



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL CASE NO. 119 OF 2005**

**NKURUMA OLE TIRIAN ..... PLAINTIFF**

**VERSUS**

**LEMAYIAN OLE KENO ..... 1<sup>ST</sup> DEFENDANT**

**THE DISTRICT LAND REGISTRAR, TRANS MARA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The pleadings

1. By a plaint dated 31<sup>st</sup> August 2005 filed on the same date the plaintiff claims as against the defendant the following reliefs:-
  - i. *Declaration that the plaintiff is the registered proprietor/owner of LR. TRANSMARA/ENAENYIENYI/465, on which the Kencell/Celtel BTS station (MAST), is situated.*
  - ii. *Declaration that LR TRANSMARA/ENAENYIENY/181, does not share a common boundary with the suit land.*
  - iii. *Declaration that the alteration(s) made to the RIM (Index) Map in respect of Enaenyieny Registration Section by the 2<sup>nd</sup> Defendant on the 2<sup>nd</sup> of September 2004, or thereabouts was illegal and thus void ab initio.*
  - iv. *Permanent injunction do issue restraining the 1<sup>st</sup> Defendant either by himself, agents, servants and/or employees from trespassing upon, claiming, interfering with and/or dealing with LR TRANSMARA/ENAENYIENY/465, in any manner whatsoever and/or howsoever.*
  - v. *Costs of this suit be borne by the defendants.*
  - vi. *Such further and/or other relief as the Honourable Court may deem fit and expedient so to grant.*
2. By an amended statement of defence and counterclaim dated 30<sup>th</sup> September 2009 pursuant to leave granted on 15<sup>th</sup> September 2009, the  
  
1<sup>st</sup> defendant admits that the plaintiff is the registered owner of land parcel No. Transmara/Enaenyieny/465 but denies that the same measures 9.8 hectares and puts the plaintiff to strict proof thereof. He also admits that he is the registered owner of LR. Transmara/  
  
Enaenyieny/181 measuring 9.66 hectares but claims that the same shares a common boundary with the plaintiff's parcel of land No. Transmara/Enaenyieny/465.
3. He further claims that the Land Registrar who came to the site made a decision that was against

- the weight of the evidence and being dissatisfied with the Land Registrar's decision, he appealed to the Chief Land Registrar as the findings by the land Registrar were not backed by the evidence and upon the appeal the decision of the Land Registrar dated 30<sup>th</sup> December 2003 was overruled.
4. He also denies having colluded with the 2<sup>nd</sup> defendant but avers that upon appeal by him to the Chief Land Registrar, the Land Registrar visited the suit land again after which he prepared a report in his favour. He further denies that the 2<sup>nd</sup> defendant's visit to the suit land was secret and/or fraudulent and has put the plaintiff to strict proof thereof. The particulars of fraud on the part of the 2<sup>nd</sup> defendant and the particulars of collusion by the 1<sup>st</sup> defendant have also been denied.
  5. The 1<sup>st</sup> Defendant maintains that the Kencel/Celtel BTS station (MAST) is situate on LR No. Transmara/Enaenyieny/181 and puts the plaintiff to strict proof of the allegations that the way leave agreement if any was to give the company access to the LR No. Transmara/Enaenyieny/465. He claims the disputed portion of land more particularly where the Kencel/Celtel BTS station MAST stands is situated within the suit land.
  6. In his counter claim the 1<sup>st</sup> defendant prays for the suit herein to be dismissed with costs and for judgment to be entered against the plaintiff for:-
    1. *A declaration that the disputed portion of land on which the Kencell/Celtel BTS station (Mast) is situate is part of the 1<sup>st</sup> defendant's land parcel No. Transmara/Enaenyieny/181.*
    2. *An order of eviction of the plaintiff by himself, his agents, servants, employees, assigns or any one claiming title under him from the disputed portion of land.*
    3. *An order of permanent injunction restraining the plaintiff from entering onto, trespassing, or in any manner whatsoever interfering with the disputed portion of land which is part of the 1<sup>st</sup> defendant's land parcel No. Transmara/Enaenyieny/181.*
    4. *Mesne profits.*
    5. *Costs and interest.*
    6. *Further or other relief deemed fit.*

