



**Kenda v Njapit & 5 others (Environment & Land Case
E013 of 2021) [2025] KEELC 3066 (KLR) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3066 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E013 OF 2021**

LN GACHERU, J

APRIL 3, 2025

BETWEEN

MOITALEL OLE KENDA PLAINTIFF

AND

MARASWA OLE NJAPIT 1ST DEFENDANT

NDERI OLE NAMPASO 2ND DEFENDANT

NDERITU MICHEAL KIMRNDERO 3RD DEFENDANT

DISTRICT LAND REGISTRAR, NAROK 4TH DEFENDANT

DISTRICT SURVEYOR, NAROK 5TH DEFENDANT

ATTORNEY GENERAL 6TH DEFENDANT

RULING

1. The Plaintiff herein Hon. Moitalel Ole Kenta, filed this suit vide a Complaint dated 2nd July 2021, and sought for various prayers among them; a declaration that the defendant's intention to subdivide the Plaintiff's land parcel No. Cis Mara/ Oldonyo Rasha/169, as per the Mutation Form herein is illegal, null and void ab initio and the Mutation Form be nullified; a declaration that the title number Cis Mara/ Oldonyo Rasha/ 1339, was fraudulently registered and the same should be nullified and cancelled among other prayers.
2. The suit is opposed by the Defendants through their respective Defences wherein the 1st – 3rd Defendants vide their Defence denied all the allegations made in the Complaint and alleged that the Plaintiff fenced off his land parcel No. Cis MARA/ Oldonya Rasha/ 169 beyond his boundaries, and he claimed an extra land far beyond his registered land. Further, as opposed to what the Plaintiff alleged in the Complaint, land parcel No. Cis Mara/ Oldonyo Rasha/ 1300, do exist and that the Mutation Form was



created by the District Land Surveyor after successful survey of the land and registration of the same as mandated by the Law.

3. Further, the 1st - 3rd Defendants averred that the Plaintiff's suit was frivolous, vexatious and an abuse of the due process of the court, and they urged the court to dismiss the suit with costs. They also averred that there were no illegal titles to be cancelled, and that the Group Ranch Chairman Kelement Ole Meingat did sign all the documents, and the same were duly processed under his instructions.
4. The 4th, 5th and 6th Defendants filed their Defence through the Attorney General, and averred that there has been a protracted complaint over the survey errors arising from the initial subdivision of Cis Mara/ Oldonyo Rasha/ 1, that had concealed the actual area of that parcel of land.
5. Further, that the Group Ranch had petitioned the Survey office to rectify the said area to enable fair distribution of excess land on the ground. It was also averred that prior to the Mutation, the officials of the Group Ranch had through the assistance of the Surveyor established that parcels of land fronting the road next to Majimoto Group Ranch, were wrongly surveyed, leaving out a huge chunk of land.
6. It was their further Defence, that the creation of Land Parcel No. Cis Mara/ Oldonyo Rasha/ 1300, was the Surveyor's option of correction of omission of the first survey, which had led to the grievances brought up by the Group Ranch Officials.
7. On 7th November 2021, the 1st, 2nd and 3rd Defendants filed a Notice of Motion Application and sought among the various prayers that the court do direct the District Land Registrar and/ or District Surveyor, Narok, to visit the land Parcel No. Cis Mara/ Oldonyo Rasha/169, to ascertain its size and file a Report on the visit.
8. This Application was opposed by the Plaintiff, and after interlocutory hearing through written submissions, the court vide its Ruling of 25th May 2023, dismissed the said Application, on the basis that the Court had not taken evidence and had not appreciated the respective positions of each party in this case. The court held; "it would be prudent in my view that parties present their case first and where need arise, or if the court deems fit in the course of trial , do order for a Report of a site visit."
9. The matter was thereafter prepared for hearing, and after the Pre- trial Conference, the suit was satisfied ready for hearing. The parties have given their evidence, wherein the Plaintiff gave evidence for himself and produce various exhibits. He did not call any other witness.
10. The Defendants gave evidence through the 1st Defendant Maraswa Ole Njapit, who is one of the officials of the Oldonyo Rasha, Group Ranch. 3rd Defendant Michael Nderitu Kimendero, the private surveyor who allegedly did the survey work gave evidence, and the District Land Registrar, Philip Mathew Oduda, also gave evidence, and adopted his witness statement wherein he averred that if there is any overlap of the parcels of land as alleged by the Plaintiff, then the dispute ought to have been resolved as stipulated in sections 18, 19 and 20 of the Land Registration. He further stated that if there was any encroachment, the Plaintiff rushed to court prematurely before exhausting the laid down mechanisms.
11. After the close of the Defence case, Mr. Kilele for the 1st – 3rd Defendants made an oral Application for the court to visit the ground and determines whether indeed the Plaintiff's parcel of land has been encroached upon, to enable the court determines this matter with finality.
12. The application for site visit was objected to by Mr. Maina Kairu for the Plaintiff on the ground that the same application had been made on 7th November 2021, and in its Ruling, the court declined to allow the said application since the issue herein was not about acreage, but encroachment. It was submitted



