



**Nkoidoroe v Nailole (Environment & Land Case E025 of 2021)
[2023] KEELC 22422 (KLR) (14 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22422 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E025 OF 2021
LC KOMINGOI, J
DECEMBER 14, 2023**

BETWEEN

PALON OLE PARKIRE NKOIDOROE PLAINTIFF

AND

LAILA OLE NAILOLE DEFENDANT

JUDGMENT

1. By a Plaint dated 28th April 2021 the Plaintiff claims that he is the absolute owner of parcel number Kajiado/Dalalekutuk/2214 and the Defendant is the owner of parcel number Kajiado/Dalalekutuk/63. However, the Defendant encroached on his parcel and fenced it together with his parcel and has declined to remove the fence despite the Plaintiff's plea and notice of intention to sue. The Plaintiff claims that he sought intervention of the Land Registrar Kajiado and the Surveyor in vain. He thus prays for:
 - a. A declaration that the Plaintiff is the absolute owner of Kajiado/Dalalekutuk/2214.
 - b. A permanent injunction restraining the Defendant, his agents or servants from interfering and trespassing on the Plaintiff's land no. Kajiado/Dalalekutuk/2214.
 - c. Eviction of the defendant, his agents or servants from the said parcel of land.
2. The Defendant in his Statement of Defence and Counterclaim dated 10th June 2021 contested the Plaintiff's claim and put him to strict proof. He stated that he was the registered owner of Kajiado/Dalalekutuk/63 from 16th August 1979 and had been in quiet possession of the property until 2010 when the Plaintiff raised the boundary dispute with him claiming that he had encroached on to his parcel of land Kajiado/Dalalekutuk/2214. He went on to state that Acme Land Surveyors was engaged and resolved the boundary issue. The suit was thus instituted in bad faith. The Defendant pointed that it was established by the Land Adjudication Office that the Plaintiff was not a member of Oloomunyi Group ranch, the title he held was fraudulent and the land Kajiado/Dalalekutuk/2214



was non-existent and the Plaintiff had been found guilty of trespassing onto the Defendant's land in Criminal Case No. 724 of 2016 (R. vs Wilson Kanai and Pailon Pankire). As such the suit should be dismissed with costs.

3. The Defendant filed a Counterclaim in which he claimed that his property Kajiado/Delalekutuk/63 only bordered land known as Kajiado/Delalekutuk/102 owned by the County Government of Kajiado. He acknowledged that there was a boundary dispute between him and the County Government of Kajiado but the same had been determined by the Kajiado County Land Registrar through a report dated 17th April 2019 which was appealed vide ELC Appeal No. 13 of 2019. The Defendant reiterated that the property Kajiado/Delalekutuk/2214 claimed by the Plaintiff was non-existent and the Title Deed by the Plaintiff had been obtained fraudulently. He thus prayed for:
 - a. An order of cancellation of title deed Kajiado/Delalekutuk/2214.
 - b. Costs of the counterclaim.
4. The Plaintiff in his reply to the Defence and counterclaim dated 13th July 2021 denied the Defendant's allegation, put him to strict proof and prayed for dismissal of the counterclaim.

Evidence of Plaintiff

5. PW1, Palon Ole Parkire adopted his witness statement dated 28th April 2021 as part of his evidence in chief and produced three documents as his evidence which were marked as P. Exhibits 1-3. He stated that he was the owner of the land as shown in the map marked as P. Exhibit 3 which the Defendant had encroached on.
6. On cross examination he stated that he had a title deed for his land Kajiado/Dalalekutuk/2214 and that he was member number 198 of the Oloomunyi Group ranch as per the register in the Defendant's bundle of documents.
7. He stated that he knew member number 198 Ole Lengetu who also resided on the group ranch's land. He stated that a surveyor visited the suit land and a letter from the Adjudication Officer indicated that he was not a member of the group ranch although the said letter had not been produced in court.
8. On re-examination he stated that Ole Lengetu resided on the group ranch's land.
9. PW2 Wilson Kanjori Ole Kitima a former treasurer at Oloomunyi Group Ranch adopted his witness statement dated 15th September 2022 as part of his evidence in chief. He testified that he knew the Plaintiff who was a member of the group ranch and stated that he had been given parcel number 2214 by the group ranch.
10. On cross examination he confirmed that he had been elected a treasurer by members of the group ranch which had 203 members. He stated that Plaintiff's father was one of the members and confirmed that they gave him the land. He indicated that the group ranch officials sought services of Land Officials who surveyed the land and it was then subdivided. He stated less than 20 members of the group ranch were yet to be issued with title deeds.
11. On re-examination he confirmed that according to P. Exhibit 2, Palon was member number 198.
12. This marked the close of the Plaintiff's case.

