an erroneous map is due to the measurement. When shown PEX 8, he claimed that Parcel Gilgil/Gilgil Block1/9937 is erroneously positioned in the map. He confirmed that when hearing a dispute they call all parties. When they visited the boundary, the owners did not object to the proceedings. He confirmed that the owner of 9937 is Simon Njoroge. When there is a dispute they call the owners of the land and when parties agree to change parcels they do prepare mutation. He was shown DEX 12 and stated that the mutation was signed by Elizabeth Nditi Njoroge. It is not in order for a non-owner to sign a mutation. The main complaint by the defendants was that their properties were supposed to be adjacent to each other on the map but that was not so. According to his understanding the defendants were misled by a caretaker. The cliff side is not habitable. Acreage of Gilgil/Gilgil Block1/9937 will not change due to the adjustment.
22. The defence further called Kathy Winnie Washuka, the Land Registrar Naivasha as the 2<sup>nd</sup> witness. She has been a Land Registrar for 16 years. Her role in boundary disputes starts with an application from the registered owner. The complainant visits the office and explains the situation. The Registrar calls the government surveyor and refers to the maps so as to issue summonses to all the affected persons in the dispute. The summons must be 14 days or more. They are served through the chiefs office or hand delivered. Payments are made for the boundary visit. The land registrar visits the ground and while on the ground he takes submission from the registered owners affected by the dispute. They take the historical information from neighbors. They request them to show them their land boundaries and invite them to show them maps, titles deeds and any other reliable documents as to their parcels of land. The government surveyor does measurements relying on original maps from the survey of Kenya. The surveyor makes an input in collaboration with the land registrar.



23. In this case, her predecessor Mr. Mwaura ordered the District Surveyor to draw a mutation reflecting the ground position of parcel number Gilgil/Gilgil Block1/9937 and to forward the same to the director of surveyor for amendment of the RIM. The applicant was to sign the mutation forms. The access road donated by Elizabeth Njoroge is to be drawn on the Registry Index Map
24. On cross examination by M/S Kamau, she states that in such proceedings they issue summonses to the affected persons. She confessed that she did not have the notices or summonses in court but stated that it is not common to go on the ground without summons. She visited the ground with the local administration. She testified that it is very unusual for the Land Registrar to go on the ground without notifying the parties. The Land Registrar cannot proceed where there is case in court. Mutation forms are signed by Registrar according to green card. To sign a document if you are not registered owner you need a power of attorney. According to the land registrar, the mutation signed by a person who is not owner of land is invalid.
25. DW3, Elizabeth Nditi Njoroge, a retired civil servant testified that she is a director of Well Springs school, a retired principal having served upto 2019. The 3<sup>rd</sup> defendant is her only son. Her statement dated 5/11/2021 was adopted as evidence in chief.
26. According to the witness Plot number Gilgil/Gilgil Block1/9937 was purchased by her son in. He bought plot number Gilgil/Gilgil Block1/398 in 2008. They were told that next to them there was another parcel of land. She claimed that because the school is delicate she did not want to have people next to them.
27. She gave her son 200,000 to pay for the plot and was to be accompanied by Derrick Kihugi to go to Kiambaa in Kiambu to transact the sale at Agricultural Holdings Ltd. The transaction was completed and a letter of transfer was done. She is seeking a permanent injunction. The plaintiff's suit should be dismissed because the land belongs to her son. They have encroached on the land and done malicious damage.
28. On cross cross examination by M/S Kamau, she states that they wanted the land number 9937 to be joined to 398. There was a caretaker Derrick Kihugi who was in charge. She relied on the information of the caretaker and did not look at the map and did not meet Derrick Kihugi the owner of the land 9937. Mr Derrick Kihugi never showed them the land but she put up a fence in 2009. The plot number 9937 did not have a number in 2009. The caretaker was relying on the instructions Derrick Kihugi of Agricultural holdings and the surveyor. There arose a boundary dispute on 9/6/2016. They were informed of the boundary dispute. They were called by the land Registrar and were talked to. The land Registrar called them for a meeting. They did not have personal interest but the meeting was informal. She was aware of the restriction on 23/5/2016 but the boundary dispute was held on 9/6/2016. The mutation was registered on 13/7/2016. The mutation is dated on 23/5/2016. The restriction had not been removed. She is the one occupying land number 9937. Her son has not complained her signing the mutation form. The signing was following the decision of the Land Registrar.
29. The 4 defence witness Patrick Sitenei Njoroge is the 2<sup>nd</sup> defendant herein but the plaintiff in ELC No.537 of 2016. His statement dated 5/11/2021 and filed on 26/11/2021 was adopted as evidence in chief. He stated that on 4/7/2021 he signed the Power of Attorney authorizing his mother to sign a mutation form. He gave his mother the original letter. He asked her to continue to transact on his behalf. He stated that Derrick Kihugi approached him on 29/9/2009 and on 28/9/2009 his mother gave him Kshs200,000/= to purchase the property. Derrick told him that Gilgil/Gilgil Block1/9937 had been subdivided from Gilgil/Gilgil Block1/398 and he could buy it and was next to the cliff. On 29/9/2009 they went to the Agricultural Holdings Ltd and gave Derrick 200,000/=. He was told to fence the property and did the fencing in October 2009.



