



**Korir v Simei & 2 others (Environment & Land Case 153 of 2021)
[2022] KEELC 12587 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12587 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 153 OF 2021
MN MWANYALE, J
SEPTEMBER 22, 2022**

BETWEEN

SHADRACK KORIR PLAINTIFF

AND

FELIX KIPKEMBOI SIMEI 1ST DEFENDANT

ABRAHAM KIMARU 2ND DEFENDANT

SALOME J. SIMEI 3RD DEFENDANT

JUDGMENT

1. Vide the Complaint dated January 17, 2019 the Plaintiff sued the 1st, 2nd and 3rd Defendants jointly and severally seeking orders to *inter alia*;
 - a. Declaration that the Defendants and/or their servants and/or agents are trespassers and/or have unlawfully adversely encroached and/or trespassed into the Plaintiff's portion of land known as Nandi/kokwet/554.
 - b. An order of eviction against the Defendants, their servants and/or agents evicting the Defendants, their servants and/or agents evicting the Defendants and their said servants and agents from all that parcel of land comprised in Nandi/kokwet/559
 - c. An order of permanent injunction restraining the Defendants, their servants and/or agents from re-entering, occupying, or continued occupation/possession and/or wasting the Plaintiff's parcel of land known as Nandi/kokwet/554 and/or from doing anything that will interfere with and/or violate the Plaintiff's respective proprietary rights and/or possession in/over that parcel of land comprised in Nandi/kokwet/544.



2. The Defendants filed initially a statement of Defence dated February 25, 2019, but later on Amended the same to include a counterclaim, *vide* their statement of defence and counterclaim dated January 21, 2022.
3. The Defendant *vide* an application dated 16/09/2019 sought and was granted orders that the County Surveyor to demarcate the boundary between the parcels of land known as Nandi/kokwet/22 and Nandi/kokwet/554 and the survey report was ordered to be filed in Court. In the said Ruling the Court (Hon. Odeny L. J) determined whether the suit was a boundary dispute and whether the Court was the right forum to hear and determine the matter.

PLAINTIFF'S CASE: -

4. It is the Plaintiff's case that he is the registered absolute proprietor of parcel number Nandi/kokwet/544 and is entitled to appurtenant rights and exclusive possession of the same.
5. That the Defendants without any colour of right encroached and trespass on the Plaintiffs property resulting into destruction and has resulted to loss, damage, loss of user and the Plaintiff particularized both the Acts of trespass and encroachment as well as loss and damages including mesne profits of kshs 25,000/= per year.
6. On the basis of the above grievances the Plaintiff prayed for the reliefs set out in paragraph 1 of this Judgement.

DEFENDANT'S CASE: -

7. It is the Defendant's case though their Amended Statement of Defence;
 - i. That the 2nd and 3rd Defendants are the executors of the Estate of Kipyego arap Simei whose Estate comprised of Nandi/kokwet/22 among other properties, which measured approximately 38.04 Ha.
 - ii. That the said Nandi/kokwet/22 measuring 38.04 Ha borders the Plaintiffs land known as Nandi/kokwet/554.
 - iii. That a private survey confirmed that Nandi/kokwet/22 measuring approximately 38.04 Ha was less by 2.01 Ha had been illegally exercised and formed part of Nandi/kokwet/544 owned by the Plaintiff.
 - iv. That a Government survey further confirms that Nandi/kokwet/554 occupied by the Plaintiff was in excess of 2.01 Ha.
8. It is the Defendants further claim that it is the Plaintiff who clothed himself with an additional 2.01 Ha which originally formed part of Nandi/kokwet/22 without following laid out statutory procedures.
9. That is the Plaintiff who trespassed on the Defendants parcel of land in July 2018 and caused a fence thereon and has constructed a bungalow on the 2.01 Ha that he illegally exercised.
10. For the above reasons, the Defendant prayed that the Plaintiff suit be dismissed.
11. As noted above the Defendant equally filed a counterclaim reiterating the Defence and claiming the 2.01 Ha allegedly illegally excised out of Nandi/kokwet/22 terming the actions by the Plaintiff as trespass.
12. The Defendants prayed for;



- i. Declaration that the Plaintiff has illegally exercised 2.01 Ha out of Nandi/kokwet/22 and now forming part of Nandi/kokwet/22 and now forming part of Nandi/kokwet 554.
- ii. A permanent injunction restraining the Plaintiff, his servants and agents from trespassing upon Nandi/kokwet/22
- iii. General damages for trespass.

