



REPUBLIC OF KENYA



Matu & 3 others v Koonyo & 14 others (Environment & Land Case 389 of 2017) [2022] KEELC 3444 (KLR) (19 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3444 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 389 OF 2017**

CG MBOGO, J

MAY 19, 2022

BETWEEN

**SARUNI MATU 1ST PLAINTIFF
JOSEPH NYOKUNI KENGA 2ND PLAINTIFF
SEURI OLE SANKOK 3RD PLAINTIFF
OLE KENGA GROUP RANCH 4TH PLAINTIFF**

AND

**STANLEY TININA KOONYO 1ST DEFENDANT
SIMINTEY OLE KOONYO 2ND DEFENDANT
KAMAAMIA OLE MASIAR 3RD DEFENDANT
MAISON OLE MASIAR 4TH DEFENDANT
LEISA OLE KISHAMBILI 5TH DEFENDANT
KANTAI OLE MASIAR 6TH DEFENDANT
MORIPET OLE MASIAR 7TH DEFENDANT
SELEON OLE KOONYO 8TH DEFENDANT
DAVID OLE NTAIYA 9TH DEFENDANT
JOSEPH OLE MASIAR 10TH DEFENDANT
NKIRRIMPA OLE MASIAR 11TH DEFENDANT
NTARUNKEY OLE MASIAR 12TH DEFENDANT
PARISNANTE OLE MASIAR 13TH DEFENDANT
PHILIP NKIRRIMPA MASIAR 14TH DEFENDANT**



JUDGMENT

1. The plaintiffs filed an Amended Plaintiff dated January 24, 2018 seeking the following orders: -
 - a A permanent injunction do issue, restraining the defendants herein by themselves, their servants, agents and any person engaged by the defendants or otherwise from trespassing, obstructing, erecting, constructing any structures of any kind whatsoever and further interfering with the plaintiffs quiet possession and ownership of parcel number Narok/Olchoro/46 measuring 351.0 Ha.
 - b That an eviction order be issued against the defendant herein, their servants and agents from interfering with parcel known as Narok/Olchoro/ 46 measuring 351.0 Ha.
 - c Costs of the suit plus interest at court rates.
 - d Any other relief the honourable court may deem fit to grant.
2. The plaintiffs averred that at all material times, they are the owners of land parcel known as Narok/Olchoro/46 measuring 351.0 Ha and that the defendants without any reasonable or justifiable cause moved into the suit land and laid claim and purported to take possession and as a result of the defendants' acts, the plaintiffs have been deprived of the opportunity to use, utilise and enjoy their land and have suffered loss and damages.
3. The defendants filed an Amended Statement of Defence dated February 14, 2018. The defendants denied the contents of the Amended Plaintiff and that the allegations contained in the Amended Plaintiff are false and perpetuated by malice the particulars being as listed hereunder: -
 - A Making false allegations that the defendants are in any sort of illegal occupation of parcel known as Narok/Olchoro/46.
 - B Making false allegations that the defendants have moved intentionally and illegally to deprive the plaintiffs of the use of the land known as Narok/Olchoro/46.
 - C Involving the defendants in litigation over the occupation of parcel of land that the defendants legally own and are in full occupation thereof.
4. The defendants are seeking the following prayers: -
 - i A declaration that the defendants are the legitimate owners of all that parcel of land known as Narok/Olchoro/46.
 - ii The suit be dismissed with costs to the defendants.
5. This matter proceeded for hearing on September 22, 2020. The plaintiffs' first witness Tom Chepkwesi (PW1)-Land Registrar Narok testified that the suit land was visited by the surveyors on November 8, 2018. He produced exhibit number 1 being a copy of the register and exhibit number 2 being a search area of Narok/Olchoro/46. On cross examination, he testified that Cis Mara/Olchoro/20 does not exist as it was subdivided and that the subdivision was conducted in 1995 and as per their records and that there are no complaints.