30. On cross examination by M/s Kamau, he states that he bought the land in 2009. There was no written sale agreement between him and Derick. They never met on the ground. He did not show him the physical position on the ground. Before they bought the land there was no map but he went to the ground accompanied by Derick. According to Derrick the property was next to Gilgil/Gilgil Block1/398. At the time the map was not drawn and the land was unsurveyed. PEX 8 shows that Gilgil/Gilgil Block1/9937 had been surveyed long before.
31. Mr. Derrick Kiragu did not show them the ground. He was called by a chief known as Kamau to attend the boundary dispute. He was aware of the disputes and was notified by the land registrar. He did not receive any documents from the land Registrar. Derrick showed the plaintiffs where to put the fence. He gave his mother permission to sign the mutation form because he was busy.
32. The 5<sup>th</sup> defence witness, Mr Derrick Kihugi Nganga who lives in Gilgil gave evidence that he used to work as an officer in Gema holdings. He was a settlement caretaker. As a settlement caretaker he used to show people their plots. He could not show people land without a map and was given a map by the company. He knew Patrick Njoroge and Elizabeth Njuguna. He relied on his statement that was adopted as his evidence in chief. According to DW5, the plaintiffs had encroached on the defendants land.

## **Submissions**

### **Plaintiffs submissions**

33. The gravamen of the plaintiff's submissions is that the 2<sup>nd</sup> and 3<sup>rd</sup> defendant never ascertained their physical location of the parcel of land on the existing maps and neither did they consult the previous owner of the parcel of land. The plaintiffs are in occupation of what is regularly theirs. The plaintiff submits that the 2<sup>nd</sup> and 3<sup>rd</sup> defendant should occupy what they bought in the year 2009, which is adjacent to parcel number 396. According to the plaintiff, Derrick Kihugi was not a surveyor but an employee of Agricultural Industrial Holdings Limited.
34. Secondly the plaintiff submits that there was no mistake on the physical boundary or location of Gilgil/Gilgil Block1/9937.
35. Thirdly the plaintiff submit that the 1<sup>st</sup> and 2<sup>nd</sup> defendant jumped the gun and failed to adhere to the procedure provided in the statute on how to change boundaries of parcels of land. He extensively referred to section 18 and 9 of the [Land Registration Act](#). According to the plaintiff section 18 and 19 of the [Land Registration Act](#) gives the Land Registrar the mandate to fix boundaries in relation to parcels of land where there arises an issue. However, the Land Registrar must adhere to section 79 of the [Land Registration Act](#) which gives a clearer way of effecting the changes by the Registrar.
36. According to the plaintiff the procedure was not followed as the plaintiff was not summoned and that the 90 days' notice was not issued and that the plaintiff was not accorded a fair hearing contrary to Articles 47 and 50 of [the Constitution](#) of Kenya 2010. The plaintiff submits that failure by the 1<sup>st</sup> defendant to comply with the mandatory statutory provisions invalidated the entire process of change of boundaries. The change of boundaries affected plaintiff's acreage.

