



REPUBLIC OF KENYA



KENYA LAW
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**Karanja v Isaac & 6 others (Environment & Land Case E28 of 2022)
[2025] KEELC 283 (KLR) (29 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 283 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E28 OF 2022
LN GACHERU, J
JANUARY 29, 2025**

BETWEEN

HILDA MWIHAKI KARANJA PLAINTIFF

AND

GEOFFREY MWANGI ISAAC 1ST DEFENDANT

DISTRICT LAND REGISTRAR MURANG'A 2ND DEFENDANT

DISTRICT SURVEYOR 3RD DEFENDANT

THE HON ATTORNEY-GENRAL 4TH DEFENDANT

JAMES KARANJA WAITHAKA 5TH DEFENDANT

JOHN WAITHIRA GITAU 6TH DEFENDANT

ANTHONY NJUGUNA MWANGI 7TH DEFENDANT

JUDGMENT

1. The Plaintiff herein filed an Amended Plaintiff dated 19th April 2023, and filed on 9th October 2023, wherein she sought for the judgement against the Defendants jointly and severally following Orders:-
 - a. A permanent injunction restraining the 1st Defendant, his servants, agents and employees from trespassing, encroaching, occupying, fencing or in any other matter interfering with the Plaintiff's land parcel No. Makuyu/Kimorori/Block/144, which property measures 3.900 Hectares (9.6369 Acres).
 - b. A declaration that the Plaintiff is the lawful and legitimate owner of all that parcel of land known as Title No. Makuyu/Kimorori/Block/144, which property measures 3.900 Hectares (9.6369 Acres).



- c. A declaration that Title No. Makuyu/Kimorori/Block/IV/384, cannot give the 1ST Defendant any rights of ownership as the same was extinguished vide prescription of title through adverse possession.
 - d. An order directed to the 2nd Defendant to cancel Title No. Makuyu/Kimorori/Block/IV/384, purporting to grant ownership over the Plaintiff's suit property known as Title No. Makuyu/Kimorori/Block/144.
 - e. An order directed to the 3rd Defendant to cancel the subdivision plan/mutation over Title No. Makuyu/Kimorori/Block/IV/384, dated 14th June, 2021 and the subsequent Title Nos. Makuyu/Kimorori/Block/IV/2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302 and 2303.
 - f. An order directed at the 2nd Defendant to cancel all the resultant titles brought by the subdivision of Title No. Makuyu/Kimorori/Block/IV/384, which are Makuyu/Kimorori/Block/IV/2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302 and 2303.
 - g. An eviction order compelling the 1st Defendant together with their agents, servants, employees or any one acting under their authority to vacate the suit premises known as Title No. Makuyu/Kimorori/Block/144, measuring 3.900 Hectares (9.6369 Acres).
 - h. An order compelling the OCS Kenol Police Station to enforce the orders issued by this Honourable Court.
 - i. Special damages Kshs.51,362,600/-.
 - j. General damages for trespass, destruction to the suit property, lost opportunity and loss of use.
 - k. Costs of the suit and interest thereon at Court rates.
 - l. Any other relief the Court may deem fit and just to grant.”
2. It is the Plaintiff's claims that she is the registered owner of land parcel No. Makuyu/Kimorori/Block/144 (the suit property), measuring 3.900 Hectares (9.6369 Acres), which she inherited from her husband Samuel Njama Karanja, who died in year 1998. She contended that the 1st Defendant is the purported owner of Title No. Makuyu/Kimorori/Block/IV/384, which title he has used to illegally occupy 5 Acres of the suit land. Further, that the 1st Defendant sub-divided 5 Acres out of the suit property to form land parcel numbers Makuyu/Kimorori/Block/IV/2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302 and 2303.
 3. She also averred that on 22nd July 1981, her husband purchased Plot No. 267 measuring 5 Acres for the entire consideration of Kshs.35,000/=, from one Dishon Kamau Njoroge ,who had been allocated the plot by Gaichanjiru Self-Help Farm. Further, on 30th November 1981, her husband purchased Plot No. 268 measuring approximately 5 Acres from one Michael Marandi Mbugua, for the total purchase price of Ksh.40,000/=, which plot was procured by the Vendor from Gaichanjiru Self-Help Farm.
 4. It was her claim that Plots Nos 267 and 268, shared a common boundary and her husband assumed occupation of both immediately following purchase of the same and his family enjoyed quiet enjoyment of both plots until 25th May 2021, when the 1st Defendant forcefully entered the suit land and illegally fenced off 5 Acres thereof.
 5. That on 1st March 1989, the Plaintiff's husband was issued with a title deed in respect of land parcel No. Makuyu/Kimorori/Block/144 measuring approximately 3.900 Hectares or 9.6369 Acres (the suit property). Further, upon the demise of her husband in year 1998, the Plaintiff filed Succession Cause



No. 1272 of 1998 (Nairobi), and was issued with a grant through which she became the registered proprietor of land parcel No. Makuyu/Kimorori/Block/144.

6. That sometimes in April, 2021, she was summoned by the Chief of Kimorori location (Mr. Ngigi), for a meeting scheduled for 3rd May 2021, which meeting she subsequently attended whereupon the 1st Defendant claimed that the Plaintiff had fenced off 5 Acres of his parcel of land purchased from his brother-in-law namely, Mr. Mwangi, who did not attend the said meeting.
7. The Plaintiff also averred that during another meeting which took place on 17th May 2021, at the Makuyu Assistant County Commissioner's Office and attended by the Chief in charge of Kimorori location, the 1st Defendant threatened to fence off the 5 Acres which he claimed were illegally occupied by the Plaintiff. Thereafter, 1st Defendant actualized the foregoing threat by fraudulently causing the suit land to be sub-divided to form land parcel numbers Makuyu/Kimorori/Block/IV/2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302 and 2303, in defiance of a Court Order forbidding encroachment into the suit property.
8. Further, that the 1st Defendant's agents occasioned massive damage to the Plaintiff following the invasion of the suit property quantified at the sum of Kshs.52,362,600/-.
9. The 2nd Defendant was accused of complicity for failing to register a caution over the suit land as sought by the Plaintiff following the illegal encroachment onto the suit property by the 1st Defendant. Allegations of complicity were also directed at the 3rd Defendant on account of having approved the sub-division of the suit land, at the instigation of the 1st Defendant, while knowing fully well about the existence of a dispute over the same property.
10. The Plaintiff described the 1st Defendant's Title No. Makuyu/Kimorori/Block/IV/384 as an outright forgery and particularized the 1st Defendant's fraud as follows:
 - a. Fraudulently procuring and/or forging Title No. Makuyu/Kimorori/Block/IV/384.
 - b. Purporting that Title No. Makuyu/Kimorori/Block/IV/384 overlapped into the Plaintiff's property being land parcel No. Makuyu/Kimorori/Block/144.
 - c. Fraudulently creating and purporting to register Title No. Makuyu/Kimorori/Block/IV/384.
 - d. Fraudulently procuring and sub-dividing Title No. Makuyu/Kimorori/Block/IV/384 into several portions being Title Nos. Makuyu/Kimorori/Block/IV/2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302 and 2303 during the pendency of the suit over the same property and in spite of Court orders stopping all dealings with the suit land.
 - e. Purporting to legally register the fraudulent subdivision and producing the Title Nos. Makuyu/Kimorori/Block/IV/2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302 and 2303 during the pendency of the suit over the same property and in spite of Court orders stopping all dealings with the suit land.
 - f. Illegally entering into and occupying 5 Acres out of the suit premises on the basis of fraudulent, illegal, forged and/or defective title document.
 - g. Unlawfully depriving the Plaintiff of quiet possession and use of its land as provided for under Article 40 of *the Constitution* of Kenya as read together with the applicable statutory law.
 - h. Colluding with the 2nd Defendant and purporting to create a Title deed in respect of 5 Acres out of the suit property while fully aware that the subject parcel of land belongs to the Plaintiff.