6. The plaintiff's second witness Lawrence Ochieng Mwenje (PW2)-District Surveyor testified that they visited the ground with the District Surveyor Mr Schodri on November 8, 2018 and were unable to determine the boundaries on that day as the family of the defendants were not cooperative and as such he could not physically identify both parcels of land. He therefore requested for security to enable him conduct the exercise. The plaintiffs' second witness further testified through the virtual platform on September 27, 2021. On cross examination, he testified that he personally visited the ground and that point R22 was shown to him by the plaintiffs and defendants and that there was something like a post on the ground which enabled him pick the point R22. He enquired as to who had erected the post and he was informed that the same was erected by demarcation officers. He further testified that he calculated the acreage of one parcel for the reason that there was an earlier report that quoted the acreage of the two parcels. He also testified that the other party denied them access to his land. On further cross examination, the surveyor testified that there exist two distinct parcels on the ground and that the acreage of the suit land is bigger for the reason that topographical maps come about as a result of aerial survey during demarcation and that the boundaries on the ground are very clear. That there is a fence that leads to the river on one side and a tree on the other side.
7. Hearing proceeded further on December 8, 2021 during which the plaintiffs' third witness, Joseph Nyokuni Kenga (PW3) testified that he is a treasurer of the Kenga Group Ranch which owns the suit land and that they are not able to utilise the group ranch because the defendants have trespassed onto it, cut down trees and cultivated on the same. That the defendants encroached onto the suit land in the year 2014. He further testified that the Surveyor has confirmed that their land exists on the ground and that the defendants own the land adjoining their group ranch. The plaintiffs closed their case.
8. The 1st defendant testified that he was present when the Surveyor visited the ground and informed him that it was necessary that they survey the whole area. That Group Ranch number 20 belongs to the Koonyo family which borders Group Ranch number 19 which belongs to Seusi family. He further testified that he accompanied the Surveyor to the point where the group ranch ends where they met members of Group Ranch 19 and while walking towards the lower part of the ranch, they saw the Kenga family leading the Surveyors towards river Enkare Ngúso while pointing on the ground during which the Surveyor who had a GPS gadget fed information on the gadget. On cross examination, the 1st defendant testified that he was present when the visit by the Surveyor was conducted and that they went to the boundary between parcels 19 and 20 but did not get to the boundary between parcel number 20 and 46 because parcel Narok/Olchoro/46 does not exist. Further that the plaintiffs are not their neighbours and that they border Group Ranch 19 and Lokinyei Group Ranch. He adopted his statement dated November 14, 2017 and produced defendant's exhibit number 1-9. The defendants thereafter closed their case.
9. The plaintiffs filed their statement of issues dated July 24, 2017 in which they have raised the following issues for determination: -
 1. Whether the Plaintiffs are the registered owners of Land parcel number Cis-Mara/Olchoro/46.
 2. Whether the defendants are in occupation of Land Parcel Number Cis-Mara/Olchoro/46.
 3. Whether the defendants have any colour of right or claim to land parcel number Cis-Mara/Olchoro/46.
 4. What reliefs should be granted in this matter.
 5. Who should bear the costs of this suit.



