



**Chepyegon (Suing as the next friend of Kamuren Chepyegon) & 3 others
v Chepkeitany & another (Environment and Land Appeal E012 of 2022)
[2023] KEELC 20493 (KLR) (25 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20493 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND APPEAL E012 OF 2022
L WAITHAKA, J
SEPTEMBER 25, 2023**

BETWEEN

**HELLEN CHEPYEGON (SUING AS THE NEXT FRIEND OF KAMUREN
CHEPYEGON) 1ST APPELLANT
NICHOLAS BARTONJO 2ND APPELLANT
ELIUD KAMUREN 3RD APPELLANT
VINCENT KIBET CHELAL 4TH APPELLANT**

AND

**MICAH CHEPKEITANY 1ST RESPONDENT
MUSA KEITANY 2ND RESPONDENT**

*(Being an Appeal from the judgment Hon. of P. C. Biwott SPM Kabarnet
delivered on 18th August 2022 in Kabarnet ELC number 10 of 2020)*

JUDGMENT

Introduction

1. By a Plaint dated 14th April 2020, the plaintiffs (now respondents) instituted a suit in the lower court to with Kabarnet SPMC's ELC Case No.10 of 2020 seeking judgment against the defendants (now appellants) for:-
 - a. A declaration that the parcel of land known as Baringo/Salawa/1654 measuring 2.75 ha (suit property) belongs to Micah Chepkaitany (1st plaintiff);



- b. A permanent order of injunction restraining the defendants by themselves, their agents, servants and/or employees from entering, developing, remaining, trespassing and/or threatening the plaintiffs' quiet enjoyment and possession of the suit property;
 - c. An order of eviction of the defendants, by themselves, their agents, servants and/or employees from the suit property;
 - d. Costs of the suit;
 - e. Any other relief that the honourable court may deem fit to grant.
2. The suit was premised on the grounds that the 1st plaintiff is the bona fide (registered) owner of the suit property having bought it from John Kipsuge in 1982 and that the plaintiffs enjoyed quiet possession of the suit property until sometime in 2018 when the defendants made attempts to enter the suit property.
 3. Explaining that the boundary to the suit property was ascertained by the District Surveyor, Baringo Central, and terming the defendants attempt to enter the suit property illegal, the plaintiffs instituted the suit hereto seeking the reliefs listed herein above.
 4. Upon being served with the suit papers, the defendants filed a statement of defence and counterclaim, dated 8th July 2020 denying the allegations levelled against them.
 5. Through the counterclaim, the defendants pleaded that the 1st defendant is the registered owner of the parcel of land known as Baringo/Salawa/1636 which on the title measures 12 acres but on the ground is 15 acres; that the difference between the size of the 1st defendant's parcel of land on the ground and in the title was occasioned by fraud on the part of the 1st, 2nd, and 3rd defendants in the counterclaim.
 6. The particulars of fraud levelled against the 1st, 2nd and 3rd defendants in the counterclaim are provided in paragraph 20 of the Counterclaim thus:-
 - i. The 2nd defendant purported to sell to the 1st defendant a portion of parcel number 1636 when he had earlier sold it to the plaintiff in the counterclaim;
 - ii. The 2nd defendant caused the land adjudication officials then in charge of Salawa Adjudication section to alter the records of the said area so as to reduce the plaintiff's acreage of land purchased from 15 acres to 12.4 acres.
 - iii. The 3rd defendant's agents forwarded the falsified register and sketch map to 4th defendant who prepared the survey map and registered title for land parcel Baringo/Salawa/ 1636 on the basis of erroneous information that did not tally with the acreage on the ground.
 7. It was the 1st defendant's case that as a result of the pleaded fraud against the 1st and the 2nd defendant he lost 2.6 acres of his land parcel, Baringo/Salawa/ 1636.
 8. Through the counterclaim, the 1st defendant sought judgment against the defendants in the counterclaim for:-
 - i. A declaratory order holding that the 2nd defendant unlawfully and or fraudulently sold to the 1st defendant a portion of land measuring 2.5 ha comprised in the then salawa Adjudication section provisional land parcel No. 1638 (now land parcel number Baringo/Salawa /1636, the same having been sold earlier to the plaintiff in the purchase agreement dated 14th March 1982 and the subsequent verbal or written agreements;