Evidence of the Defendant

13. DW1, Laila Ole Nailole the Defendant adopted his witness statement dated 7th March 2022 as part of his evidence in chief and produced documents in the bundle as exhibits. The documents were marked



as D. Exhibit 1 to 22. He stated that he had not encroached on any land and parcel number 63 was his having been given to him over forty eight (48) years ago pointing out that it was among the first parcels of land to be surveyed. He indicated that the Plaintiff did not have land since he was not a member of the Oloomunyi group ranch. He stated that the Plaintiff together with other people went to fight him on his land but they were arrested and charged in court adding that a surveyor confirmed that the land was his. He thus sought for the suit to be dismissed.

14. On cross examination he confirmed that according to the P. Exhibit 3 there was parcel number 63 and 2214 on the said map and according to that map, his land bordered the shopping centre and the Plaintiff's parcel number 2214. He confirmed that the recommendation on the document on page 121 of his bundle of documents indicated "To establish boundaries on the ground" but he rejected that recommendation. He contested the allegation that he had fenced the shopping centre and the Plaintiff's land arguing that the land was his.
15. On re-examination he stated that he had never seen the area map adduced by the Plaintiff and did not know where it came from but had seen the map at the Lands Registry. He pointed out that he was given title to his parcel at the Lands Registry way before the group ranch got its titles.
16. This marked the close of the Defendants case.
17. At the close of the oral testimonies, parties tendered final written submissions.

The Plaintiff's Submissions

18. In the submissions dated 3rd May 2023 counsel for the Plaintiff submitted that as per Section 24 to 26 of the *Land Registration Act*, a title document was prima facie evidence of ownership of land unless it could be challenged which had not been done. The Defendant had thus encroached on the Plaintiff's land denying him quiet enjoyment and possession of his property contrary to Article 40(1) and 65 of *the Constitution*. Counsel submitted that the Defendant's allegation that the Plaintiff was not a member of the group ranch and as such could not own land in the said area was disproved by Plaintiff's evidence and PW2 who confirmed that the Plaintiff was a member and had been assigned the said land by officials of the group ranch. Counsel further submitted that the area map adduced as evidence had also proved that the Plaintiff's land indeed existed. Counsel went on to question the certificate of title adduced by the Defendant stating that it did not contain measurements of acreage his property. He also pointed out that Kajiado Civil Appeal 13 of 2019 between Laila Ole Nailole Kangu vs The County Land Registrar Kajiado bore the same facts as this instant suit.
19. He thus submitted that the Plaintiff was the lawful owner of property Kajiado/Dalalekutuk/2214 and the Defendant should be evicted from occupation of the said land with costs to the Plaintiff.

The Defendant's submissions

20. In the submissions dated 13th October 2023, counsel submitted that the issues for determination were whether the Plaintiff's title deed was irregularly and illegally acquired and if so whether the court can order for cancellation of the title deed and whether the Defendant had trespassed on the Plaintiff's land and whether an eviction order can issue.
21. On whether the Plaintiff's title had been acquired legally, counsel submitted that the Plaintiff was not a registered member of the group ranch stating that on 21st June 2016 the Land Adjudication Officer Kajiado County wrote to the public informing them that a bonafide member of the group ranch was one whose name was in the group ranch's register and someone appearing on the area list and not in the register was not a member. To this effect, counsel submitted that the Plaintiff adduced