### **Defendants Submissions**

37. The gist of the defendant's submission is that the plaintiff lacks capacity to file the plaint as it is described as a cultural group sued through its officials. The plaintiff is an association registered under



the department of culture and arts in the Republic of Kenya. According to the defendants, the plaintiff is not capable of suing and owning land

38. The defendant further submits that the boundary of Gilgil/Gilgil Block 1/9937 was lawfully altered. According to the defendants' counsel, the 3<sup>rd</sup> Defendant bought Gilgil/Gilgil Block 1 /9937 from Fredrick Ngugi Karagu in the year 2009 after being financed by his mother Elizabeth Njoroge the 2<sup>nd</sup> Defendant herein. The said parcel of land was bought through Agricultural and Industrial Holdings Limited. At the time of purchase the said parcel of land was measuring about two acres and the said Fredrick Ngugi Karagu confirmed receipt of Kshs.180,000/= as a purchase price. This was indicated in the letter dated 29<sup>th</sup> September 2009. At the time of purchase the 3<sup>rd</sup> Defendant was shown the physical location of the parcel of land which was adjacent to their land parcel no. 398.
39. The defendants contend that on 8<sup>th</sup> March 2016, the Plaintiffs herein alongside media people entered upon the said parcel of land and destroyed the structure and she reported to Gilgil police station, but nothing was done. She was forced to report to Naivasha CID offices. That as a result the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant recorded a dispute at the Land Registrar's office at Naivasha for investigations. Upon receipt of the application, the Land Registrar Naivasha held a boundary dispute meeting between the owners of Gilgil/Gilgil Block 1/9937 and 22633 (Kekoepy). The parties present during the meeting were the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant, Mr Wandegwa from the Agricultural and Industrial Holding Limited, Harrison Waweru- Gilgil Cultural Centre and the Plaintiff herein, Mr Kamau- Senior Chief Gilgil Loaction, Mr. Muchiri- Gilgil District Officer, Mr- Werugia- a registered surveyor, Mr.Mwangi- the District Surveyor and Mr. Mwaura the Land registrar. The landowners of the two parcels of land were given an opportunity to make submissions.
40. The observation made during the boundary dispute meeting was that the Plaintiff had encroached on parcels 398, 399 and 431 and facilitated the grading through the same parcel. It was also observed that the registered index map 9937 was erroneously drawn and required to be amended to tally with the ground. Gilgil Cultural Centre did not honor the existing beacons while grading the road.
41. As a result the boundary dispute meeting the Land Registrar ordered the district surveyor to draw a mutation reflecting the ground position of parcel no9937 and forward the same to the director of surveys for amendment of the Registry Index map. The access road to be donated by Elizabeth Njoroge was included on the map.
42. After the correction/amendment of the R.I.M. The applicant Elizabeth Njoroge was to buy the concerned map and fence all the four parcels 398, 399, 431 and 9937 to avoid future conflict.
43. The Land Registrar also forwarded the District Surveyor's sketch plan showing all the requirements and the then current position together with a sketch map showing how the position should be.
44. That on July 12, 2016, the Land Surveyor wrote a letter to the director of surveys whereby he directed him to amend sheet number 11 and Inset 60(sixty) so that Gilgil/Gilgil Block 1/9937 (Kekoepy) can share common boundary with parcel 398 as reflected in the mutation.
45. On August 2, 2016 the Director of surveys forwarded the copies of the Amended Registry Index Map to the District Land Surveyor, Nakuru. On August 16, 2016 the Director of Survey forwarded copies of the amended Registry Index Map to the Chief Land Registrar.
46. During hearing the Land Registrar testified that there was no fraud that was committed when the Registry Index Map was being altered because a boundary report had been issued and therefore fraud did not arise. She also testified that in carrying out the amendments the nature of the parcel of land was not affected. The land surveyor on the other hand stated that Gilgil/Gilgil Block 1/9937 (Kekoepy)