- ii. A declaratory order holding that the alteration of the register and sketch map for Salawa Adjudication Section so as to occasion a reduction on the acreage of the plaintiff's land parcel Baringo/Salawa/1636 from 15 acres to 12.4 acres or lesser was unlawful;
 - iii. An order for rectification of title, survey map, adjudication register and other relevant records relating to parcel number Baringo/Salawa/ 1636 so as to indicate the acreage as 15 acres;
 - iii. An order compelling the 1st defendant to pay special damages in the sum of Kshs.63,183/- for malicious destruction of property;
 - iii. An order of permanent injunction restraining the 1st and the 2nd defendants from further encroaching or in any other way interfering with the plaintiff's peaceful enjoyment and use of land parcel Baringo/Salawa/1636;
 - iii. Any other reliefs as shall be necessary in the interest of justice.
 - iii. Costs.
9. The defendants in the counterclaim did not file any defence to it. The counterclaim was, therefore, undefended.

Evidence

Plaintiff's Case

- 10. When the case came up for hearing, P.W.1, Micah Chepkaitany relied on his statement recorded on 14th April, 2020 after it was adopted as his evidence in chief. He told the court that Chepyegon had entered his land-1654 which he had bought from Kipsuge; that a surveyor cut for him 6.5 acres and that he paid 3900/-; that there was no written agreement but they recorded the transaction in a note book and that boundaries were marked. He further informed the court that Chepyegon had his portion there; that Kamuren lived on the lower side area and that nobody questioned him.
- 11. In 1983, he received information that another person had entered his land. He established that the intruder was Karumen Chepyegon. He reported to the police and Kamuren Chepyegon was summoned but he refused to move out.
- 12. He further informed the court that title to the suit property was not issued until 2020. Maintaining that his land is 6 ½ acres, he urged the court to evict the defendants from the suit property.
- 13. In cross examination, he stated that the 1st defendant occupies his land; that he prevented him from entering his land; that his portion was still in the seller's name in 1982 and that a surveyor demarcated his portion for him in the presence of the seller. Further, that the 1st defendant and his sons had trespassed on the suit property and had been there since the time they entered it. He could not tell whether 1st defendant bought 15 acres.
- 14. In re-examination, he stated that he was shown his portion in 1982 in the presence of the 1st defendant; that the 1st defendant did not raise any questions; that the 2nd plaintiff is his son and that he sent his son to till the land but the 1st defendant became an obstacle.
- 15. He acknowledged that he did not produce any written agreement from which the court could confirm the size of land he bought.
- 16. John Kaimugul Kipsuge, relied on his statements recorded on 9th September, 2020 and 14th April, 2020 after they were adopted as his evidence in chief.



17. He stated that he sold 8 acres to the 1st defendant's daughter; that he did not sell any other portion to the 1st defendant and that he also sold land to Micah. He further stated that every one knew their boundary, that surveyors went to the scene after disputes arose recently; that the plaintiff paid him 3900/- and that the 1st defendant erected structures on the plaintiff's land.
18. In re-examination, he stated that he sold land to Kamuren through Loice, 8 acres, and Micah 6 acres. He remained with 2 acres.
19. He further stated that the original acreage of 1057 was 20 acres; that agreements were partly written and partly oral. He acknowledged instalments.
18. He stated that Parcel number 1636 came through objection process. He signed nowhere in 1984 that he sold the 1st defendant 15 acres.
20. BK, informed the court that he was born in 1980. He could not tell what happened before he was born. He was a minor till 2008. He came to know the plaintiff's complaint in 2019. His dad, P.W.2 gave him the history of plot No.1056. The 1st defendant claimed their land, 1056. In 2010 he reported to the chief and he stopped his claim.
21. Musa Keitany, the plaintiff's son, visited the suit land in 1993 with P.W.2. P.W.2 showed him the boundaries. He returned to the land in 2015 and put a temporary fence which was destroyed and some structures erected there by the 1st defendant.
22. He reported to the police. The OCS summoned Kamuren and his son.
23. They met at Kabarnet Police Station. The OCS directed them to the District Surveyor. They went to the ground with the surveyor who showed them beacons between 1636 and 1654. That happened in 2018. He fenced according to beacons. In 2019, he went to till the land but the 1st defendant's sons prevented him. The area chief advised him to come to court. He took a lawyer who issued a demand notice. He produced the demand letter, dated 14th August 2019, as Dexbt 2. The defendants did not heed the demand. He urged the court to order that parties stick to their own portions as per beacons. No one should encroach on another's land.
24. In cross examination, he stated that the 1st defendant moved boundaries in 2015. They are in occupation of two acres of their land. They did not move out in 2019 when the lawyer issued them with a demand letter. His father showed him the land. He did not see the sale agreement. He does not know whether the 1st defendant controls 15 acres on the ground. They took possession of their land after they got a court order. They did not damage the 1st defendant's property.
25. In re-examination, he stated that he has not been charged with malicious damage to property. He was young when his father bought the land. Kamuren's sons denied them access to the land.