The 1st Defendant's Response

11. The suit is opposed by the 1st Defendant through his Amended Defence and Counterclaim dated 30th May, 2023 filed pursuant to the leave granted by the Court on 8th December, 2021. It was his averments that he is in possession of the title deed for Makuyu/Kimorori/Block/IV/384, and has been having quiet enjoyment of the said land since year 1988, and has cultivated and developed the same.
12. Further, that the Plaintiff is the holder of Makuyu/Kimorori/Block/144, which is distinct from the 1st Defendant's land parcel and the Plaintiff interfered with the 1st Defendant's land by attempting to prevent the 1st Defendant from sub-dividing the same.
13. That the Plaintiff refused to appear before the local administration in order to amicably resolve the dispute with the 1st Defendant over the suit property. Further, that the 1st Defendant sub-divided his land parcel and disposed the same to third parties who are not parties to the subject suit.
14. That the 1st Defendant procured a title deed in respect of land parcel No. Makuyu/Kimorori/Block/IV/384, in year 1989 through a purchase and assumed occupation immediately following purchase, and constructed his family home thereon which is visible to the Plaintiff.
15. In his Counterclaim dated 30th May 2023, the 1st Defendant prayed for a declaration that he is the legal owner of land parcel No. Makuyu/Kimorori/Block/IV/384, and also sought prohibitory Orders restraining the Plaintiff from interfering with his land parcel.

The 2nd, 3rd and 4th Defendants' Response

16. The 2nd, 3rd and 4th Defendants also opposed the Plaintiff's suit through their joint Statement of Defence dated 13th October 2023 and denied all the allegations of collusion and fraud as set out in the Plaintiff's Amended Complaint and reiterated their respective statutory mandates.
17. They particularized their statutory duties in para 7 of their Defence among them receiving executed documents from concerned parties, registering or rejecting to register lodged documents, making entries in the land register and issuing land title deeds or certificates of lease.
18. The 5th, 6th and 7th Defendants did not enter appearance nor file their Defence, and thus the suit proceeded without their input.
19. After the Pretrial Directions, the matter proceeded for hearing via viva voce evidence wherein the Plaintiff gave evidence for herself and called one more witness whereas the 1st Defendant gave evidence for himself and called no witness. The 2nd, 3rd and 4th Defendants did not attend court for hearing though served with hearing notice. The 5th, 6th and 7th Defendants did not participate in the proceedings.

The Plaintiff's Case

20. PW1 Hilda Mwiwaki Karanja; the Plaintiff herein adopted her Witness Statement dated 19th May 2023, as part of her evidence in chief. She also produced her List of Documents as exhibits, which were marked as P Exhibit 1-14. She also produced Valuation Reports dated 16th October 2000, and dated 13th May, 2018, as exhibits in support of her case.
21. The Plaintiff testified that the approximate acreage of the suit land is 10 Acres, that her husband Samuel Karanja (deceased) purchased the suit property through the two shares, which he held and each share entitled him to 5 Acres of land. She testified that she took physical possession of the suit land in year



- 1981, and her husband fenced off the suit property with barbed wire, dug a borehole on the property and planted 1400 avocado trees which she cultivates through irrigation.
22. Further, that the 1st Defendant first laid claim to a section of the suit property in April 2021, when she received a letter from the local Chief summoning her to a meeting scheduled for May 2021, whereupon she engaged a lawyer who crafted a Demand Letter in response.
 23. It was her testimony that the 1st Defendant invaded the suit property, fenced off, sub-divided a section thereof and cut down the Plaintiff's mature avocado trees and destroyed her bee-hives. That the 1st Defendant has never been her neighbor, and she never sold the suit property to him. Further, that the 1st Defendant was well aware of the Court Order procured by the Plaintiff from the Kigumo Law Courts barring interference with the suit property during the pendency of the suit in question.
 24. The Plaintiff referred to the Green card dated 1st March 1989, and testified that the Green card annexed to the Affidavit of Geoffrey Mwangi is unsigned, and that there is a second Green card dated 21st May 2021, purportedly issued in year 1989. Further, that she obtained a loan twice using the title to the suit property.
 25. On cross-examination by Ms. Musyoka for the 1st Defendant, PW1 affirmed that she is the proprietor of land parcel No. Makuyu/Kimorori/Block/144, while the 1st Defendant occupies Makuyu/Kimorori/Block/IV/384. She confirmed that there is a title deed issued in the name of the 1st Defendant, Geoffrey Mwangi.
 26. PW1 also testified that her husband purchased land parcels Nos 267 and 268, and although she did not have any documents connecting the said parcels of land to the suit land, or to land parcel Makuyu/Kimorori/Block/IV/384, she was in possession of documents in support of her claim.
 27. It was her further testimony that land parcel No. Makuyu/Kimorori/Block/IV/384 is not owned by Geoffrey Mwangi, the 1st Defendant herein, but by the Plaintiff. She accused the 1st Defendant of invading her land. Further, that before consolidation was effected, land parcel No. Makuyu/Kimorori/Block/144, was known as plots 267 and 268.
 28. She also admitted to not having reported to the Police in regard to the threats issued to her by the 1st Defendant, and she affirmed the existence of Court orders from Kigumo Law Courts dated 17th June 2021 concerning her land parcel No. Makuyu/Kimorori/Block/144. It was her further testimony that the foregoing Court Orders directed the 1st Defendant not to sub-divide the suit land, which Orders he ignored by sub-dividing the suit property on or about May/June 2021.
 29. She also referred to a Valuation Report dated 21st June 2022, contained on page 19 of her bundle of documents, which indicated the developments found on the suit property, which include a house for farm workers, who live on the said property. Further, she accused the 1st Defendant of damaging the suit land by cutting down the crops and trees growing thereon.
 30. On re-examination, she testified that the certificate of allocation appears on pages 49 and 5 of her trial bundle, while the Occurrence Book (O.B) report is contained on page 54. Reference was made to page 70 of the Plaintiff's bundle containing the report of the Presidential Commission on large-scale farms in Makuyu dated 4th October 1988, wherein her husband's name is listed. She also accused the 1st Defendant of hiving off half of the entire acreage of the suit property and forcefully occupying the same.
 31. PW2 Dennis Gachau Karanja, testified that he is a son to the Plaintiff, who is the registered proprietor of the suit land. That the suit property was purchased by his late father, and fenced off by both his