had been wrongly placed on the map and according to the map produced as PEX 8 parcel 9937 is erroneously positioned on the map.

47. The defence counsel further submits that the 2<sup>nd</sup> Defendant signing the mutation on behalf of 3<sup>rd</sup> Defendant does not invalidate the process because the 2<sup>nd</sup> Defendant had obtained the requisite authority from the 3<sup>rd</sup> Defendant. The 3<sup>rd</sup> Defendant affirmed this position and stated that he had given the 2<sup>nd</sup> Defendant authority. Moreover, it was the Land Registrar's evidence that signing the mutation on behalf of the owner of the land is allowed and it is the owner who can only file a complaint if his consent was not sought.
48. Thus, based on the foregoing counsel submits that the due process was followed in carrying out the amendment of the Registry Index Map to reflect the proper position on the ground.
49. The defence counsel submits that the report arising out of the boundary dispute meeting clearly shows that the Plaintiff had encroached on parcels 398, 399 and 431 which belonged to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant. The Plaintiff's witness Mr Werugia admitted that Harrison Waweru Nganga, James Kianja Karanja and Joseph Kihara had encroached onto the parcels of land belonging to the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. It also became apparent that Harrison Waweru Nganga, James Kianja Karanja and Joseph Kihara had originally settled where the land Gilgil Cultural Centre is situated. After the Registry Index Map being amended, parcel no. 9937 was placed in the correct position. If Harrison Waweru Nganga, James Kianja Karanja and Joseph Kihara insist on using the old map, they will be encroaching the 2<sup>nd</sup> Defendant's parcel of land.
50. He submits that based on the evidence presented the defendant have proven Harrison Waweru Nganga, James Kianja Karanja and Joseph Kihara have encroached on all that parcel of land known as Gilgil/ Gilgil Block 1/9937 and interfered with the 3<sup>rd</sup> Defendant's quiet possession. We urge the court to so find. The upshot of the above according to the defendants is that the plaintiff's suit is to be dismissed with costs.

### Analysis And Determination

51. The defendant has raised the issue of the capacity of the plaintiff to sue and own property. I do find the defendant's argument that the plaintiff has no capacity to sue without merit as the plaintiff has brought the suit through its officials.
52. In the case of *Trustees Kenya Redeemed Church & Anor v Samuel M'Obiya & 5 others* [2011] eKLR it was held thus:

“It is trite law that a society under the *Societies Act* is not a legal person with capacity to sue or be sued. A society can only sue or be sued through its due officers. It has not been pleaded that the 2<sup>nd</sup> defendant has been sued in the capacity of an official of Kenya Redeemed Church nor has it been pleaded that he has been sued in his personal capacity.”
53. Further in the case of *Free Pentecostal Fellowship in Kenya vs Kenya Commercial Bank* Nairobi HCCC No. 4116 of 1992 Justice Bosire (as he then was) stated thus:

“The position at common law is that a suit by or against unincorporated bodies of persons must be brought in the names of, or against all the members of the body or bodies. Where there are numerous members the suit may be instituted by or against one or more such persons in a representative capacity pursuant to the provisions of Order 1 rule 8 Civil Procedure Rules.”



54. In the instant matter, the suit is instituted in the name Gilgil Cultural Association through its officials. Though it is not a body corporate for it to sue as a legal personality and lacks the capacity to institute proceedings in its own name, it has complied with the law by suing in the names of the officials.

