



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

ELC APPEAL NO. E002 OF 2021

SIMON TIANTA OLOTAPORI.....APPELLANT

VERSUS

SHADRACK SAMOEI & JOSPHAT KIPKORIR (Suing on behalf of the estate of the

Late Eunice Samoei).....1ST RESPONDENT

NANANAAI OLE LEPERES.....2ND RESPONDENT

JUDGMENT

1. Being dissatisfied with the decision and or judgment of Hon. G.N. Wakahiu (Chief Magistrate) delivered on 30th March, 2021, the Appellant who was the Plaintiff in ELC 28 of 2018 appealed to this court against the entire judgment and decree of the learned trial magistrate and sets forth the following grounds: -

- 1. That the learned trial magistrate erred in law and fact in holding that the respondents had not trespassed upon the appellant's parcel of land despite overwhelming evidence to the contrary.**
- 2. That the learned trial magistrate erred in law and fact in failing to find and hold that the 2nd defendant illegally excised a portion of the appellant's parcel of land and transferred the same to the 1st defendant despite conclusive evidence of the same.**
- 3. That the learned trial magistrate erred in law in imposing upon the appellant an unfair and unreasonably high standard of proof in the circumstances.**
- 4. That the learned trial magistrate erred in law and in fact in failing to find that the appellant had proved his case on a balance of probabilities.**
- 5. That the learned trial magistrate erred in law and fact by failing to determine the dispute herein on the basis of its merits.**
- 6. That the learned trial magistrate erred in law and in fact in filling in the gaps and making up for the readily apparent shortcomings in the respondents' case.**
- 7. That the learned trial magistrate erred in law in failing to consider the full magnitude of the documentary evidence and submissions tendered on behalf of the appellant thereby arriving at a fundamentally flawed decision.**

2. The appellant prays for: -

- 1. That this appeal be allowed.**
- 2. That the judgment of the learned trial magistrate be set aside in its entirety and that judgment be entered in favour of the appellant as prayed for in his plaint.**
- 3. That in the alternative, this honourable court be pleased to order the retrial of this matter before the appropriate court.**

4. That the costs of this appeal and that of the lower court matter be awarded to the appellant.

3. The appellant filed written submissions dated 16th November, 2021. I note that the Appellant started off well by giving a background to the case and proceeded to give a summary of the appellant's and the respondent's cases. Sadly, it appears that the grounds for submission were for a different matter and not the current case. I say so because in page 3 of his written submissions the appellant has referred to the memorandum of appeal dated 15th January, 2009 which he says that the same raises several issues..... For this reason, I will take not proceed to consider the appellant's submissions as they are irrelevant.

4. The respondents filed written submissions dated 10th December, 2021. The respondents raised 5 issues for determination as follows:-

a) Whether the trial court erred in finding that the 2nd respondent had not illegally excised a portion from the appellants land and transferred it to the 2nd respondents

b) Whether the trial court in holding that the respondents had not trespassed upon the appellant's parcel and whether the appellant adduced evidence of the alleged trespass.

c) Whether the trial court erred in imposing the burden of proof on the appellant and whether the appellant discharged the burden.

d) Whether the documentary evidence adduced was in support of the appellant's allegations.

e) Whether the 1st defendant title over Cis-Mara/Lemek/ 3789 is valid and indefeasible.

5. The respondents submitted that subdivision and excision of land is a preserve of a licensed surveyor and it involves the preparation and registration of the mutation forms and generation of registry index map (RIM) and that the registry index map will in most cases indicate the official changes on the land but for the ascertainment of the boundaries, the physical features identified by owners of the land should be considered by the Registrar. They rely on the case of **Azzuri Limited versus Pink Properties Limited [2017] eKLR**. In this case, the registry index map does not indicate the respondents insertion of a brace and the Registrar's report did not reveal any encroachment by the 2nd respondent nor did it reveal placement of a brace.