Defendants Case

26. D.W.1, Nicholas Bartonjo Kamuren (2nd defendant), relied on his statement filed on 7th August, 2020.
27. He told the court that he was born in 1985 in the suit property.
28. In cross examination, he stated that in October 2019, he was on the suit land. He did not see surveyors coming to the land. The land is about 12.5 acres. He never attended the survey process.
29. D.W.2 Eliud Kamuren, relied on his statement recorded on 7th August, 2020 after it was adopted as his evidence in chief. He was born in 1989.



30. In cross examination, he stated that he saw the plaintiff in 2020. He did not meet him in 2019.
31. D.W.3 Vincent Kibet Chelal (4th defendant), relied on his statement recorded on 7th August, 2020 after it was adopted as his evidence in chief. He told the court that he does not know anything about the suit land; that he has no claim to the suit land and that he does not know why he was sued. (He is a relative of the defendants).
32. In cross examination, he stated that the 2nd and 3rd defendants live in parcel No.1636 within borders of the 1st defendant's parcel; that surveyors came to the suit land in October 2020 and that he did not attend the beaconing process. He further stated that he has information that his uncle's land is 15 acres. He does not know when the area was demarcated.
33. In re-examination, he stated that the plaintiffs are new to him.
34. D.W.4, Hellen Chepyegon, who testified on behalf of 1st defendant (her father) adopted the statement of the 1st defendant dated 7th August, 2020 as her evidence in chief. She stated that she does not know parcel number 1654. They have no interest in it. They have been in possession of 1636 since 1982. It is 15 acres. She urged the court to dismiss the plaintiffs' suit and to allow their counterclaim. She produced title and certificate of search in respect of 1636. She stated that it has acreage of 12. 4 acres yet the 1st defendant had bought 15 acres. She produced agreement dated 14th March, 1982 as Dexbt 2. She also produced documents concerning the other payments made in respect of their parcel and photographs of the developments they effected in the suit property as exhibits.
35. She informed the court that in April 2020, the plaintiff damaged their property and fence; that a Private surveyor visited their land and said it is 15 acres. She produced the surveyors report as Dexbt 8.
36. She urged that the survey maps be corrected to match the ground. She further informed the court that the damage caused by the plaintiff was assessed at Kshs.68, 183/-. She produced the report in respect of the damage as Dexbt 9.
37. Explaining that their land is different from that of the plaintiff and that they reside on it, she urged the court to order that the the title be corrected and their counter-claim be allowed as it is unopposed.
38. In cross examination, she stated that their land title reads 12 acres; that the defendant did not protest at lands office, that she saw surveyors visit the land in 2021 and that the plaintiff claimed their land in 2018. Further, that from 2010 she knew their land as 15 acres. They intend to have the title rectified to read 15 acres.
39. In re-examination, she stated that the agreement she produced is signed by her dad and the seller and that it is also endorsed by the area chief. She stated that the survey map and title ought to be rectified to show their land as 15 acres.
40. D.W.5 Joseph Kimuge Chelimo, informed the court that the 1st defendant and he have been neighbours since 1982; that he does not know the plaintiff; that he does not know the size of the 1st defendant land and that he was not a party to the agreement between the plaintiff and the 1st defendant.
41. D.W.6 Joseph Chebor, stated that the 1st defendant bought his land in 1982 and fenced it with a live fence; that he does not know the size of the land and that doesn't know the plaintiff.



42. It is on the basis of the foregoing evidence that the learned trial magistrate entered Judgment in favour of the plaintiff. In so doing he inter alia stated/held:-

“...The plaintiff’s case is that the 1st plaintiff bought the suit parcel No. Baringo/Salawa/1654 from P.W.2 in 1982; that parcel was registered in his name; that the 1st defendant and his relatives have encroached on it and erected structures hence this suit.