55. Similarly, in the case of *African Orthodox Church of Kenya vs Rev. Charles Omuroka & Anor* [2014] eKLR. Justice E. C. Mwita in his Ruling on a preliminary objection raised challenging the plaintiff's capacity to sue in its own name stated as follows:

“The plaintiff has pleaded in paragraph 1 of its plaint that it is a duly registered church. At paragraph 3 of the plaint, the plaintiff has described the 2<sup>nd</sup> defendant as a duly registered church or organization obviously churches are societies under the *Societies Act*. Societies do not have capacity to sue or be sued in their own names.”

56. Moving to other issues, I have considered the pleadings, evidence on record and the plaintiffs submission and do find that there was an alleged boundary dispute in respect of parcel of land Gilgil/Gilgil Block1/27977 (Kekopey) and Gilgil /Gilgil Block 1/Kikopey Ranch Gilgil/Gilgil Block1/9937. It was alleged that parcel number Gilgil/Gilgil Block1/9937 was wrongfully placed on the map contrary to the land owners wish. The land owner for Block1/9937 was Simon Patrick Njoroge. The proceedings of the boundary dispute were undertaken when Elizabeth Nditi Njoroge claimed that her properties were adjacent to each other but wrongly placed. The Registrar corrected the misplacement and fixed the boundaries. The Registry Index Map was amended to fix the boundaries. The amendment was done on 16<sup>th</sup> August 2016. The Land Registrar on cross examination states that to change the boundaries of the property, they have to inform all the parties. The plaintiffs were not informed but they appeared during the hearing of the dispute.

57. After the hearing, they prepared the mutation form that was signed by Elizabeth Nditi Njoroge and not Simon Patrick Njoroge the registered owner of the land. The Land Registrar testified that a mutation form signed by a person who is not an owner is invalid. This court finds that the dispute revolves on section 18 and 19 of the *Land Registration Act* especially section 19 of the Act that provides: -

18. Boundaries.

(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.

19. Fixed boundaries.



- (1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.
- (2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.
- (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.

58. Section 19 (1) presupposes that before the Land Registrar takes any action he has to invite the owners an occupiers of parcels of land adjoining the boundaries that he intends to fix. In this case, there is no indication that the Land Registrar invited the plaintiffs for the hearing of the boundary dispute and that she considered any filed plan approved by any authority before making any step to start the determination of the dispute. Moreover, there is no application by any interested party. It is not clear how the Land Registrar initiated the proceedings. I do find that section 19 (1) of the [Land Registration Act](#) was not adhered to as there was no formal complaint or an application or letter to the land registrar and there were no summonses to affected parties.

59. Though the plaintiffs attended the hearing they might not have known the claim or application against them if any and therefore. The proceedings were shrouded with procedural impropriety and therefore the same were tainted with illegality.

60. Section 4 of the [Fair Administrative Action Act](#), 2015 provides the parameters of the right to fair administrative action as follows: -

- (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
- (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
  - (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
  - (b) an opportunity to be heard and to make representations in that regard;
  - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
  - (d) a statement of reasons pursuant to section 6;
  - (e) notice of the right to legal representation, where applicable;



- (f) notice of the right to cross-examine or where applicable; or
  - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.
- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to-
- (a) attend proceedings, in person or in the company of an expert of his choice; Administrative action to be taken expeditiously, efficiently, lawfully etc.
  - (b) be heard;
  - (c) cross-examine persons who give adverse evidence against him; and
  - (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
- (5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.
- (6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 41 of *the Constitution*, the administrator may act in accordance with that different procedure.
61. Article 47 of *the constitution* provides for a fair administrative action that includes the following:-

7. Fair administrative action

- (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
  - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
  - (b) promote efficient administration.

62. Article 50(1) of *the constitution* of Kenya provides for a fair hearing. Fair hearing includes: -

50. Fair hearing

- (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.