6. The respondents further submitted that for a claim of trespass to be successful, the plaintiff must prove that the defendants' entry into his land was without lawful justification and in this case it is clear that CISMARA/ LEMEK/3789 belongs to the 1st respondent which was validly derived from CISMARA/LEMEEK/1749 belonging to the 2nd respondent and that the 2nd respondent legally transferred the same to the 1st respondent. And as such there is no illegality on the ownership, possession and occupation of land CISMARA/LEMEEK/3789.

7. The respondents further submitted that it is trite law that whoever alleges must prove as was held in the case of **Palace Investments Limited versus Geoffrey Kariuki Mwenda & Another [2015] eKLR**. That the Registrar's report is not evidence of the placement of brace but is evidence of the accurate acreage of the suit properties more particularly the appellant's being 75.9 acres and the 2nd respondent's being 127.14 acres. That the appellant did not adduce any evidence to prove that the respondent placed a brace on CIS MARA/ LEMEK/1749 and or they excised 27 acres from his land and the surveyor who was involved in the initial demarcation testified and confirmed that the brace had been there from the first demarcation. They further submitted that the report by the Registrar clarifies on the correct ground positioning of the suit land and disapproves the appellant's claim that the 2nd respondent excised his land by placing a brace on his land.

8. The respondents further submitted that **section 26 (1) of the Land Registration Act** provides that a certificate of title can be cancelled if it is shown that the title was obtained illegally, unprocedurally or through a corrupt scheme. The respondents rely on the case of **Ibrahim versus Hassan & Charles Kimenyi Macharia, Interested Party [2019] eKLR**. They submitted that their title meets the threshold of a bonafide purchaser for value as the same was obtained procedurally and in accordance with the law and it is therefore untenable that a third party in the person of the appellant can cast aspersions as to their title without evidence whereas he was not the owner of CISMARA/LEMEEK/1749 that gave rise to CISMARA/ LEMEK/ 3789. They submit that there is no iota of evidence which has been adduced at the trial that indicates that the respondents committed illegality or committed any act of fraud in subdivision of CISMARA/ LEMEK/ 1749.

9. This being the first appellate court, I am required to reevaluate evidence adduced before the trial court and make an independent determination. This I do with the knowledge that unlike the trial court, I did not get the benefit of taking evidence first hand and observe the demeanor of witnesses. For this reason, I will give due allowance. The principles guiding the first appellate court were set out in the case of **Selle & Another Vs Associated Motor Boat Co. Ltd & Others (1968) EA 123** where the court stated as follows: -

“...An appeal to this court from the trial court is by way of retrial and the principles upon which the court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”.

10. Upon consideration of the materials presented in respect of the Appeal herein, the following are the issues for determination:

1. Whether the Judgement in Narok CMCC ELC No. 28 of 2018 dated the 30th March, 2021 should be set aside.

2. Who should bear the costs of the Appeal.

11. Before the Trial court the appellant (plaintiff) testified that he was the registered owner of CISMARA/LEMEK/1758 which he claimed was interfered with by the respondents who hived off 27 acres by using a different sheet map-number 10 and that on the said sheet 10, the owner of land known as CISMARA/LEMEK/3789 is the one who encroached on his land. The beacon was placed between CISMARA/LEMEK/1758 and CISMARA/LEMEK/1756.

12. The 1st defence witness was Dr. Josephat Korir testified that CISMARA/LEMEK/3789 belonged to his parents and they have been living there since 1999 and during this time they have never received any objection until the year 2011. That his parents bought 27 acres from the 2nd respondent (defendant) who was the registered owner of CISMARA/LEMEK/1749. At the time he was in school. He further testified that there was no sale agreement and neither was there any receipt. That a surveyor by the name Henry conducted subdivision and it was only after the appellant (plaintiff) wanted to subdivide his portion that he discovered that his land was encroached.