a copy of the area list where his name was number 198 on the list but not on the register of members list produced by the Defendant. Counsel also submitted that vide a letter dated 17th May 2021 the County Land Adjudicator and Settlement Officer confirmed that the Plaintiff was not a registered member of Oloomunyi Group Ranch and was not entitled to any share of land in the group ranch. Counsel submitted that the Plaintiff did not adduce reliable evidence on to his membership status making reference to the provisions of Section 107 (1) and (2) of the *Evidence Act*. Therefore, the Plaintiff's title was illegally acquired since he was not a member and ought to be impeached. Counsel made reference to Section 26 of the *Land Registration Act* and the following authorities: Nakuru Automobile House Ltd vs Lawrence Maina Mwangi & Another (2021) eKLR, Joseph Kiptotich Bor vs Tabutany Chepkoech Chebusit [2021] eKLR, Daudi Kiptugen vs Commissioner for Lands & 4 others [2015] eKLR and Munyu Maina vs Hiram Gathiha Maina [2013] eKLR. Counsel also submitted the Supreme Court case of Dina Management vs County Government of Mombasa & 5 others [2022] KESC 24 (KLR) which held that process to attaining a lease or title ought to be followed else the title cannot be held as indefeasible.

22. On whether the court could cancel a title deed, counsel submitted that Section 80 of the *Land Registration Act* gave court the authority to order cancellation or rectification a title that had been acquired irregularly such as the Plaintiff's title also citing Joseph Gitari vs Muthui Chomba & 7 others [2018] eKLR, Republic vs Minister for Transport and Communication & 5 others ex parter Waa Ship Garbage Collector & 15 others [2006] 1KLR (E&L) 563 and Daudi Kiptugen (supra).
23. On whether the Defendant had trespassed on the Plaintiff's land and should be evicted, counsel submitted that the Plaintiff's suit property only appeared on paper but on ground and no survey laying beacons had been effected. Counsel went on to point out that the Plaintiff had never been in possession of the said property since acquiring its title in 2003. Counsel added that having determined that the Plaintiff was not a member of the group ranch and did not acquire the property procedurally meant he was not entitled to any property and therefore there could be no trespass to a property that did not belong to him citing Charles Ogejo Ochieng vs Goffrey Okumu (1995) eKLR where court of Appeal held that "...the proper plaintiff in an action of trespass to land is the one who has title to it..."
24. Therefore, the Defendant was entitled to quiet possession of his land and his counterclaim should be allowed as sought.

Analysis and Determination

25. I have considered the pleadings, the evidence on record, the submissions and the authorities cited. The issues for determination are:
 - i. Whether the Plaintiff is the owner of property Kajiado/Dalalekutuk/2214
 - ii. Whether the Plaintiff is entitled to the reliefs sought?
 - iii. Whether the Defendant's counterclaim is merited and entitled to the reliefs sought therein.
 - iv. Who should bear costs of the suit?
26. The dispute at hand revolves around a claim of trespass by the Plaintiff, alleging that the Defendant encroached upon his land and proceeded to fence it. The Defendant vehemently contests this assertion, contending that the contested parcel, Kajiado/Dalalekutuk/2214, was non-existent. Additionally, the Defendant argues that the Plaintiff's membership in the Oloomunyi group ranch was invalid adding that any existing boundary dispute had been previously resolved through the Land Dispute Adjudication report dated 17th April 2019 and ELC Appeal 13 of 2019.



27. To ascertain whether the issue was resolved, I shall begin by looking at the Land Dispute Adjudication report dated 17th April 2019. It is noted that report delineates a dispute involving various parcels, including Kajiado/Dalalekutuk/102 (the Defendant's land), Kajiado/Dalalekutuk/2214 (the Plaintiff's land) among other parcels. The report reads in part:

“ On the 27th March, we visited the site and the attendance was as per the attached list herein above. The following are statements by the affected parties.

Statement by Laila Ole Nailole Kangu Kajiado/Dalalekutuk/63... on physical identification of the said boundary marks on the ground, he showed us beacon D5, D7 and D9...

Statement by Palon Ole Parkire Nkoitorea Kajiado/Dalalekutuk/2214... on the site he went and showed beacons No. D9.