63. I do find that the decision of the Land Registrar was a nullity having failed to adhere to the aforesaid constitutional provisions as the plaintiffs were not notified of the application by the defendants.

In *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR, the Court of Appeal stated that: -

“Without attempting to lay an exhaustive distinction, the right to fair administrative action under article 47 is a distinct right from the right to fair hearing under article 50(1). Fair administrative action on the other hand refers broadly to administrative justice in public administration. It is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations. The right to fair administrative action, though a fundamental right, is contextual and flexible in its application and as article 24(1) provides, can be limited by law. “Fair hearing” in article 50(1) as the text stipulates applies where any dispute can be resolved by the application of the law and applies to proceedings before a court or, if appropriate, another independent and impartial tribunal or body. It is clear that fair hearing as employed in article 50(1) is a term of art which exclusively applies to trial or inquiries in judicial proceedings where a final decision is to be made through the application of law to facts. By Article 25 that right cannot be limited by law or otherwise.”

64. Moreover, this court finds that the proceedings before the land registrar was not a boundary dispute but an attempt by the defendants to change the Registry Index Map in order to place parcel number Gilgil/Gilgil Block1/9937 next to Gilgil/Gilgil Block1/398. I have looked at PEX 8 which is the original map sheet 11 for Kikopey in respect of Gilgil/Gilgil Block1(Kikopey) and do find that it is a clear fact that parcel of land no Gilgil/Gilgil Block1/9937 was created on the 9<sup>th</sup> of September 2009 from un-surveyed parcel of land. The Map sheet shows in entry no 2 that created 9935 to 9938 were created on the same day thus 9/9/2009. Parcel number Gilgil/Gilgil Block1/9937 was placed next to Gilgil/Gilgil Block1/396 and not Gilgil/Gilgil Block1/398 and therefore the claim by the defendants before the land registrar that there was a boundary dispute was not proper as it amounted to a claim to land that belonged to the plaintiffs and the land registrar had no powers to determine a land ownership dispute. The decision by the land registrar was an illegality for want of jurisdiction to move the parcel of land in issue from the position on the map to another position and to order for the correction of the map.
65. The evidence of Derrick Kihugi Nganga that there was an error on the map holds no water as he is not the surveyor who carried out the survey works in respect of the parcel number 9937 as the same was done by Martha Wathira under the instructions of George Kimani Mugenyio who were not called as witnesses. This court finds no error on the Registry index Map in respect of the parcel number 9937 as the same was prepared by the Director of Survey after a ground survey and the land was registered in the names of Patrick Simon Njoroge by way of transfer by the government of Kenya on February 24, 2016 after the same was surrendered to the said government. The title was issued on the February 29, 2016 and no error was ever reported.
66. This court further finds that the mutation forms were not signed by the plaintiffs officials and the 3<sup>rd</sup> defendant who are owners of the adjoining land hence the same were invalid and could not be used to rectify the map.



67. The mutation form produced as DEX12 was supposed to be signed by all interested parties. In conclusion this court finds that the action of the Land Registrar was tainted with illegality and the same are hereby declared a nullity. I do grant judgment in terms of a cancellation of entries made by the 1<sup>st</sup> defendant in respect to parcels known as Gilgil/Gilgil Block 1/27977 (Kekopey) and Gilgil/Gilgil Block 1(Kekopey Ranch)/9937. I do grant a permanent injunction restraining the defendants either by themselves, their agents, servants and/or employees from trespassing, encroaching, alienating, developing and/or in any way interfering with the plaintiff's peaceful occupation and use of the parcel known as Gilgil/Gilgil Block1/27977. The counter claim is dismissed. Costs of the suit and counter claim to the plaintiff.

**JUDGMENT DATED, SIGNED AND DELIVERED VIA EMAIL THIS 27<sup>TH</sup> DAY OF APRIL 2023**

**A O OMBWAYO**

**JUDGE**