father and paternal uncle in 1988. That the 1st Defendant began to lay claim to the suit property in year 2021, and a Report was lodged with the police as attested to by the letter of page 54 of the Plaintiff's bundle. That his father amalgamated two plots to constitute the suit land while the Plaintiff planted avocado trees thereon and irrigated the land.

32. On cross-examination by Ms. Musyoka, PW2 stated that the 1st Defendant is not known to him, and he does not live on the suit land. That he recorded a video of the 1st Defendant laying to waste the Plaintiff's avocado trees, which video clip is not an exhibit in the instant suit. That he reported the invasion of the suit land by the 1st Defendant to the police. He admitted having seen the structure erected on the suit property by the 1st Defendant but was not aware if it was inhabited.
33. On re-examination, it was his testimony that the Plaintiff did not erect structures on the suit land during the 40 years of her occupation, and the 1st Defendant after invading the property in year 2021 established a structure thereon.

The 1st Defendant's Case

34. DW1 Geoffrey Mwangi Isaac, the 1st Defendant an electrician by profession, and adopted his Witness Statement filed on 31st May, 2023. He also produced his list of documents as his Defence exhibits marked D exhibits 1-16. He affirmed being the holder of a title deed issued on 1st March 1999, entitling him to a property with an acreage of 2.2 Hectares or 5 Acres.
35. He also testified that he assumed occupation of the property in year 1988, and was shown the said land by a Surveyor together with others including the Plaintiff's husband. That he purchased his land parcel from one Zablon Kariuki (deceased). Further, that Makuyu/Kimorori/Block/144, belongs to the Plaintiff's husband.
36. That the 1st Defendant's title was issued in year 1999 and the Green card thereto is dated 2021. That he had not undertaken a search in respect of his land parcel, and when he carried out a search, the Land Registrar informed him that there was a document which was not signed and requested the 1st Defendant to swear an Affidavit to the effect that the suit property belonged to him.
37. He also testified that he needed to be accompanied by two witnesses, which he did, whereupon he was issued with a Green card in respect of the suit property. He admitted that there was no dispute as between himself and the Plaintiff's husband during the latter's lifetime.
38. He affirmed that the existence of a letter from of the Chief – Kimorori location, and he accused the Plaintiff of trespassing on his land parcel. He also testified that Makuyu/Kimorori/Block/IV/384, was no longer in existence having been sub-divided procedurally.
39. He also refuted claims that he felled the Plaintiff's avocado trees and urged the Court to allow his Counterclaim and to dismiss the instant suit with costs.
40. On re-examination, he testified that when asked to present two witnesses by the Registrar, he did not consider the Plaintiff as his witness although she is his immediate neighbor. He reiterated that he purchased his land parcel from Zablon Kariuki Mwangi, and with whom he is not related for the consideration of Kshs.70,000/= . That he misplaced the sale agreement in respect of the purchase of the suit property, and obtained a Police abstract in respect of the same, which abstract he did not produce as an exhibit in court.
41. DW1 further testified that Zablon Kariuki Mwangi did not supply him with any documents, and he admitted that he did not have any documents issued by Gachanjiru Self-Help Group or possess any documents at all attesting to his purchase of the suit property.



42. He further testified that he took possession 1988, but he did not have photographs of the house he built thereon in 1988. Further, that he constructed a permanent house on the suit land in year 2020. He admitted that he did not have any bills to demonstrate that he has been in occupation of the suit property since 1988.
43. He also testified that he dug a borehole on the property, but did not have the necessary supporting documents to verify the same. That Agricultural Finance Corporation (AFC), did not charge his land as stated in the Plaintiff's bundle, neither did United Women Sacco execute a charge in respect of the suit land. He distinguished his land parcel from the Plaintiff's, and he denied forceful occupation of the Plaintiff's land and also admitted seeing the Valuation Report dated 2018.
44. DW1 testified that he planted his own avocado trees just like the Plaintiff, and has brought up his children on the this property, however, he did not call any of them as a witness, and neither did he call the local chief, as his witness. He stated that he complained to the Chief in year 2021.
45. Further, that he swore an Affidavit in year 2021, to allow for sub-division of his land, which could not proceed otherwise. That the Green card pertaining to his land parcel was not signed since year 1988, and his parcel of land is not NO. 144. but No, 384, which parcel of land he has already sub-divided. That he was allocated the suit land by the Presidential Commission on large-scale farms, and he paid the requisite stamp duty and registration fees ,but mislaid the receipt thereto.
46. He affirmed that Catherine Wambui Mwangi, is his daughter and has sworn an Affidavit in respect of instant suit, and that he brought up his children on land parcel number Block 1/3212. That he sub-divided his land parcel after selling a portion thereof to one Mwangi, and engaged the services of a surveyor.
47. The 1st Defendant denied that the sub-divisions that he carried out were meant to mask an illegality and he reiterated that his land parcel is No. 384, and was not conversant with the actual acreage of the Plaintiff's land parcel.
48. On re-examination, he testified that his property was never the subject of a charge.
49. After the close of viva voce evidence, the court directed the parties to file their respective written submissions, which directions were adhered to; the submissions are as follows;

The Plaintiff's Submissions

50. The Plaintiff filed her written submissions dated 13th September, 2024 through H.T. & Associates Advocates, and identified three issues for resolution by the Court as follows:
 - “(a) Whether the Plaintiff is the lawful registered owner of land parcel No. Makuyu/Kimorori/Block/144, which property measures 3.900 Hectares (9.6369 Acres), and thus entitled to the orders of permanent injunction, vacant possession, assistance by the OCS Kenol Police Station, special damages and general damages for trespass and costs of the suit.
 - (b) Does title No. Makuyu/Kimorori/Block/IV/384, give the 1st Defendant any rights of ownership or was the same if it actually exists extinguished vide prescription of title through adverse possession of the same by the Plaintiff for over 12 years.