Statement by Joseph Nailole Kajiado/Dalalekutuk/2072... can identify beacons to his land including beacon D9.

...

- (v) Observation based on the appearance of features
 - (a) Shape of the RIM
 - (b) Shape of the pickings

The shape of the two parcels i.e. 102 and 63 in original adjudication map agrees well with the RIM. The same RIM is the basis of our records, agrees well.

...

- (ix) The boundary line connecting points D9, D7 and D5 as per the owner of parcel 63 is a straight line.
- (x) Observation based on the borderline as per the representative of the community is that the same is not a straight line.
- (xi) The resultant shape as per the pickings of the community representative parcel no. 102- compares well with both original adjudication map and the RIM.

The resultant shape for parcel no. 63 defers with the one on the RIM and original adjudication map.

On plotting the picking as per the owner of 63, the resulting shape ended up affecting the individual parcels with Olumunyi Group Ranch to wit parcels 2072, 2275 and 2085. According to the community the pickings affected the individual parcels 2228, 2075 and 2085.

Analysis as to border line, dispute the boundary along D9, D7, D5 and D8 as per both owner of 63 and original adjudication map they are parallel having a distance of 600 meters between them. This clearly indicate they are two distinct position and not compatible. This further informs why there is acreage increase for parcel Kajiado/Dalalekutuk/63.

...

Accordingly having analysed the evidence addressed and having taken into consideration all records tendered it is now my considered opinion that:

...



- (b) If we adopt any of the two shapes as per the owner of parcel 63 and parcel 102, the same will disinherit some persons who are the beneficiaries of the Olomunyi group ranch and are affected by the dispute.

...

Having taken all the above considerations, I now direct that the trading centre that is Kajiado/Dalalekutuk/102 and neighbouring parcels be established on the ground as per the original adjudication map and the RIM. Further, the boundary line separating Olomunyi Group ranch and the trading centre (102) and parcel number 63 passing through D9, D7 and D5 should be established on the ground as per the original adjudication map and the RIM.”

28. Following this ruling, the Defendant appealed vide Kajiado ELC Appeal 13 of 2019 which I have taken time to peruse. The said Appeal was dismissed on 14th February 2023 by Gicheru J. Part of the judgement reads:

“

- “7. Coming now to the issues, I find that there was a dispute between the owners of LR Kajiado/Dalalekutuk/102 and other parties namely Kajiado/Dalalekutuk/63, 2070, 2072, 2069, 2073, 2075, 2085, 2084, 2226, 2214 and 64. The disputants were Olomunyi trading centre and the neighbouring parcels.

...

Under sections 18 and 19 of the [Land Registration Act](#), it is only the Land Registrar who has power to determine boundaries of registered land.

... I find no evidence to prove that the Land Registrar failed to take into consideration any relevant material... The report by the Land Registrar is very comprehensive and deals with all aspects of the exercise. It has not been faulted at all by any expert in surveying and land registration.

I find that it is neither fair nor just to interfere with a legitimate exercise carried out by a legitimate authority and which has not been shown to be faulty in any way.

For the above stated reasons, I dismiss the entire appeal with costs to the respondents. It is so ordered.”

29. It is noted that the Land Surveyor ruled that the Defendant’s land had encroached on the neighbouring lands and directed the delineation of precise boundaries between the disputed parcels as per the Original Adjudication Map and RIM. This court affirmed that decision as having been conclusively adjudicated upon. In that regard, this court finds that the issue of boundary dispute and encroachment on the Plaintiff’s land is res judicata as it has been determined by a court of equal status.
30. It is pertinent to emphasize that the boundary dispute between the Plaintiff’s and Defendant’s land having been addressed, all involved parties are now obliged to honour and comply with the decision rendered by the Land Registrar. This decision, having settled the dispute, carries the weight of authority and requires strict adherence and respect from all concerned parties involved in the matter.
31. Therefore, this suit together with the Defendant’s counterclaim is hereby dismissed with no orders to costs.



DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 14TH DAY OF
DECEMBER 2023.

L. KOMINGOI

JUDGE