#### The Plaintiff's case

7. The plaintiff testified and also called three witnesses. Jackson Sansare Ole Nkuruna, PW1, a farmer from Transmara and the son to the plaintiff told the court that though the plaintiff is very old, he owns a property known as Transmara Enaenyieny/465 which he was given by Emorogi group ranch. He gave a brief history of the father's parcel of land which was given by Emorogi Group Ranch which was initially part of Enaenyieny Group Ranch. Enaenyieny Group Ranch was split into 5 Group Ranches which are Emorogi, Olembogit, Emorinyango, Olengaroni and Osupukia, the plaintiff being a member of Emorogi Group Ranch. He states that he was given the power of attorney by his father the plaintiff herein – **P. Exhibit 1** – he also produced the official search **P. Exhibit 2**. He stated further that he knew the 1<sup>st</sup> defendant who is a neighbour but his land parcel No.181 does not border their land. He confirms that the 1<sup>st</sup> defendant was also a member of Enaenyieny group ranch but when the same was split into 5 group ranches he joined the Olembogit group ranch.
8. He further testified that Ole Moseiyek was the chairman of Emorogi Group Ranch and Ole Putari took over from him. In December 2003 there was a case over the plaintiff's land where the 1<sup>st</sup> defendant was claiming it. The case was heard before the Land Registrar after due notice was given to the parties. He attended the hearing together with other people including the area chief, D.O. Land Surveyor and elders. On the 24<sup>th</sup> December 2003 the Land Registrar gave his ruling – **P. Exhibit 3** – where it was found that parcel No. 465 and 181 did not have a common boundary. According to PW1, the plaintiff did not appeal against that finding and he was not aware whether the 1<sup>st</sup> defendant had appealed as no notice was given. Later they learnt that the Land Registrar came to the land again as indicated in **P. Exhibit 4** which stated that the two parcels 181 and 465 shared a common boundary which report he did not agree with. He further testified that Ole

- Pontare Kimere was said to have been in that meeting but when he talked to him he denied having attended.
9. PW1 then complained to the Chief Land Registrar through his advocates but they never got any response. He confirms that there is a Kencell MAST on his father's parcel No.465 created in January 2004 after his father entered into a Lease agreement with Kencell Communications Limited.
  10. He further says that their land does not border any road and that one has to go through 4 parcels of land to reach it i.e. parcel No.181, 175, 301 and 300. Kencel had to get a right of way from the proprietors of the 4 other parcels of land including the 1<sup>st</sup> defendant's upon payment of Kshs.20,000/= to give right of way therefore the first defendant was aware of the MAST being erected by Kencell Communication Limited on the plaintiff's land. PW1 further stated that the 1<sup>st</sup> defendant did not complain until after about one (1) year when he called the Land Registrar who came to the suit land for the first time.
  11. There is a green card in respect of the land in dispute – **P. Exhibit 4**. He does not agree with the second report of the registrar and asked the court to be guided by the Registry Index Diagram from the District Land Registrar being **P. Exhibit 8**. He prays that judgment be entered for the plaintiff as prayed.
  12. On cross examination PW1 said that there were no marked boundaries or beacons separating the 5 group ranches but that the plaintiff's parcel is the last parcel of the Emorogi group ranch, while Land parcel No. 250 is the first one in Olembogit Group Ranch which belongs to the brother of the 1<sup>st</sup> defendant. He reiterated that parcel No.465 and 181 did not have any common boundary.
  13. PW2 Stephen Waithaka Githinji the District Land Registrar Transmara testified to the fact that he went to Transmara in March 2010. He says that his duties include visiting disputed boundary sites and solving boundary disputes and that Transmara Enaenyeny falls within his area of jurisdiction. He also had documents relating to that area.
  14. He had the registers (green cards) for parcels 465 and 181 which are kept separate from the parcel files. Parcel 181 is 9.66 Hectares and was registered in the names of Lemayian Ole Keno on 4<sup>th</sup> December 2003. First registered owner was Olembogit Group Ranch. The Green Card shows Registry Index Sheet Nos.130/3/4/144/2. He stated that the sheet numbers are not obtainable at Transmara District Land Registry, and those that were there before have been disfigured. He confirmed that there are no notes on the Green card to show that the Registrar ever visited the land with regard to any land dispute although the law requires that if a Land Registrar goes to an area to sort out a dispute he makes an endorsement to that effect.
  15. According to PW2's testimony, Land parcel 465 is 9.87 hectares and belongs to the plaintiff though previously owned by Emorogi Group Ranch. It is on sheet No.5. Parcels No.465 and 181 are on different sheet numbers. He did not know whether they share a common boundary. He stated that before a Land Registrar goes to a parcel of land to sort out a boundary dispute he issues a boundary summons to the parties concerned. The summons may or may not be issued to area elders and chief. He further stated that if a party is aggrieved by a Land Registrar's ruling on a boundary dispute such person can appeal to the Chief Land Registrar within 30 days after the ruling by writing a letter and the Chief Land Registrar can either go to the disputed land in person or designate a different Land Registrar to go to the land. Notices (boundary summons) are issued to both parties again. The Chief Land Registrar and the designated registrar can ask the parties to present themselves to him and thereafter make another report.
  16. PW2 stated that he was aware of the existence of 2 reports by 2 different Land Registrars regarding this dispute and states that if there was an appeal there would be a letter in the records from the Chief Land Registrar. Copies of boundary summons are normally kept in a general correspondence file and not in the parcel file. He could not tell whether such summons existed in respect of the instant case. He further stated that on the date of the scheduled meeting the affected parties are required to be present. It is shown on **P. Exhibit 4** that both parties were present and the Land Registrar decided that the Registry Index Map be amended. In the case of amendment, the Land Registrar must register a mutation which must be noted in the respective Green Card and then the alterations can then be effected. PW2 stated further that the two green cards did not show