13. The 2nd defence witness was a surveyor by the name Henry Oluoch Nyaema. He testified that they were given the survey work by the committee members of Lemek Group Ranch to partition and subdivide land for 1200 members. That the Appellant's father was allocated CISMARA/LEMEK/1758 and that when the land was being subdivided, it had brace continuous on the other side of the road and a brace on the initial plan. He further testified that once allocation was done and the members were satisfied, the Registry Index Map (RIM) was forwarded to the District Surveyor. The appellant produced sheet no. 2 which does not qualify to be map for the reasons that in sheet 2, the title number are in series 1400 upwards and in sheet 10 the title number are in 1700, 1800 and partly 600.

14. On cross examination, the surveyor further testified that the appellant's (plaintiff's) exhibit number 5 did not qualify to be a map because there was no brace on it and it was also not authentic. He testified that he was a surveyor but he did not have the certificate nor the instruction letter from Lemek for the reason that he was not involved in the allocation process. He further testified that Labune got parcel number 1749 but could not recall the parcel's measurement. He was also not aware that CISMARA/LEMEK/2749 had been subdivided. He further testified that the RIM had a brace and amendments to the RIM are always indicated on the side and the same was forwarded to Nakuru who then issued the RIM.

15. The 3rd defence witness, Nanai Ole Leperes, testified that he was a member of Lemek Group Ranch and that during the first allocation he acquired 120 acres. That thereafter, he bought more land from a man called Pere, though he does not remember the parcel number. He produced the green card for parcel number 1749 which he later subdivided. He also produced the green card for parcel number 3272. He testified that he never changed the boundaries. On cross examination, he testified that he sold the land to Josephat Samoei for about 300,000/- though he does not recall signing an agreement. He thereafter sought the consent of the Land Control Board. He testified that subdivision was done by the surveyors in his presence.

16. On 26th August, 2020 parties agreed by consent to have the Registrar's report dated 26th August, 2020 be produced as DEX.6. I have perused the registrar's report dated 26th August, 2020 addressed to the trial court which stated that "The District Surveyor and I visited the above parcel Nos. CISMARA/LEMEK/1749 and 1758 on 26th February, 2020. On the basis of the existing boundaries, the acreage of either parcel was established as

	Ground area	Registered area
CISMARA/LEMEK/1749	127.14 HA	93.95 HA
CISMARA/LEMEK/1758	75.9 HA	79.0 HA".

17. The Registrar's report was accompanied by the surveyor's report dated 26th August, 2020. The surveyor made the following findings:-

"After compilation of the field data we were shown by the owners of the parcels of land, we realized the following:-

- i) The ground area does not fall with the registered acreages for both parcels of land.
- ii) The RIM does not tally with ground respectively as shown on the attached tracings. The tracing in red shows ground picking while tracing in blue shows the RIM respectively.

18. The question that begs asking is, did the respondents encroach on to the appellants land? It is clear that during the trial, neither the appellant nor the respondent's disputed the land Registrar's report and the Surveyor's report. With regard to land parcel CISMARA/LEMEK/1749, the ground area is more than the registered area by 33.19 Hectares whereas CISMARA/LEMEK/1758, the ground area is less than the registered area by 3.1 hectares. From the above and appreciating that both parties were present when the exercise was conducted, I find that the appellant's land has not been encroached by the respondents. In fact, the ground area for CISMARA/LEMEK/1749 is astonishingly less compared to what is registered.

19. Given the above, the trial magistrate cannot be faulted for arriving at the decision that he made on 30th March, 2021. I, therefore, see no basis for interfering with the judgement of the learned trial magistrate. The appeal must therefore fail.

20. The upshot of the foregoing, is that the Memorandum of Appeal dated 14th April, 2021 unmeritorious and the same is dismissed with costs to the respondents. It is so ordered.

DATED, SIGNED and DELIVERED VIA EMAIL ON 27TH APRIL, 2022.

Mbogo C.G

Judge

In the presence of: -

CA: Timothy Chuma