that a court cannot be invited to validate an invalid process. Further, that the Plaintiff is not disputing the acreage, but the process.

13. The Application for site visit was supported by Ms Nyawira, the State Counsel on behalf of the 4th, 5th and 6th Defendants, who submitted that a site visit is important as the court would be in a better position to determine whether land parcel No 1300 has encroached on land parcel No 169.
14. In rejoinder, Mr Kilele urged the court to allow the application as no prejudice will be occasioned to the Plaintiff if the court would allow the Application.
15. The court has considered the grounds for and opposition to the Application and finds as follows;
16. Indeed, from the court's record, the 1st, 2nd and 3rd Defendants had filed an Application dated 7th November 2021, wherein they had sought for orders that the court do direct the District Land Registrar/ and Surveyor, Narok, to visit the land parcel No. Cis Mara/ Oldonyo Rasha/ 169, and ascertain its size and file a Report on the visit.
17. The above Application was filed before the suit had begun, and in its Ruling, the court relied on various decided cases among them the cases of Beatrice Ngonyo Ndungu & Another vs Samuel K. Kiprono & 2 others (2017) eKLR, and Chira & 2 others vs Kenya Power & Lighting Co. Ltd ELC Case No 94 of 2019(2022), KEELC 2519(KLR), wherein the courts were of the view that before the court could visit the Locus Quo, the applicant must place before the court special, exceptional and peculiar circumstances that will warrant such a visit.
18. The Court in dismissing the above Application held that it would be prudent for the parties to present their case first, and if need arise and / or the court deems it fit, it would order for such site visit. The parties herein have already adduced their evidence in court.
19. The instant Application for site visit was made orally, and the Defendants did not cite the provisions of law that the said application is anchored upon. However, this court is alive to the provisions of sections 1A, 1B and 3A of the Civil Procedure Act, which sections of law deals with the objective of the Civil Procedure Act of ensuring that Civil disputes before the court are dealt with proportionately, without undue delay and in a manner that would promote the interest of justice. Further, section 3A of the said Act, donates unfettered powers to this court to make such orders that are just, and which would ensure that the end of justice is met.
20. With the above in mind, this court will proceed to decide on whether the site visit is necessary or not. In the case of Beatrice Ngonyo Ndung'u & another vs Samuel K Kanyoro & 2 others (2017) eKLR, the court stated as follows:-

“If the court visits a site, it can only be for purposes of receiving evidence which will assist in making a just decision. So long as a site visit is incapable of yielding any evidence or for that matter any admissible evidence, then the Judge will be no better than a tourist satisfying curiosities and taking photographs during a site visit. A court in session must perform judicial functions and must restrict distractions that take it away from its mission.”

21. Further in the same case, the court held as follows;

“ a visit to the site by a Judge who is not a survey expert and who is not armed with survey equipment would not yield anything. An expert report by a surveyor complied with the aid of survey equipment would certainly be more useful.”