- any registration of the mutation, though it shows cancellation of the title for parcel No.181 which was affected by the mutation. There was increase in size of that parcel of land, but no change in parcel No.465. He said that when the size of a parcel of land increases or decreases the parcel number does not change.
- 17.PW2 testified further that there was alteration in the Registry Index Map but he could not see the mutation which ought to have been registered but was not. He had a registry index map showing the location of parcel No.181 which he produced as **P. Exhibit 9**. Land parcel No.465 is next to 181. He produced the Green Card for parcel 181 showing cancellation of title and increase in acreage as **P. Exhibit 10** and for parcel No.465 **P. Exhibit 11**.
  - 18.On cross examination PW2 stated that he had no personal knowledge that parcel No.465 and 181 had a common boundary. He testified that he was only aware the 5 different group ranches had boundaries of physical features like valleys or hills but from a map he could not tell the boundaries.
  - 19.PW3 Oleputari Kimekere who stays at Emorogi testified that he was aware of Enaenyeny Group Ranch which was split/divided into 5 group ranches namely Emorogi, Olembogit, Emorinyango, Olengaroni and Osupukia. He was a member of Enaenyeny group ranch and was the Chairman of Emorogi Group Ranch and he knew the plaintiff who was a member of the Emorogi group ranch. The 1<sup>st</sup> defendant's father was the Chairman of Enaenyeny Group Ranch after the original Enaenyeny Group Ranch was split. The 1<sup>st</sup> defendant belonged to Olembogit Group Ranch.
  - 20.He testified further that he did not know the location of the 1<sup>st</sup> defendant's land but only knew the location of the plaintiff's land. It is his testimony that the two parcels of land do not have a common boundary as there is another parcel of land in between them belonging to Ole Masitoi. The 1<sup>st</sup> defendant's land is not in Emorogi Group Ranch.
  - 21.PW3 stated that he knew that in 2003 there was a land dispute between the plaintiff and the 1<sup>st</sup> defendant. In December 2003 the Land Registrar went to resolve the dispute where he was summoned as the chairman of Emorogi Group Ranch. He says that a report was done thereafter; there was no other visit by the Land Registrar and he was not in the alleged Land Registrar's visit on 2<sup>nd</sup> September 2004 – **P. Exhibit 4**.

#### The Defence case

- 22.At the close of the plaintiff's case on 16<sup>th</sup> September 2010, the 1<sup>st</sup> defendant testified partly but failed to attend court to finalize his testimony and to be cross examined and/or call more evidence. In his testimony he stated that he hails from Olembogit Transmara District and he knows the plaintiff who is his neighbour and whose parcel of land is Transmara/Enaenyeny/465, while his own land is parcel number 181 which measures 9.66 hectares as shown on a copy of the title deed - **D. Exhibit 1**.
- 23.He further claims that the plaintiff's land borders his and there is a common boundary namely a valley in between which was recognized as the boundary in 1974 when group ranches were being formed. He confirms that the plaintiff is in a different group ranch and that he knows he has a title deed. He says that the group ranches were subdivided in 1992 and he got his share. That apart from the valley beacons were also planted dividing the 2 group ranches. The 1<sup>st</sup> defendant did not agree that there are 2 other parcels of land No.466 and 250 in between his parcel of land and that of the plaintiff.
- 24.The 1<sup>st</sup> defendant stated that it is clear in **P. Exhibit 9** where parcels No.466 and 465 have been marked. He further testified that in 2003 a booster was put on his land parcel No.181. He said he had travelled out of his home when the Kencell people came to his land. He reported the matter to the area District Officer and later he went to the Land Registrar who came to the ground a Mr. Omasire. He heard the dispute but he (1<sup>st</sup> defendant) was not satisfied with the decision and he wrote to the Chief Land Registrar through the District Commissioner.
- 25.At that point in 1<sup>st</sup> defendant's testimony, his counsel sought an adjournment to enable her make an application for discovery of the letter which was said to be crucial to the case. The

adjournment was granted but the 1<sup>st</sup> defendant failed to appear on various occasions prompting the 1<sup>st</sup> defendant's counsel to close the defence case. Parties have since exchanged written submissions together with relevant authorities. I have carefully read through the two sets of submissions.