10. The plaintiffs filed written submissions dated February 17, 2022. The plaintiffs raised two issues for determination as follows: -
 - a Who is the owner of land parcel number Narok/Olchoro/46.
 - b Whether the defendants have trespassed into the land parcel number Narok/Olchoro/46.
11. It is their submission that the Land Registrar and the District Surveyor confirmed that Narok/Olchoro/20 does exist and the same is owned by the Kenga Family Group Ranch through production of a certificate of official search and a copy of the register. He further submitted that the only reason why the defendants are not aware of the existence of the suit land is because they have trespassed onto it and annexed it as their land.
12. The defendants filed written submissions dated February 17, 2021. In which they have raised 4 issues for determination as follows: -
 1. Whether or not the Plaintiffs have the required *locus standi* to institute this suit.
 2. Whether the existence of the suit land has been established.
 3. Whether the plaintiffs have succeeded in proving that the defendants have indeed trespassed upon all that parcel of land known as Narok/Olchoro/46.
 4. Who bears the costs of the suit.
13. The defendants began by conceding that the issue of *locus standi* was not pleaded but that notwithstanding, this issue has become readily apparent and merits this court's determination. They rely on the case of *Odd Jobs versus Mubia* (1970) EA 476 as cited in the case of [Moses Owino Odongo \[2020\] eKLR](#) and [Alfred Njau & Others versus City Council of Nairobi](#) (1982)KAR 229 and they submitted that as can be seen from the pleadings that the first, second and third plaintiffs have approached this court as representatives of Ole Kenga Group Ranch, the fourth plaintiff, which is not the registered proprietor of the suit land as such, the plaintiffs in this matter do not have the necessary locus standi to institute and sustain this suit.
14. The defendants further submitted that it is the primary responsibility of the plaintiffs to prove to the required standard of proof as provided for in Section 107 of [Evidence Act](#) and that according to the 1st defendants' testimony the exercise conducted by the surveyor was biased and could not be relied upon by the court. The defendants' further submitted that based on the records and evidence produced, the plaintiffs have failed to meet the legal threshold by failing to avail cogent evidence to demonstrate that the defendants have acted in the manner consistent with the particulars of trespass. It was also their submissions that it is therefore improbable to state that the defendants who are 15 in number are in actual occupation of 351 Hectares of land. They relied on the case of *Republic versus Rosemary Wairimu Munene, Ex-parte Applicant versus Ihurur Dairy Farmers Cooperative Society Limited and Lewis Karungu Waruiro versus Moses Muriuki Muchiri, Reginah Nyambura Waithatu versus Tarcisio Kagunda Waithatu & 3 Others*.
15. I have analysed the pleadings filed by both parties and considered the written submissions thereof and the issue for determinations is whether there is trespass on the plaintiff suit land which warrants the prayers sought in the plaint.
16. A perusal of the proceedings indicates that on September 25, 2018, the court gave directions that the Land Registrar and District Surveyor visit the land and determine whether both parcels of land exist and ascertain the boundaries thereof and make a report on the same. The plaintiffs' exhibit number



four was the initial Surveyor's report dated November 13, 2018 which it was noted that the defendants and others were resistant and uncooperative and therefore the District Surveyor could not conduct the exercise. The Surveyors' observation and finding was that the defendants and their families are in occupation of both parcels of land. During the hearing, the District Surveyor testified that the report tabled was not conclusive and sought the enforcement of security personnel to enable him carry out the exercise. The District Surveyor filed a report dated May 19, 2021 which made a finding that the final ground area of the suit land was found to be 331.73 Hectares as opposed to what was registered which is 351.00 Hectares.

17. A perusal of the written submissions on the Surveyor's report dated July 1 and 5, 2021 respectively and filed by counsel for both parties is disputed. The plaintiffs in conclusion stated that the District Surveyor seems to have overlooked the terms of reference and did not identify and clarify the boundaries between the two parcels. The defendants on the other hand stated that the District Surveyor calculated the acreage owned by the plaintiffs and did not calculate the acreage of Cis Mara/Olchoro/20 which demonstrates biasness in the findings and observations. In conclusion they submitted that the Survey Report May 19, 2021 is inconclusive and consists of disoriented observations and findings and not worthy of court's consideration.

18. Section 18 of the [Land Registration Act](#) No 3 of 2012 provides as follows: -

“(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](#)”.

19. Section 19 of the [Land Registration Act](#) No 3 of 2012 provides as follows: -

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

20. I have looked at the pleadings and the evidence of both parties and the issue relates to the general boundaries which in my view is not clear and there is need for determination by the Land Registrar. It would only be in the interest of justice that this court gives room for the Land Registrar to determine the same before the parties come to court. I place reliance in the case of *George Kamau Macharia v Dexka Limited* [2019] eKLR where the court held as follows:

“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.”

21. Arising from the above, the Amended Plaint January 24, 2018 is dismissed. I hereby direct that the Defendants do pay the Plaintiffs the Surveyors fees incurred on their behalf. Each party shall bear its own costs. It is so ordered.

DATED, SIGNED and DELIVERED VIA EMAIL ON 19TH MAY, 2022.

Mbogo C G

Judge

19/5/2022

In the presence of: -

CA: Timothy Chuma