(c) Whether the 1st Defendant is deserving of the orders he seeks in his Counterclaim or the same should be dismissed with costs.

51. The Plaintiff submitted that she has established her occupation of the suit property during the trial, through the Valuation Reports dated 16th October 2000, and 18th May 2018, which corroborated the Plaintiff's viva voce evidence. That, if the 1st Defendant had been in occupation of the suit land since 1988 as claimed, the said Valuation Reports would have captured the same information.
52. It was further submitted that the 1st Defendant failed to supply any form of evidence attesting to his alleged occupation of the suit property. Further, that the 1st Defendant during cross-examination admitted that he erected a building on the suit land in year 2020, which contradicts his witness statement wherein he stated that he built his family home on the property in year 1988. That the 1st Defendant's Surveyor's report is dated 14th June 2021, which demonstrates that his entry thereon is dated to year 2021.
53. The Plaintiff further submitted that the Green card relied upon by 1st Defendant remained unsigned for 38 years, until when it was un-procedurally signed 21st May 202 therein , pointing to the 2nd, 3rd and 4th Defendant's complicity in the 1st Defendant's fraud.
54. The total acreage of the Plaintiff's entire land holding was stated as 10 Acres, as attested by the documents appearing on pages 13, and 48 of her bundle of documents. Further, that the 1st Defendant's Counterclaim is statutory-barred pursuant to the provisions of Section 7 of the Limitation of Actions Act because he failed to present any cogent or other reason why he did not file suit in respect of the suit land for over 40 years until his invasion in year 2021.
55. The Plaintiff relied on various decided cases being; Francis Munyoki Kilonzo & Another Vs Vincent Mutua Mutiso (2013) eKLR; Ane mumbi Hinga Vs Gaitho Oil ltd (2019) eKLR; and, Caliph Properties Ltd Vs Barbel Sharma & Another [2015] eKLR.
56. On the question of the Court's mandate to order for the cancellation of a title which was procured illegally or un-procedurally, reliance was placed in the Judgment of the Court in the cases of Alice Chemutai Too Vs Nickson Kipkirui Korir & 2 Others [2015] eKLR; and, Joseph Wachira Mbiti Vs George Muhoho & Another [2020] eKLR.
57. The Plaintiff argued that she has made out a compelling case, which entitles her to general damages for trespass and damage amounting to Kshs. 20,000,000/=. Guidance was sought in the reasoning of the Court in the case of Rhoda S. Kiilu Vs Jiangxi Water and Hydropower Construction Kenya Ltd [2019] eKLR; Willesden Investments Ltd Vs Kenya Hotel Properties Ltd NBI HCC No. 367 of 2000; and, John Chumia Nganga Vs Attorney-General & Another [2019] eKLR.
58. On the issue of adverse possession and eviction, reliance was placed in the decision of the Court in the case of Kidbrooke Investment Ltd Vs Isaac Mwangi & 2 Others [2019] eKLR; and, Rodgers Kindia Kaibunga Vs Esther Kyell [2019] eKLR.

The 1st Defendant's Submissions

59. The 1st Defendant filed his written submissions dated 24th September, 2024 through Kiarie Joshua & Associates Advocates, and submitted that land parcel No. Makuyu/Kimorori/Block/IV/384, was subdivided resulting in land parcels Nos Makuyu/Kimorori/Block 2294 and Makuyu/Kimorori/Block 2296, registered in the names of Charity Kagendo Komo and Lucy Gatwiri Mbaya, respectively and who have not been sued in the instant suit.



60. It was also submitted that the Court cannot grant the Order sought by the Plaintiff against the mentioned two individuals, having not been parties to the instant suit. Reliance was sought in the case of *Kiai Mbaki & 2 Others Vs Gichuhi Macharia & Another* [2005] eKLR.
61. Further, that the 1st Defendant was issued with a title to his land parcel on 1st March 1989, and there was no fraud in respect of the issuance of a Green card to him in year 2021, as the same document had been left unsigned hence in need of rectification by the Registrar who did so upon receiving the 1st Defendant's affidavit and testimony from two witnesses being neighbors to the 1st Defendant.
62. Further, that the instant suit actually concerns a boundary dispute because the Plaintiff's land is distinct from the 1st Defendant's as attested to by the Survey report undertaken by Geo-Eclipse Company Ltd, appearing on page 191 of the 1st Defendant's bundle. Reliance was sought in the Judgment of the Court in the case of *Estate of Sonrisa Ltd & Another Vs Samuel Kamau Macharia & 2 Others* [2020] eKLR.
63. On the issue of impeachment of title, reliance was placed in the holding of the Court in ELC Case No. 244 of 2017, *Zacharia Wambugu Gathimu Vs David Wangari Maina; Kinyanjui Kamau Vs George Kamau* (2015) eKLR; *Vijay Morjaria V Nansigh Dabar & Another* (2000) eKLR, and submitted that the Plaintiff failed to adduce sufficient evidence warranting cancellation of the 1st Defendant's title.
64. With regard to the issue of Adverse Possession, guidance was sought in the reasoning of the Court in the case of *Celina Muthoni Kithinji Vs Safiya Swaleh & Others* [2018] eKLR; *Helen Wanagri Wangechi Vs Bcarumera Muthini Gathua* [2005] eKLR.
65. Concerning the Plaintiff's prayer for General and Special damages in respect of trespass, guidance was sought in the holding of the Court in *Pello 7 Another (Suing as the legal representative of the estate of the Late Lankoi Ole Pello Saisai) Vs County Government of Kajiado* (ELC Case No. 154 of 2018) [2023] KEELC 20889 (KLR) (19 OCTOBER 2023) and *Wareham t/a Wareham & 2 Others Vs Kenya Post Office Savings Bank* [2004] eKLR.
66. The above are the Pleadings, the evidence of the parties, the rival written submissions and the cited authorities which this court has carefully considered and it finds the issues for determination are;=
- i. Whether the Plaintiff's suit is merited
 - ii. Who shall bear the costs of the suit
 - iii. Whether the 1st Defendant's Counterclaim is merited
 - iv. Who shall bear the costs of the counterclaim
67. Before embarking on the disputed facts, the court will point out some undisputed facts as follows: -The Plaintiff herein Hilda Mwihaki Karanja, is the registered owner of land parcel No Makuyu/Kimorori/Block IV/144, which measures 3.90Ha or approximately 9.6 acres. The Plaintiff was registered as the owner of the suit of land on 8th November, 2000, through transmission. Initially, the said parcel of land was registered in favour of Samuel Njama Karanja (deceased), who was the husband to the Plaintiff herein on 1st March, 1989, under "The Registered [Land Act](#), Cap 300(repealed) regime.
68. Further, it is evident that the late Samuel Njama Karanja had purchased two plots in 1981 being plots Nos 267 & 268 (Mwambu Farm), from two persons being Dishon Kamau Njoroge who sold to him plot No 267 at Ksh. 35,000/=, and Michael Marandi Mbugua who sold Plot No 268 at Ksh.40,000/= . There are two acknowledgement Receipts or vouchers, produced by the Plaintiff confirming that the said Samuel Njama Karanja paid the full payment of the purchase price to the two vendors.