PLAINTIFF'S EVIDENCE: -

13. The Plaintiff Shadrack Kibet Korir testified as PW1 he adopted his witness statements and produced exhibits in his list of documents.
14. It was his testimony that the property Nandi/kokwet/554 was his and he produced a copy of the title as P Exhibit No. 1, he equally produced an official search as P Exhibit No. 2. It was his further testimony that he had purchased the property as a whole vide an agreement for sale dated January 11, 2007 – P Exhibit 4.
15. At time of purchase the parcel of land had been fenced through barbered fence, and that he bought the same without removing the boundaries as claimed by the Defendants.
16. It was his testimony that he brought his property Nandi/kokwet/544 from a Mr. Kipkieny Bwanahoey who was the initial registered owner together with Kipkigen Kwanoi, while the neighboring property belonged to the late Thomas Kipyego and that there was no boundary dispute between the two owners as the boundary was fixed by the original owners.
17. He sought for the orders prayed for in the Plaintiff.
18. In cross – examination, the witness stated that his property was approximately 6.1Ha. The said property was a subdivision of Nandi/kokwet/21. In the agreement for sale it was indicated that he bought only 3.0 Ha. That the property was on Registry Map Sheet No. 4; and that it borders Nandi/kokwet 22. Boundaries had been erected before he purchased.
19. He agreed with the surveyor's report that the property has an excess of 5 acres, which is unaccounted for as it is 8.11 Ha; while Nandi/kokwet/22 is 35.87 Ha as per the surveyor's report and its title ought to be 38.04 Ha. During the pendency of the suit, he sold 4 acres to someone else.
20. He had no problem if the Court orders that the extra 5 acres be returned to the rightful owner.
21. In Re- examination, he stated that the green card was opened on July 10, 1987. The survey report shows that the boundary is still intact. He bought the whole Nandi/kokwet 544 and the title reads approximately 6.01 Ha.

DEFENCE CASE:-

22. Three Defence witnesses testified DW1 Abraham Kimaru Yego testified adopting his witness statement and produced D Exhibit 1 to 26.
23. It was his statement that his complaint is that Nandi/kokwet/22 is smaller in size than on the title. The missing acreage was found in the neighboring property Nandi/kokwet/544 registered in the name of the Plaintiff.
24. He prayed that the counterclaim be allowed.
25. In cross – examination, he stated that when he was born Kipkieny Bwanahoery was their neighbor and that there was no dispute at all. The neighboring properties had always have a boundary, but he did not



- know who placed the boundary. It was during succession that they found that his late father's property was smaller in acreage. From the search the property was 38.04 Ha but on the ground it was 35.87Ha.
26. The difference was 2.17 Ha, whilst the Plaintiff title was 6.1 Ha but on the ground it was 8.1 Ha. That 2.01 Ha and 2.17 Ha were not identical.
 27. The Plaintiff did not move any boundaries. The properties borders 4 others but only surveyed Nandi/kokwet/554. In re- examination, he stated that he become the registered owner in 2018 and filed the case in 2019.
 28. The survey was conducted by a Government surveyor and that his demand letter had been written before the survey.
 29. DW2, Felix Kipkemboi Simei testified too, and adopted his statement as part of his evidence in chief. It was his testimony that the Plaintiff's suit be dismissed and their 5 acres be returned to them.
 30. He confirmed in cross examination that, the Plaintiff did not move a single inch of the property. He did not know when the boundary was fixed, as it was in existence when it was born in 1983.
 31. He stated that he was claiming 2.01 Ha that had been amalgamated in 554 when subdivision was done; on July 10, 1969.
 32. In re-examination he stated that a survey was carried out in 2004 and the County Survey equally confirmed the deficit of the 2.01 Ha.
 33. DW3 Evans Osieta Nyamoro a Land surveyor testified in the matter. It was his testimony that he had undertaken a survey on the two disputed plots and he wrote a survey report dated August 11, 2020.
 34. It was his findings in the report that the ground boundaries were fairly represented but the acreage on the title differ from the ones on the title. Nandi/kokwet/554 has 20.04 acres while Nandi/kokwet/22 has 88.64 acres.
 35. There were complaints that had been registered in the survey office before the Court case was filed. It was his testimony that Section 15 of the L.R.A the survey office had a mandate to ensure that maps and titles and compactible, and the surveys herein was a general survey boundary.
 36. In cross – examination, he stated the anomaly in the acreage was discovered in 2004 by Felix Simei. The boundaries were not changed and the initial owners had no challenge.
 37. The Land Registrar did not fix the boundary since the matter was in Court. He further stated that general boundaries were aerial survey and that is why it is approximate.
 38. He stated that the difference between 38.04Ha to 35.87Ha is 2.17 Ha while 8.11 Ha less 6.10 Ha is 2.01 Ha. Whatever is missing in number 22 does not tally with what is in 554. He state that he did not survey the neighboring 20 properties.
 39. After the testimony of the three witnesses the defence case closed.