43. The defence case is that the 1st defendant’s husband late Kamuren Chepyegon bought 15 acres from P.W.2 and caused it to be registered as Baringo/Salawa/1636.

The defendants claimed that when title deeds issued, their portion was reduced to 12.4 acres by fraud.

Both the 1st plaintiff and husband to the 1st defendant claim to have purchased their parcels from P.W.2.

testified that he sold 1st plaintiff his portion now No.1654 in 1982 and that he also sold 8 acres to one Loise (deceased) who was daughter to 1st defendant’s husband-Kamuren Chepyegon; that Kamuren Chepyegon never bought land from him and that now the defendant owns 12.4 acres was not right with him. He (P.W.2) had not brought suit against the defendant yet.

The defendant have Parcel No.Baringo/Salawa/1636 which the plaintiff is not claiming. The plaintiff’s have parcel No.Baringo/Salawa/1654 which the defendants claim he obtained by fraud but without proving fraud. The evidence of P.W.2 made it clear that both defendants were purchaser’s for value.

The plaintiffs proved their case on balance of probability. I allow them the prayers sought. the 1st plaintiff is declared absolute owner of parcel number Baringo/Salawa/1654. The defendants are ordered evicted from this parcel and thereafter permanently injuncted from entering or in any other manner interfering with plaintiff’s possession.

The 1st defendant is hereby declared absolute owner of parcel No. Baringo/Salawa/1636. The defendants should only remain on the 1st defendants parcel and not go beyond its boundaries. Any claim on balance of the 15 acres should lie with P.W.2 and not the plaintiff’s herein.

In a nutshell, the plaintiff’s suit succeeds as presented in terms of prayers (a), (b), and (c). The 1st defendants counter-claim which is not opposed succeeds to the extend of prayer (a) only, declaration that the 1st defendant was

absolute owner of parcel number Baringo/Salawa/1636.

I order the defendants jointly and severally to meet the costs of this suit. The costs of the suit be borne by the defendants.

Orders accordingly.”

44. Aggrieved by the judgment, the defendants in the main suit (now appellants) appealed to this court on the grounds that the learned trial magistrate erred by:-**

1. Stating that Kamuren Chepyegon (1st Appellant) was deceased when he was not;
2. Holding that the appellant encroached on land parcel number Baringo/Salawa/1654 when no evidence was put forward to prove the claim;
3. Failing to hold that the circumstances under which the respondent purportedly acquired land parcel Baringo/Salawa/1654 was fraudulent;



4. Failing to give sufficient basis for finding that the respondents were the legitimate owners of land parcel Baringo/Salawa/1654;
 5. Granting orders to the respondents as prayed when there was no sufficient basis for doing so;
 6. Failing to allow all the prayers in the counterclaim when the same was not opposed.
45. The appellants pray for orders that:-
- i. The orders granted to the respondent in Kabarnet SPM E/L No.10/2020 be set aside;
 - ii. The respondent's claim in the said suit be dismissed;
 - ii. The appellants' counterclaim in Kabarnet SPM E/L No.10/2020 be allowed in its entirety;
 - ii. Costs in the plaint and counterclaim in Karbarnet SPM E/L No.10/2020
 - ii. Costs of the Appeal.
46. Pursuant to directions given on 14th March, 2023, the appeal was disposed off by way of written submissions.

Submissions

Appellants Submissions

47. The appellants filed submissions dated 14th April, 2023 in which they have identified the following as the issues for the court's determination:-
 - i. Whether 1st defendant appellant is deceased;
 - ii. Whether the 1st respondent legitimately acquired L.R No. Baringo/Salawa/1654
 - iii. Whether the 1st defendant/appellant has encroached on LR No. Baringo/Salawa/1654.
 - iv. Whether the 1st respondent is entitled to the orders granted by the court, particularly the order of eviction of the 1st appellant from 1654-
 - iv. Whether the appellant's counterclaim was unopposed and has merit
48. On whether 1st defendant appellant is deceased, it is submitted that the learned trial magistrate alluded to demise of the 1st appellant which is not the case. The learned trial magistrate is said to have erred by stating that 1st defendant/appellant is deceased when the true position was that Helen Chepyegon was acting as his next friend because of old age.
49. On whether the 1st respondent legitimately acquired L.R No. Baringo/Salawa/1654, it is submitted that the 1st respondent had no proof of how he acquired his property; that he had never taken possession and that P.W.2 had no sale agreement or witness to prove that he sold 6.5 acres to the 1st plaintiff, P.W.1. Further, that the evidence of P.W.2 supports the 1st appellant's claim that he bought 15 acres as opposed to 12.4 acres captured in his title deed and that P.W.2 did not have 6.5 acres to sell to P.W.1.
50. The 1st defendant's evidence that he bought 15 acres is said to have been uncontroverted.
51. The survey report produced as Dexbt 7 is said to have confirmed that the appellants are in possession of 15 acres.