69. Further, it is evident that the Plaintiff also produced two share certificates for Plots Nos 267 and 268 in the name of Samuel Njama Karanja, that were issued by Gaichanjiru Self Help Farm (Mwambu Farm). The two share certificates indicated that the two plots were located in LR No. 10739/2, measuring approximately at five (5) acres each. Further a sale agreement between one of the vendors Michael Marandi Mbugua and Samuel Njama Karanja, was produced as an exhibit. Therefore, there is no doubt that the late Samuel Njama Karanja purchased two plots which were located in Mwambu Farm in 1981.
70. However, there was no evidence produced to confirm whether the two plots were amalgamated to form one parcel of land, and after registration, the two plots translated to what title; but what is evident is that Samuel Njama Karanja became the registered owner of Makuyu/Kimorori/Block IV/144(Mwambu), which registration was done on 1st March 1989.
71. Further, it was not clear whether the two plots Nos 267 & 268 were consolidated to form land parcel number Makuyu/Kimorori/Block IV/144 or not, or whether any of them was linked to Makuyu/Kimorori/Block iv/ 144, which now belongs to the Plaintiff herein. Further it was not clear whether the two plots eventually gave rise to any of title deeds referred to herein.
72. There is no doubt, and it very is clear that the title deed; Makuyu/Kimorori/Block IV/144, is traceable from 1st March, 1989, when it was initially registered in the name of the Government of Kenya, and later on the same day was registered in the name of Samuel Njama Karanja, and later transmitted to the Hilda Mwhaki Karanja, the Plaintiff herein on 8th November, 2000 under Succession cause number 1272 of 1998 (Nairobi).
73. Further, there is no doubt that land parcel number Makuyu/Kimorori/Block IV(Mwambu)/384, measuring approximately 2.02 Ha was also transferred from the Government of Kenya to Geoffrey Mwangi Isaac, the 1st Defendant herein on 1st March, 1989. That registration was done the same period as that of late Samuel Njama Karanja, who was registered as the owner of land parcel No. Makuyu/Kimorori/Block IV/144.
74. The said Geoffrey Mwangi Isaac(1st Defendant herein), was issued with his title deed under The Registered Land Act, Cap 300(repealed) just like the late Samuel Njama Karanja . It is evident that under the said Cap 300(repealed) section 27(a) provides that: -
- “ a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”
75. Therefore the late Samuel Njama Karanja and Geoffrey Mwangi Isaac(1st Defendant herein) became the absolute and indefeasible owners of their respective parcels of land as from 1st March, 1989. As the absolute and indefeasible owners, their rights of ownership of their portions of land was protected and could only be defeated as provided by the law. See section 28 of the said Cap 300(repealed).
76. Further, it is evident from the Green Card produced by the 1st Defendant, confirmed that he remained the registered owner of the said parcel land No. 384, from 1st March, 1989 until 1st June 2021, when the said title was closed for subdivision. After the said closure and subdivision of title No. Makuyu/Kimorori/Block IV/384, which parcel of land that was initially registered in favour of the 1st Defendant, it ceased to exist. The resultant subdivisions are titles Nos Makuyu/Kimorori/Block IV/2294 – 2303, which titles were issued on 1st July 2021, as is evident from the Witness statement of the Land Registrar E. Muthoni Mputhia dated 13th December, 2023.



77. Further, from the evidence and exhibits produced by 1st Defendant, some of the resultant subdivisions have already been sold to third parties. It is evident that Land parcel number Makuyu/Kimorori/Block IV/2298, was sold to John Mwangi Gathara & Milka Nyawira Mwangi, as seen from the sale agreement dated 28th April, 2022, which was produced as an exhibit by the 1st Defendant. The said exhibit was not challenged by the Plaintiff, and this court will have no reasons to doubt the said sale agreement.
78. Further land parcel No. Makuyu/Kimorori/Block IV/2299, has already been sold to Kelvin Kamande, while Makuyu/Kimorori/Block IV/2300, has been sold to Anthony Njuguna Mwangi, while Makuyu/Kimorori/Block IV/2302, has been sold to David Gatimu Kungu and Makuyu/Kimorori/Block IV/2303, has been sold to James Karanja Waithaka and Joan Waithaka Gitau. The above sales are evident from the sale agreements produced in court as exhibits, by the 1st Defendant, which sale agreements were never challenged at all by the Plaintiff herein.
79. Therefore, with the evidence of the said closure of the title No. 384, upon subdivision of the same, it is clear that the said land parcel number Makuyu/Kimorori/Block IV/384, is not in existence and ceased existing when it was subdivided and then closed.
80. However, it is also not in doubt that a Certificate of title can be impeached and/or cancelled if the said Certificate of title is found to have been acquired fraudulently, through misrepresentation, illegally or through a corrupt scheme as provided by Section 26(1)(a&b) of the Land Registered Act. See also the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others* [2015] eKLR, the Court held that:
- “It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.”
81. Even with the subdivision and closure of the said title No. 384, if there is sufficient evidence to prove that this title was acquired under any of the conditions described in section 26(1)(1&2), of the [Land Registration Act](#), above, then this court would not hesitate to cancel the said title and directs that the Register in respect of the said title be rectified as provided by section 80(1) of the said [Land Registration Act](#), which provides;
- “(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”
82. Further from the documents produced as exhibits by both the Plaintiff and 1st defendant herein titled Makuyu/Kimorori/Block IV(Mwambu), the two land parcels Nos 144 and 384, are next to each other. It is also evident as earlier pointed by the court that the two parcels of land have distinct titles, which titles were issued to two different proprietors on 1st March, 1989, and probably they were issued under



the same transaction: - Samuel Njama Karanja was issued title for land parcel No 144 and Geoffrey Mwangi Isaac(1st Defendant), was issued with title for land parcel No. 384.