PLAINTIFF'S SUBMISSIONS: -

40. The Plaintiff submits that he is a *bonafide* purchaser for value without any notice of any defect having purchased the property on January 10, 2007 from Kipkienny Arap Bwanahoeys with pre-existing boundaries.



41. It is the Plaintiff's further submission that under Section 23 (1) of the Repealed Registration of Titles Act Cap 281 (now repealed, the title of Nandi/kipkuret 554 having not been acquired the title fraudulently the title is indefeasible, and that the state guarantees the indefeasibility of registered title.
42. It is Plaintiff's further submissions that as the title for Nandi/kokwet/554 was acquired on January 11, 2007, before enactment of the Land Registration Act, the provisions of Section 107 of the Land Registration Act, being transitional provisions should apply.
43. The Plaintiff submits that under Section 26 (1) of the Land Registration Act the indefeasibility of title as established is guarantee, unless title was obtained by fraud or misrepresentation to which the title holder is proved to have been a party to.
44. With respect to the counterclaim, the Plaintiff submits and places reliance on the decision in *R.G. Patel vs Lalyi Makanji* 1957 E. A. that "allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt; something more than a mere balance of probabilities is required."
45. The Plaintiff submits that it was fatal on the part of the Defendant not to have sued the Land Registrar and County Surveyor.
46. The Plaintiff in reliance to Section 80 of the Land Registration Act 2012 submits that the Register can only be rectified upon proof of fraud.
47. The Plaintiff submits that the prayers sought by the Defendant cannot issue since the eviction orders and permanent injunction as sought have no backing of an order to rectify the register.
48. Towards this end the Plaintiff submits that the Court should not issue orders in vain, and ponders as to what will happen once the eviction is done, but the register has not been rectified. In support of this submissions, the Plaintiff places reliance on the decision in *Issa Ahmed & 15 others vs Mobered Al - Sawae* 2021 eKLR, *Protus Oduor Malala vs Wanyangu Livingstone Onjala* (2021) eKLR. Where the Courts in the above cited cases unanimously agree that Court cannot issue orders in vain.
49. The Plaintiff thus prays that the counterclaim be dismissed with costs.

DEFENDANTS SUBMISSIONS: -

50. The Defendant have submitted on Section 18 of the Land Registration Act as to whether this Court has jurisdiction to hear and determine the suit.
51. It is their submission that the claim herein is not a boundary dispute claim but a claim of land by Defendants from the Plaintiff and that the Court can hear and determine the same under Section 13 of the Environment and Land Court Act.
52. The Defendant further submits that there is no dispute that 2.1 Ha forming part of Nandi/kokwet/544 is more than the actual acreage on the title.
53. It is the Defendants further submissions that the trespass herein come to knowledge of the Plaintiff upon the survey on July 23, 2022 and the trespass is thus continuing.
54. The Defendant submit placing reliance on the decision in *Basley vs Clarkson* (1681) 3 Lev 3.7, where Court held a mistake is no defence in trespass and that the Plaintiff cannot plead mistake.
55. It is the Defendants other submission that under 26 (1) of the Land Registration Act, that a title of a registered owner is prima facie evidence of the proprietor is the absolute and indefeasible owner of



the land; hence under Section 25, 26 and 27 of the [Land Registration Act](#), the title be the Defendant is indefeasible and Defendants are entitled to protection of the law.