52. Arguing that the maximum land size P.W.2 could sell to P.W.1 is 4 acres, the appellants have submitted that the defendants in the counterclaim acted in concert to unlawfully and fraudulently apportion more land to P.W.1 than was available on the ground.
53. The appellant urges the court to find P.W.1's title invalid to the extent that it shows that his land is 6.8 acres.
54. On whether the 1st defendant/appellant has encroached on LR No. Baringo/Salawa/1654, it is submitted that no evidence was adduced capable of proving that the 1st defendant had encroached on 1654; that P.W.1's averments, pleadings and oral evidence on the alleged encroachment were conflicting and confusing hence incapable of proving that the defendant acted in any unlawful manner.
55. It is submitted that the plaintiff is estopped from claiming that the defendant encroached on his parcel of land because such a claim is at variance with his pleadings. In that regard reference is made to the case of Serah Njeri Mwobi vs. John Kimani Njoroge (2013) eKLR where it was held:-

“The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of his.”
56. On whether the 1st respondent is entitled to the orders granted by the court, particularly the order of eviction of the 1st appellant from 1654 based on the plaintiff's pleadings, it is submitted that there was no proof of encroachment into 1654 by the 1st appellant. The 1st respondent is said to be belabouring under the mistaken belief that part of his land, 1654, is occupied by the appellant which arises as a result of mismatch between the acreage in the title and the actual land on the ground.
57. It is reiterated that no evidence of encroachment or extent of encroachment was proved.
58. The learned trial magistrate is said to have erred by holding that the 1st appellant had encroached on 1654 without stating the evidence she considered or reasons for reaching that decision.
59. The learned trial magistrate is also faulted for disregarding the appellant's evidence that showed that he had not encroached on the plaintiff's land.
60. Based on the decision in the case of Chandaria vs. Njeri (1982) e KLR, the 1st appellant submits that failure by the learned trial magistrate to consider his evidence, rendered her judgment unsatisfactory and the trial of the case a mistrial.
61. Based on the decision in the case of County Government of Narok vs British Pharmaceuticals Ltd Civil Appeal 20 of 2020 (2022)KEHC 10127 (KLR), where it was held that a decision devoid of reasons is hollow and cannot be said to determine the disputes effectively and effectually, it is reiterated that no sufficient evidence was adduced by the 1st respondent to prove that the appellants encroached on their land, 1654.
62. On whether the appellant's counterclaim was unopposed and has merit, it is submitted that the learned trial magistrate grossly misdirected herself on the summary of reliefs sought in the counterclaim; and arising from the misdirection, made an erroneous deduction and conclusion that the counterclaim succeeds only to the extent that the 1st appellant was declared the owner of 1636.
63. Based on the decision in the case of Francis Muregi Kiragu vs. Joseph Gachie Kiragu & another where it was inter alia held that it is the duty of the court to discern the issues for determination, it is submitted that the determination by the learned trial magistrate was at variance with the prayers sought in the counterclaim. In that regard, it is submitted that ownership of 1636 was not in contention.



64. It is submitted that what was in contention was whether the 2nd defendant unlawfully alienated 2.5 acres comprised in 1636 and whether an order for rectification of the area stated in the title, the survey map and adjudication register for land parcel number 1636 should be made so that the acreage reads 15 acres as opposed to 12.4 acres.
65. The learned trial magistrate is said to have failed to address the two issues despite sufficient evidence having been adduced to warrant grant of the orders sought.
66. Based on the evidence of P.W.2 concerning his land and how he appropriated it, it is submitted that the only reasonable conclusion that can be deduced from his evidence is that in collusion with the other defendants in the counterclaim, P.W.2 unlawfully/illegally caused the 1st defendant to be registered as the proprietor of 2.6 acres of land curved from 1636.
67. It is further submitted that there is consistency in the 1st appellant's pleading and evidence; the only inconsistency being the acreage of his land as captured in the land documents.
68. It is reiterated that the respondents jointly and severally acted unlawfully and/or fraudulently at the technical stage of land registration process to deprive the 1st appellant his lawfully acquired land.
69. The survey report adduced in evidence by the appellant is said to have proved that the appellant occupies 15 acres of land on the ground.