83. This court too has seen a document produced by the 1st Defendant from a Land Surveyor, one Kimengi I.M. of Geo-Eclipse Co. Ltd which document indicates that land parcel No. Makuyu/Kimorori/Block.IV/384, exist as a distinct parcel of land contained in Registry Index Map of the suit land exhibit Sheet No. 2, which was compiled by the Survey of Kenya in 1988.
84. Further, the District Surveyor Murang'a, one Lazarus Ndivo in his Witness Statement, which is on recorded also alluded that the field data plans that were used for registration of the said parcels of land were in custody of the Director of Surveys. The Plaintiff being the one who had alleged should have availed this record from the Director of Surveys to confirm whether indicated had parcel of land fell also in title No. 384, which is registered in the name of the 1st Defendant.
85. The above are the undisputed facts, and the court will now turn to the disputed facts, analyse the available evidence, relevant provisions of law and the relevant case law and on doing so, determines the issues identified earlier for determination.

i. Whether the Plaintiffs' suit is merited?

86. The Plaintiff herein is the one who has alleged and given that it is trite that he who 'alleges must prove' the Plaintiff needed to call sufficient evidence to prove all the allegations of fraud, on the part of the Defendants herein. As alleged in her claim. (see Section 107 and 108 of the [Evidence Act](#)).
87. Did the Plaintiff herein satisfy the above onerous task of proving her allegations by calling sufficient evidence to prove her case on the required standard of balance of probabilities? See the case of *Miller Vs Minister of Pensions (1947) 2 ALL ER 372*, where court held;

“ That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability is equal, it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”
88. In her claim, the Plaintiff herein alleged that the 1st Defendant, Geoffrey Mwangi Isaac, purported to be the owner of Land title No. Makuyu/Kimorori/Block IV/384, which title he has used to occupy the Plaintiff's 5 acres forcefully from land parcel No. Makuyu/ Kimorori/ Block IV/ 144.
89. The Plaintiff also alleged that the 1st Defendant fraudulently caused the said land parcel No. Makuyu/ Kimorori/Block IV/384, to be registered in his name, and later illegally caused the said land to be subdivided into various land parcels being; Nos Makuyu/Kimorori Block IV/2294 – 2303, in spite of a Court order and which resultant titles are irregular, illegal and unlawful; thus null and void.
90. The Plaintiff also accused the 2nd Defendant of failure to register a restriction over the said land parcel, and also accused the 3rd Defendant of complicity in the fraud and/ or fraudulent activities allegedly committed by the 1st Defendant.
91. Further, the Plaintiff alleged that even if the court was to find that the 1st Defendant was the registered owner of the Land parcel No. Makuyu/ Kimorori/ Block IV/384, then his title has been extinguished



by virtue of her long occupation and possession of the said land, and thus the Plaintiff is entitled to ownership of the said parcel of land through the doctrine of adverse possession.

92. The Plaintiff has alleged that the 1st Defendant got registered as the owner of the said land parcel No. Makuyu/Kimorori/Block IV/384, through fraud or in an illegal or irregular manner. It is trite that fraud is a serious allegation, which allegation must not only be pleaded, but must also be proved through calling of evidence. The standard of proof of fraud is on a higher standard than on a balance of probabilities, but slightly lower than or beyond reasonable doubt. See the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR (Civil Appeal No. 106 of 2000)* where the court declared as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

93. From the onset, this court pointed out that the 1st Defendant became the registered owner of the land parcel No.384, on 1st March, 1989, and a title deed was issued in his name on the same date, and thus he became an absolute proprietor, unless there is prove that the said registration was done fraudulently, illegally, irregularly or unprocedurally through corrupt scheme. See the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR* the Court stated that;

“Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part.”

94. The Plaintiff also alleged that the 1st Defendant’s title was fraudulently acquired because he did not produce the sale agreement between himself and the alleged Mwangi who sold the said parcel of land to him. The Plaintiff further alleged that the Green Card produced by the 1st Defendant was signed in 2021. As the court pointed out earlier, he who alleges must prove. Did the Plaintiff herein who alleged prove the said allegations?

95. It is evident that the title deed in favour of the 1st Defendant dated 1st March 1989, was issued the same time as when the title deed in favour of Samuel Njama Karanja was issued. The said certificate of title was issued by the Lands office, and for the plaintiff to prove that this registration by the 1st Defendant was fraudulent, she ought to have called evidence from either Gaichanjru Self help Group or officials of Mwambu Farm to confirm that indeed the 1st Defendant was not deserving to be registered as such. She did not call any witness from the two original owners of the larger portion of the land, where the title deed in question was derived from.

96. The Plaintiff questioned the authenticity of the Green Card which shows the transactions and the history of this land parcel divided by the 1st Defendant. The 1st Defendant alleged that there was an omission initially in failure to sign in s the Green Card for his land parcel No. 384, but after he swore an Affidavit to the effect that he owned the said parcel of land and also availed two witness, the Land Registrar signed the Green Card in question in the year 2021.



97. As already pointed out, the Plaintiff being the one who alleged, that the title deed held by the 1st Defendant was fraudulently acquired, she had a duty to call evidence to support her allegations. Without calling sufficient evidence, her allegations just remained as mere allegations, which were not sufficient to prove case on the required standard. See the case of Cmc Aviation Ltd Vs. Crusair Ltd (NO.1) (1987) KLR 103 where the court held;
- “The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.”
98. The two parcels of land were allegedly hived from Mwambu Farm, and the Plaintiff’s husband bought his two plots from two individuals who were members of Gaichanjiru Self Help Group, a land buying Company, which had allotted the various plots to its members through balloting.
99. For the Plaintiff to prove that the 1st Defendant title was a purported one and not a genuine title or was acquired fraudulently, she ought to have called a witness from Mwambu Farm to confirm if indeed the said Farm had facilitated preparation of title No. Makuyu/Kimorori/Block IV/384, in the name of Samuel Njama Karanja or not, and /or whether the same had been registered in favour of the 1st Defendant herein or not.
100. The Plaintiff alleged that plots Nos 267 & 268, gave rise to land parcels Nos 144 and 384. There is no evidence called from Gaichanjiru Self Help Group, who issued the two share certificates to Samuel Njama Karanja to confirm whether plots Nos 267 and 268, gave rise to or translated to land parcels Nos Makuyu/Kimorori/Block IV/144 and 384, in the name of Samuel Njama Karanj, as alleged by the Plaintiff.
101. Further, there was no evidence called either from Mambu Farm or Gaichanjiru Self Help Group to link plots Nos 267 and 268, which Plots the late Samuel Njama Karanja, had purchased ,to the two parcels of land herein.
102. What is clear is that Samuel Njama Karanja was the registered owner of land parcel No Makuyu/ Kimorori/Block IV/144, measuring 3.900 Ha, while Geoffrey Mwangi Isaack ,the 1st Defendant is the registered owner of Makuyu/Kimorori/Block IV/384.
103. These two parcels of land are next to each other and from the Surveyors report from Geo –Links, which was produced by the 1st Defendant , and which document the Plaintiff did not dispute did indicate that land parcel No Makuyu/Kimorori/Block IV/384, was a distinct parcel of land on the ground, and its Registry Index Map was contained in Sheet number 2.
104. The Plaintiff did not call any evidence from the Director of Surveys to dispute that evidence from Geo -Links Ltd and therefore, this court will have no reasons to doubt that land parcel No Makuyu/ Kimorori/Block IV/384, is a distinct parcel of land, and its title deed was issued to Geoffrey Mwangi Isaac, the 1st Defendant on 1st March, 1989, just the same time as when Samuel Njama Karanja, the husband to the Plaintiff herein was issued with his title deed for Makuyu/Kimorori/Block IV/144.
105. The Plaintiff also alleged that plots Nos 267 and 268 ,gave rise to titles Nos Makuyu/Kimorori/Block IV/144 and 384, which two parcels of belonged to Samuel Njama Karanja. However, it is evident that Samuel Njama Karanja ,was issued with his title deed for land Parcel nNo 144, and not 384. The said title deed did not even indicate that it was a consolidation of plots Nos 267 and 268.