56. The Defendants submits that in order to protect their title, the Court had requisite authority, power and discretion to make appropriate orders in the circumstances of this case. In support of this the Defendant submits that under the doctrine of “Ex turpi causa non oritur actio, meaning that “no Court ought to enforce an illegal action which is illegal, if the illegality is duly brought to the notice of the Court.”
57. The Defendant submit that eviction orders can issue against the Plaintiff if the Court finds the Plaintiff has trespassed, on their land and in support of this, the Defendant, have cited the case of Jaber Mohsen Ali and Another vs Priscillah Boit and 2 others.
58. In further submissions, the Defendant submits that the orders of permanent injunction should not be issued against them, since the Plaintiffs claim, was founded on an illegality.
59. The Defendants further submit that General damages for trespass ought to be awarded and have submitted kshs 500,000/= as general damages based on account of Plaintiffs admission.
60. In this regard the Defendants have cited the decision in [Kimutai Tanui Leonard vs Samuel Cheboi](#) 2017 (eKLR) where the Court held “Having determined that the Defendant is a trespasser, it follows that he should pay damages. It is trite law that trespass to land is actionable per se and once proved, the Plaintiff is under no duty to prove that he suffered any specific damage or loss. It is incumbent upon the Court to assess the reasonable damages to be awarded to the Plaintiff....”
61. The Defendant further submit that the Plaintiffs claim is fatally and incurably defective, bad in law an abuse of the Court process and it thus ought to be dismissed with costs.

ISSUES FOR DETERMINATION: -

62. In his submission, the Plaintiff submitted generally and did not frame any issues for determination. The Defendant on their part identified issues as follows;
 - i. Jurisdiction on the Court in light of Section 18 of the [Land Registration Act](#).
 - ii. Whether the Plaintiff's is in possession of 2.1Ha forming part of Nandi/kokwet/554.
 - iii. Whether eviction orders can issue against the Plaintiff.
63. Upon review of the pleadings, the evidence and submissions of the parties, the Court frames the following as issues for determination.
 - 1 a) whether the Plaintiffs and the Defendants claim are boundary dispute and whether the under Section 18 of the [Land Registration Act](#) the Court has jurisdiction to her and determine the same.
 - b) Do titles Nandi/kokwet/544 and Nandi/kokwet/22 correspond in terms of the acreage on the title and acreage on the ground?
 - c)
 - i) If answer to b above is in the affirmative has the Plaintiff proved his case against the Defendant.
 - ii) If answer to b above is in the negative has the Defendant proved its counterclaim against the Plaintiff?
 - iv. What reliefs can issue in the circumstances?
 - v. Who bears the costs of the suit?