Prayer for special damages

70. The claim for Kshs. 63,183/- on account of damage done on the 1st appellant's properties and developments in 1636 is said to have been proven through the photographic images and agricultural officer's report which was produced in evidence. The claim is also said to be not controverted.

Order for permanent injunction to restrain the 1st and the 2nd respondent's from interfering with the appellant's parcel of land/1636
71. It is submitted that the appellant has demonstrated that he is the lawful owner of 1636; that his land measures 15 acres on the ground and that the 1st and the 2nd respondent colluded to deprive him of his lawful land acreage; that the 1st appellant's agents unlawfully entered the appellant's land and committed acts of destruction thereon.
72. The court is urged to grant an order of permanent injunction to restrain the respondents from interfering with the appellant's property.

1st and 2nd Respondents' Submissions

73. In their submissions filed on 2nd May 2023, the 1st and the 2nd respondents have framed two issues for court's determination. These are:-
 - i. Whether the learned trial magistrate properly directed herself when she held that the appellants encroached on LR No. Baringo/Salawa/1964;
 - ii. Whether the learned trial magistrate properly directed herself when she failed to consider all the prayers in the appellants' counterclaim;
74. On whether the learned trial magistrate properly directed herself when she held that the appellants encroached on LR No. Baringo/Salawa/1964; it is submitted that it is common ground that the appellants and the 1st respondent bought land from P.W.2 sometime in early 1980s; that both the appellants and the 1st respondent were shown their respective portions; that they processed title deeds



for their portions after surveying and beaconing was done and that the appellants' land was registered as L.R No. Baringo/Salawa/1636 measuring 12.4 acres and that of the respondents registered as L.R No. Baringo/Salawa/1654 measuring 6.5 acres.

75. It is pointed out that the appellants in their pleadings acknowledge that their homesteads fall within L.R No. Baringo/Salawa/1654.
76. Terming the acknowledgement by the appellants that their homestead falls with 1654 an admission of encroachment on the respondents' land, the 1st and 2nd respondents submit that the appellants are estopped from denying trespass/encroachment into the respondents' land.
77. is said to have been a critical witness, who gave evidence in support of the respondents' case to wit, that he sold 6.5 acres to the respondent and 8 acres to the appellants.
78. With regard to the 2nd issue, it is admitted that the 1st and the 2nd respondents did not file a defence to the appellants' counterclaim but submitted that failure to file a defence to the counterclaim was inconsequential because:-
- i. The issues therein affected third parties who were not parties to the main suit;
 - ii. The prayers sought in the counterclaim did not substantially affect or interfere with the ownership of the suit land;
 - ii. The Memorandum of Appeal does not list the 2nd to 6th respondents as parties to the appeal;
 - ii. There is no evidence of service of the counterclaim to the 2nd defendant in the counterclaim;
 - ii. The 2nd defendant was sued without leave of court as procedurally required;
 - ii. The plaintiff in the counterclaim neither requested for judgment within the requisite period nor proceeded to formal proof of his counterclaim; and
 - ii. The prayers sought in the counterclaim could not be granted without participation of the 2nd to 5th defendants who were not parties to the main suit and were not properly sued-no leave of court or proof of service of summons on them.
79. It is further submitted that the 1st defendant in the counterclaim owned land parcel number 1654 which was not the subject matter of the counterclaim; that judgment could not be entered in respect of the counterclaim because there was no request for judgment and formal proof in respect of it.
80. It is further submitted that the valuation report was not produced by an expert as legally required.