106. Therefore, this court finds and holds that there is no evidence to link title No 384 to Samuel Njama Karanja or the Plaintiff at all. The Plaintiff acquired land parcel No 144 through transmission after the death of her husband Samuel Njama Karanja, vide HC Succession Cause No. 1272 of 1998.
107. The said transmission indicates very clearly that the inherited land was Makuyu/Kimorori/Block IV/144, and not No 384. This court finds no link between plot No 268, and land parcel No 384, which was initially owned by the 1st Defendant, but has now been closed upon subdivision.
108. Though the Plaintiff alleged that the 1st Defendant fraudulently procured and forged title for Makuyu/Kimorori/Block IV/384, and created a register for the said parcel of land. However, there was no evidence called from the lands office to confirm that the said title deed held by the 1st Defendant was fraudulently acquired, was not genuine, was illegally acquired and was irregular, and therefore null and void.
109. Further, the Plaintiff alleged that the 1st Defendant illegally, unlawfully and irregularly caused the land parcel No Makuyu/Kimorori/Block IV/384, to be subdivided into various parcels of lands while there was an existence a court order. The said court order was not clearly produced as an exhibit in this case.
110. The court has seen an application to the Land Control Board for consent to subdivide the said land, which consent was issued by the relevant Land Control Board. As the court observed earlier, the 1st Defendant was the registered owner of the land parcel No Makuyu/Kimorori/Block IV/384. As an absolute and indefeasible owner of the said parcel of land, and as provided by section 27 of the Registered Land Act (repealed,) the 1st Defendant had all the rights to deal with the said land, as he so wished, as the said title deed had not been cancelled and/ or impeached. Subdivision and selling of the said subdivided portions of land were among such rights and that is what the 1st Defendant did herein.
111. The Plaintiff further alleged and contended that even if the court was to find that the 1st Defendant was the registered owner of the land parcel No 384, then the 1st Defendant's right has been extinguished through her long occupation and possession, and thus she owns the said land No 384, through adverse possession.
112. The 1st Defendant denied that he has ever lost possession and occupation of the suit land, and therefore the Plaintiff could not have acquired the said land parcel No.384, through adverse possession.
113. Adverse possession was defined by the Court in the case of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR as follows;
- “Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”
114. A claim for adverse possession is anchored under Section 7 of the Limitation of Actions Act, which provides;
- “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”



115. For a claim of adverse possession, to crystallise, the registered owner of the land in question must have been deprived of possession and / or occupation and ownership of the suit land by the adverse possessors. The registered owner should and must be aware of the said dispossession and occupation of the suit land by the adverse possessor for a period of 12 years, and did nothing about it to assert his/her right. See the case of *Gabriel Mbui vs Mukindia Maranya* [1993]eKLR, where adverse possession was defined as;

“..the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owner’s enjoyment of land for purposes for which the owner intended to use it.”

116. The Plaintiff herein alleged to have acquired the suit land by adverse possession, by virtue of the fact that she has been in possession of this parcel of land for over 40 years, which allegations were denied by the 1st Defendant. However, there was no evidence called to prove that the Plaintiff ever dispossessed the 1st Defendant herein of his occupation and that the 1st Defendant never did anything to assert his right. The fact that the 1st Defendant had not built and/ or occupied his parcel of land did not mean that he lost possession and/or ownership of the suit land. Consequently, this court finds that the available evidence does not support a claim for adverse possession.

117. What is not in doubt is that the Plaintiff owns land parcel No Makuyu/Kimorori/Block IV/144, and the 1st Defendant owns land parcel No Makuyu/Kimorori/Block IV/384, which has now been subdivided into various parcels of land, and the two parcels are distinct and are next to each other.

118. The dispute between the Plaintiff and the 1st Defendant is either a boundary dispute or a dispute the actual position of land parcel No. Makuyu/Kimorori/Block IV/384 vis a vis land parcel No Makuyu/Kimorori/Block IV/144.

119. This dispute herein being a boundary dispute, then the parties ought to have referred the said dispute to the Land Registrar as provided by sections 18 and 19 of the [Land Registration Act](#) which provide: -

“ 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, 18. and the parcel shall be deemed to have had its boundaries fixed under this section.”

120. Having found that the dispute herein between the Plaintiff and the 1st Defendant is a boundary dispute, then section 18 and 19 of the *Land Registration Act* comes into play. Further, Section 18(2) of the said *Land Registration Act* prohibits court from entertaining any dispute or proceedings relating to a dispute over boundaries of a registered land, unless the boundaries have been determined as provided by the Act. It provides;

“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.”

121. It is evident that said section 18(2) of the said Act is couched in mandatory terms that a dispute relating to boundaries should be determined by the Land Registrar unless the boundaries are fixed.

122. The dispute herein being a boundary one, then it should just have been referred to the Land Registrar for determination before coming to this court, because each of the party herein the Plaintiff and 1st Defendant owns a title to land and they should have their boundaries fixed.



123. According to section 19(3), of the said *Land Registration Act*, boundaries are fixed as follows: -

“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.”

124. From the above provision of Law, the boundaries are fixed by reference to a plan verified by the office responsible for survey of land, who would prepare a note in the register that the boundaries have been fixed. The Plaintiff herein sued the District Surveyor and the Land registrar instead of referring the dispute herein for them for fixing of the boundaries herein.