22. Therefore, it is evident that the purpose of a site visit is for gathering evidence which would assist the court in making a just determination.
23. In his Complaint, the Plaintiff claimed that the Defendants fraudulently created a Register for Cis Mara/ Oldonyo Rasha/ 1300, which was registered in the name Oldonyo Rasha Group Ranch and in the process fraudulently dispossessed the Plaintiff of 20.23 Ha.
24. The District Land Registrar, gave evidence and alleged that the issue herein is on overlap of the parcels of land, and that the issue of encroachment can best be resolved as provided by sections 18, 19 and 20 of the *Land Registration Act*.
25. There is indeed an unresolved issue of whether the creation of land parcel Cis Mara/ Oldonyo Rasha/1300 did encroach on the Plaintiff's 20.23 Ha. Before the court could make a determination on whether the Defendants fraudulently created a Mutation Form for land parcel no Cis Mara/ Oldonyo Rasha/ 1300, the court will need to establish whether the said creation did affect the Plaintiff's acreage. This can only be established by a visit to the ground.
26. An application for site visit by the District Land Registrar made by 1st – 3rd Defendant had earlier been dismissed by the court. However, the said dismissal was on the fact that no evidence had been adduced yet, and it was too early in the proceedings to seek for a site visit as that would be tantamount to assisting parties in gathering their evidence.
27. In the case of *Atek Otech Richard & 11 others v Stelco Properties; M-Oriental Bank Limited (Interested Party)* [2022] eKLR the court held;

I agree with the Plaintiffs' observations that the court may be perceived to be collecting evidence for the Applicants. We must never lose sight of the fact that ours is an adversarial system. The Black's Law Dictionary (10th Edition), defines such a system as a legal system, 'involving active and unhindered parties contesting with each other to put forth a case before an independent decision-maker.' The decision-maker, in this case, the court must remain impartial. Sir Barclay Nihill put it thus; "a trial Judge should not descend into the arena where his vision may become clouded by the dust of the conflict." (*Jashbhai C Patel vs BD Joshi*).
28. By its Ruling of 25th May 2023, the court was avoiding a situation where it may be seen to have drifted from a position of being an impartial arbiter, to an active party involved in investigations and collecting of evidence for either of the parties. The court had concluded that as and if necessary in the course of the hearing of the matter, then it may order such a site visit.
29. The court did not on its own motion find it necessary to order for such site visit. However, the court has been moved again by the 1st – 3rd Defendants through an Oral application to order for a ground/ and or site visit. The duty of the court is to ensure that justice is done, and parties in a civil suit have the duty to avail the best evidence to assist the court in reaching at such a determination.
30. Since there is a conflict on whether Land Parcel No Cis Mara/ Oldonyo Rasha/ 1300, has encroached on land parcel No Cis Mara/ Oldonyo Rasha/ 169, belonging to the Plaintiff, and that 20.23Ha acres have been hived off from the Plaintiff's land, then a ground visit is necessary.



31. However, this court is alive to the fact that it is not an expert in determining boundaries. This is a preserve of the Surveyor and Land Registrar. As was held in the case of Beatrice Ngonyo(supra)

“a visit to the site by a Judge who is not a survey expert and who is not armed with survey equipment would not yield anything. An expert report by a surveyor complied with the aid of survey equipment would certainly be more useful.”

32. In its Ruling of 25th May 2023, the court held that after the parties have presented their case and there is need to order for a site visit, then the court would order for such visit. After the oral application by the 1st – 3rd Defendants court has found there is need to order for the ground visit. Consequently, this court directs the District Land Registrar and the District Surveyor, Narok to visit the ground and ascertain the size of land parcel No Cis Mara/ Oldonyo Rasha/169, and also ascertain its boundaries with Land Parcel No. Cis Mara/ Oldonyo Rasha/ 1300, and prepare a Report on the said visit and avail it in court.

33. The said site visit to be conducted on a date that is agreeable to all the parties herein, and the parties and/ or their advocates to be present on the date of such visit. The Application for site visit has been made by the Defendants; therefore, the Defendants to facilitate the said site visit. The site visits (locus quo) to be conducted within a period of 21 days from the date hereof.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAROK THIS 3RD DAY OF APRIL, 2025.

L. GACHERU

JUDGE

Delivered online in the presence of

Meyoki - Court Assistant

Mr. Maina Kairu for the Plaintiff

Mr. Kilele for 1st, 2nd and 3rd Defendants

Ms. Nyawira for 4th, 5th and 6th Defendants.

L. GACHERU

JUDGE