### Findings and Conclusions

26. Upon consideration of the evidence on record, the issue that arises for determination is whether the plaintiff has proved his case against the defendants jointly and severally on a balance of probabilities. From the testimonies of the plaintiff's witnesses and the documents produced there is no evidence of an appeal having been lodged by the 1<sup>st</sup> defendant to the Chief Land Registrar against the findings of the first report. He (1<sup>st</sup> defendant) has not shown any letter to that effect as the said appeals are normally made in writing to the Chief Land Registrar as indicated by PW2. Having said that I hold that the second report by the Land Registrar was either a fraud and/or a forgery. That means that there were no common boundaries between LR TRANSMARA/ENAENYIENY/465 and LR TRANSMARA/ ENAENYIENY/181. So the court herein will rely on the 1<sup>st</sup> Report – **P. Exhibit 3** dated 24<sup>th</sup> December 2003 by the Land Registrar in making the finding that the plaintiff's and the 1<sup>st</sup> defendant's parcels of land did not share a common boundary.
27. It was confirmed by PW3 that sometime in 2003 there was a meeting to resolve the dispute between the plaintiff and the 1<sup>st</sup> defendant. Being the chairman of Emorogi group ranch he was summoned to the meeting which he attended, and a report was made thereafter. He testified that there had not been any other meeting called by the Land Registrar because if there had been such a meeting, notices or summons to the respective parties would have been issued and he would have attended the meeting.
28. PW1 has shown the power of Attorney signed by his father thus he was competent to have given evidence on behalf of his father. From the evidence given by PW1 it is demonstrated that there is no common boundary between parcel 465 and 181 as the plaintiff and the 1<sup>st</sup> defendants were from very different group ranches, that is to say Emorogi group ranch and Olembogit group ranch. It was also established that there existed two (2) other parcels of land situate between the suit land and LR NO. TRANSMARA/ENAENYIENY/181. These are LR NOS. TRANSMARA/ENAENYIENY 250 and 466. It is therefore my finding that the suit land does not share a common boundary with LR NO. TRANSMARA/ENAENYIENY/181.
29. It has also been demonstrated that the MAST by Kencel Communications Limited was mounted after the said company entered into an agreement with the plaintiff which shows that the MAST is situated on LR NO. TRANSMARA/ENAENYIENY/465 the suit land herein. The 1<sup>st</sup> defendant has laid claim to the ground on which the MAST is located basing his contention on a falsified Land Registrar's Report which purports that the suit land and LR NO. TRANSMARA/ ENAENYIENY/181 do share a common boundary and by extension that the ground wherein the MAST is located falls within LR NO. Transmara/Enaenyieny/181. No evidence was given by the 1<sup>st</sup> defendant to support his claim. All that the 1<sup>st</sup> defendant stated was that he was away from home when the mast was erected. I find that piece of evidence hard to believe.
30. The court has also noted that the amendment to the Registry Index Map and the attendant enlargement of LR No. Transmara/ Enaenyieny/181 were undertaken without any appeal having been mounted against the visitation and the attendant report dated 24<sup>th</sup> December 2003. The claim by the 1<sup>st</sup> defendant that the suit land and LR NO. Transmara/Enaenyieny/181 share a common boundary, is therefore founded on a fraudulent document and the court therefore will not consider the same. In any event, the 1<sup>st</sup> defendant was obliged to call evidence to support his claims. He did not do so.
31. As regards the 1<sup>st</sup> defendant's counterclaim which asked the court to issue a litany of orders, no single witness was called or document produced to support the same. The 1<sup>st</sup> defendant was under

a duty to adduce credible evidence to support his counterclaim. He has therefore not proved his counterclaim on a balance of probabilities.

32. In the premises, I am satisfied that the plaintiff has proved his case against the 1<sup>st</sup> defendant on a balance of probabilities. I accordingly enter judgment for the plaintiff as against the defendants in terms of prayers (i) – (iv) of the plaint. As the 1<sup>st</sup> defendant's counterclaim has not been proved on a balance of probabilities, the same is dismissed in its entirety.

33. Costs of the suit to the plaintiff.

34. Orders accordingly.

**Dated and delivered at Kisii this 11<sup>th</sup> day of July, 2013**

**RUTH NEKOYE SITATI**

**JUDGE.**

**In the presence of:**

**Mr. Moracha for Oguttu-Mboya for Plaintiff**

**Mr. Owade for Mrs. Asati for Defendant**

**Mr. Bibu - Court Clerk**