125. In the case of *Azzuri Ltd vs Pink Properties Ltd* [2018] eKLR, the Court of Appeal held as follows: -

“This means that under the aforesaid provisions, boundary disputes pertaining to lands falling within general boundary areas must be referred to the Land Registrar for resolution..... From this analysis of the law, it should be clear from the above that, we are in agreement with the learned Judge’s conclusion that the dispute ought to have been heard by the Land Registrar as stated in the statute. Jurisdiction is everything. It has been said many times before, that, without it a court has no powers to make one more step, irrespective of the strength and nature of evidence in the parties’ possession”.

126. Further, in the case of *George Kamau Macharia vs Dexke Ltd* [2019] eKLR the Court stated: -

“From the above provisions of the law, it is manifestly clear that the above section gives the mandate to the Land Registrar to resolve boundary disputes of land with general boundaries. Registry index map (RIM) only indicates approximate boundaries and the approximate situation on the ground. Even if this court was to hear and determine this matter it will still require the input of the Land Registrar. The framers of section 18 (2) of the *Land Registration Act* placed this matter before the land registrar who has the technical advice and resources of the district surveyor to determine and ascertain the boundaries. It is trite law that where the law has given a legal obligation to a department of government, it is important for the court to let that department proceed to meet its legal obligations. In this case the office of the land registrar is mandated to deal with the general boundary dispute first before the same is escalated to the court. It is the view of this court that the dispute is prematurely before the court”.

127. The court too will rely In the case of *Estate Sonrisa Ltd & another v Samuel Kamau Macharia & 2 others* [2020] eKLR, where the court stated thus;

“It is the *Land Registration Act* that makes provisions relating to the determination of boundaries. Those provisions are found in sections 16 to 19. Specifically, for this dispute, the Registrar is empowered, after giving notice to all the affected parties, in this case, the 1st appellant and 1st respondent, indeed as well as any owner whose land adjoins the boundaries in question, and with the assistance of the surveyor, to ascertain and fix the disputed boundaries...

Under that Act, the Registrar carries out his functions without any restrictions and may rely on any other relevant document and existing records in order to resolve any dispute between landowners. Because a title deed is only prima facie evidence of the matters shown therein, the Registrar’s investigations, of necessity must encompass all entries in the register, rely on



any other relevant document and existing records, conduct proceedings in accordance with section 14(1) and cause a survey to be carried out and determine the dispute...It is only after determining the dispute can parties move to court to challenge it.”

128. Being guided as above by the provision of law and the cited cases, it is trite that the dispute herein being a boundary dispute then it ought to be resolved by the Land Registrar and the District Surveyor before the parties could seek intervention of this court.
129. It is trite that where the law gives a legal obligation to department of Government, the court should allow the said department to proceed and meet its legal obligation. The Land Registrar and the District Surveyor have an obligation of dealing with boundary disputes, and they should be allowed to carry such obligation.
130. For this holding, the court will be guided by the holding of the Court of Appeal in the case of Speaker of National Assembly -Versus- Karume (1992) KLR 21, where the court held:-

“Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”
131. Having found that the Plaintiff failed to prove all her allegations against the Defendants herein on the required standard of balance of probabilities, and having found that the dispute herein is a boundary dispute, the court finds and holds that the Plaintiff suit herein is not merited and the same is dismissed entirely, save for a finding that the dispute herein should be referred to the Land Registrar to deal with it as provided by sections 18 and 19 of the *Land Registration Act*.

ii. Whether the 1st Defendants Counter-claim is merited?

132. The 1st Defendant had sought for an inhibition order and a declaration that he is the owner of land parcel No Makuyu/Kimorori/Block IV/384. This court has found and held that each of the party herein , that is the Plaintiff a s the owner of land parcel NO Makuyu/Kimorori/Block IV/144 and the 1st Defendant as the owner of Makuyu/Kimorori/Block IV/384, which has now been closed and subdivided into various parcels of land, have a boundary dispute, which ought to be resolved, but each one of the owns their distinct parcel of land.
133. Since the said parcel of land Makuyu/Kimorori/Block IV/384, has been subdivided into various parcels of land, owned by third parties who are not parties to this suit, what is there to inhibit the Plaintiff from dealing with?
134. However, for orderliness on the ground, the Plaintiff is inhibited from interfering or dealing with the resultant subdivisions of Makuyu/Kimorori/Block IV/384, until when the Land Registrar will have delt with the matter and fix the boundaries, as directed by the court.
135. However, it is evident that the 1st Defendant it is the lawful owner of land parcel No Makuyu/ Kimorori/Block IV/384, before the same was subdivided and closed. The court declares the 1st Defendant such legal owner of the said parcel of land before it was subdivided into various parcels of land.



i. Who should bear costs of the suit herein and the counter-claim?

136. The court is always guided by the provisions of Section 27 of the *Civil Procedure Act* on the award of costs where it provides that costs are awarded at the discretion of the court. However, cost follow the event and are awarded to the successful litigant. The Plaintiffs suit is found not merited, and is dismissed wholly. Therefore the 1st Defendant is the successful and should ordinarily be awarded costs; but given the circumstances of this case, the court directs that each party should bear its own costs.
137. In conclusion, having carefully considered the available evidence, and the fact that land parcel No Makuyu/Kimorori/Block IV/384, has now been subdivided and the subdivisions are owned by third parties, who are not parties to this case, and the fact that the Plaintiff has failed to prove her case on the required standard of balance of probabilities, and the dispute herein is a boundary dispute, the court finds that the Plaintiff has not proved her case on the required standard of balance of probabilities. The suit is dismissed entirely with an order that each party to bear its own costs.
138. Further the court allows the 1st Defendants Counter-claim with an order that each party to bear its own costs for the Counter-claim
139. For the interest of justice and as provided by section 3A of the *Civil Procedure Act*, the Court refers this matter to the Land Registrar to deal with said dispute, and fix the boundaries within the next 60 days from the date hereof. Further, the Plaintiff and 1st Defendant herein to meet the costs of such exercise of fixing the boundaries.
140. The Land Registrar is directed to prepare a Report after dealing with the dispute herein and then file such a Report within a period of 60 days from the date hereof. Any of the party herein is at liberty to apply.

It is so ordered.

DATED,SIGNED AND DELIVERED VIRTUALLY THIS 29TH DAY OF JANUARY, 2025.

L. Gacheru

Judge

29/01/2025

Delivered online in the presence of:

Court Assistant - Joel Njonjo

Mr Thimba for the Plaintiff

Ms Musyoka for 1st Defendant

N/A for the other Defendants

L. Gacheru

Judge

29/01/2025