Analysis and determination

81. In exercise of the duty vested in this court as the first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard, see *Selle & another vs. Associated Motor Boat Co. Ltd* (1968)E.A 123, *Mwanasokoni vs. Kenya Bus Service Ltd* (1982-88)1 KAR and *Kiruga vs. Kiruga & Another* (1988)eKLR 348.
82. A review of the pleadings filed by the plaintiffs'/respondents, shows that the plaintiffs had pleaded that the defendants had attempted to encroach on the suit property. However, when the case came up for hearing, they departed from their pleaded case and led evidence to the effect that the defendants had encroached on their parcel of land.



83. Order 2 Rule 6(1) of the Civil Procedure Rules prohibits parties from departing from their pleadings. In that regard, see the said provision of the law which provides as follows:-
- “No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit”
84. In the case of Independent Electoral and Boundaries Commission & Another vs. Mutinda Mule & 3 others (2014) e KLR the Court of Appeal cited with approval the decision in Nigeria Supreme Case, Adetonn Oladeji (NIG) LTD versus Nigeria Breweries PLC SC91/2002 where it was inter alia stated:-
- “It is now a very trite principle that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded”.
85. In the circumstances of this case, the plaintiffs pleaded that the defendants had on several occasions made attempts to encroach on the suit property which attempts were not successful.
86. The defendants, in their statement of defence and counterclaim, had denied having encroached on the plaintiffs’ land and explained that there was an error in the registration of the 1st defendant’s parcel of land occasioned by fraud committed by the 1st defendant and the 2nd defendant in the counterclaim in registration of the suit property.
87. Whereas, the plaintiff in the Counterclaim did not prove the pleaded fraud in the registration of the plaintiff as the owner of the suit property to the standard of proof required, I do find as a fact that he proved that there was an error in the registration of the parcel of land he owns in that the acreage as captured in the title deed issued to him and what he bought from the 2nd defendant and had been holding on the ground do not match.
88. I find the evidence of the 2nd defendant to the counterclaim (P.W.2) to the effect that he only sold to the plaintiff in the Counterclaim, through his daughter only 8 acres of land comprised in Baringo/Salawa/1356 to be unsupported by the totality of the evidence adduced in the lower court.
89. The evidence adduced by the 1st defendant/appellant comprised in copy of the title deed issued to him in respect of parcel number Baringo/Salawa/1356 (Dexbt 1(a); Certificate of official search in respect of that parcel (Dexbt 1(b); Sale agreement 14th March 1982 (Dexbt 2); and the several acknowledgement notes produced as Dexbt 4, 5 and 6 clearly show that the 1st defendant/appellant bought 15 acres of land from the defendant.
90. There is evidence that the 1st defendant and his family were in use and occupation of the entire portion of land measuring 15 acres and that issues only arose after titles were issued showing that the 1st plaintiff’s land was bigger in the title than on the ground and that the 1st defendant’s title smaller in the title than on the ground.
91. From the conduct of the parties before titles deeds were issued and taking into account that the 1st plaintiff did not produce any document from which his claim that he bought 6.5 acres of land from P.W.2 can be ascertained; it is the considered view of this court that there was an error or mistake in the registration of the suit property. The error or mistake, though not capable of amounting to proof of fraud on the part of the defendants in the counterclaim, in my view, does form sufficient ground for granting the plaintiff in the counterclaim some of the reliefs sought. I say so because, the plaintiff in



the counterclaim had in his pleadings implicitly pleaded that there was an error in the registration of the suit property.

92. From the totality of the evidence produced in the lower court, I agree with the plaintiff in the Counterclaim that there was an error in the registration of the suit property which occasioned the reduction of the 1st defendant's parcel of land in the title but not on the ground.
93. Concerning the prayer for payment of Kshs. 63,183/-on account of damage done on the 1st appellant's properties and developments in 1636, I note that it was not specifically pleaded as by law required. For that reason, I decline to grant it.
94. The upshot of the foregoing is that the appellants have made up a case for interference with the decision of the lower court and for grant of the prayers sought in the Appeal, which I hereby grant them in terms of prayers (i), (iii) and (iv) of the counterclaim. I also award the them the costs of the main suit and the counterclaim. I also award them costs of the appeal to be paid by the 2nd defendant in the Counterclaim.
95. Orders accordingly.

DATED, SIGNED AND DELIVERED AT ITEN THIS 25TH DAY OF SEPTEMBER, 2023

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:-

Mr. Esikuru hoding brief for Mr. Kipnyekwei for the appellant Mr. Chepkilot for the respondent Christine
– Court Assistant