ANALYSIS AND DETERMINATION:-

64. In the course of the proceedings, DW3 stated that under Section 18 of the *Land Registration Act*, the Act reserved jurisdiction to the Land Register to handle boundary disputes. This Court directed parties to submit on whether the dispute as presented before Court is a boundary dispute or not.
65. The Plaintiffs submission were silent on it, while the Defendant submitted that this was not a boundary dispute, but a trespass claim by the Plaintiff and a claim of land by the Defendants.
66. In paragraph 3 of this judgment the Court observed that the issue of jurisdiction in terms of Section 18 was raised and Odeny L. J in a ruling delivered on June 30, 2020 determined that this was a claim of land on the part of the Defendants and trespass on the part of the Plaintiff. Accordingly the Judge determined that the Court had jurisdiction to hear and determine the suit, and this Court equally finds that it has jurisdiction based on the findings earlier made by Odeny L. J.
67. Thus in answer to issue (i) the Court finds it has jurisdiction as the claim is a claim for land on the part of the Defendant and trespass on the part of the Plaintiff.
68. In arriving at the decision the Court is guided by the appellate Courts decision in *Ezekiel Kamau Wainana va Land Registrar Thika District and 3 others* 2017 eKLR. Where a party was demanding 4 acres from another land, the Court held “what we understand the Registrar have been saying was that the issue the parties had placed before him was not an issue of determining the boundary between two parcels of land within the meaning of Section 21 of the Repealed Act. It was a dispute entailing substantial reduction, on the ground, of the size of one parcel and corresponding. Increment of the size of another. In his professional view that was a claim for a chunk of land, which was beyond his jurisdiction and not merely a boundary dispute.....in the result, we are satisfied that the Registrar properly determined that the dispute in issue in this appeal was not a boundary dispute and that the remedy for appellants’ complaint lay elsewhere than under Section 21 of the Repealed Act.”
69. Similarly in the case of *James Kihara Wanderi & 5 Others vs Paul Wachira Muchunu* (2020) eKLR the Court faced with a similar question observed...
- “The Land Registrars report of May 20, 2015 had also confirmed that indeed parcel No. 439 had encroached into plot 438. Upon consideration of both the surveyor’s report, the land register report and the evidence on record, I find that the dispute between the two parties entailed a substantial reduction on the ground, of the size of one parcel and corresponding increment of the size of another by about 12 acres. This was therefore a land claim for a chunk of land which in my humble opinion was beyond the jurisdiction of the Land Registrar, as it was not merely, a boundary dispute but trespass, encroachment or invasion of land.”
70. On the strength of the above decisions and having found the dispute not to be merely a boundary dispute but trespass and a claim of Land the Court finds that it has jurisdiction to hear and determine this suit in answer to issue number 1 above.
71. In answer to issue number 2 as whether the acreage on title Nandi/kokwet 554 and Nandi/kokwet/22 are the same on the ground. The Court ordered a survey to be conducted and a report to be filed in Court upon the application by the Defendants. The survey was conducted by DW3 and a report dated August 11, 2022 was filed in Court. It was DW3 testimony that he conducted the survey and the Plaintiff confirmed that he was present during the survey. The findings of the report which the Plaintiff confirmed were that Nandi/kokwet/554 measured 8.1 Ha on the ground while the title indicated it to be 6.1 Ha; while Nandi Kokwet/22, measured 35.87 Ha while the title indicated it to be 38.04 Ha.



72. From the said report, there were fences that were intact and which demarcated the two properties. The conclusion is that there was a mistake of fact during the fencing process which resulted in Nandi/kokwet/554 encroaching into Nandi/kokwet/22 by 2.01 Ha. The acreage on the titles does not therefore correspond to the actual acreage on the ground to the disadvantages of the proprietor of Nandi/kokwet/554 the Defendants herein and the benefit of Plaintiff as proprietor of Nandi/kokwet/22.
73. Having answered issue number 2 in the affirmative, the question that follows is whether the Plaintiff has proved his case.
74. From the pleadings, the Plaintiff has sued the Defendants for trespass and encroachment of his parcel. From the evidence tendered, it is actually the Plaintiff who encroached the Defendants land by 2.01 Ha. It follows therefrom that the Plaintiff's claim was premised on the mistaken belief that the Defendants had trespassed onto his property. The Plaintiff has therefore not proved his case on the required standard of proof and his suit must fail.
75. On issue number 3 (i) the Defendant has on a balance of probabilities proved their claim for 2.01 Ha that wrongly form part of Nandi/kokwet/334. Being a claim for recovery of land, the same would be time barred after 12 years when the right accrued.
- The right herein firstly accrued to the Defendants upon confirmation of a Grant of Probate, which was confirmed on March 9, 2017 and the counterclaim filed on January 25, 2022 well within time.
76. The Defendant has therefore proved that the Plaintiff has trespassed and encroached on 2.0 Ha of their Nandi/kokwet/22 which have been under a mistake of fact from the previous owners being incorporated in Nandi/kokwet/554.
77. Having proved trespass, the Court finds that the Defendant is entitled to the reliefs sought.
78. The Plaintiff submits that there is no prayer for rectification of the Register hence the prayers of eviction and injunction cannot issue. Respectful, the Court disagrees as there is no need to rectify the Register as the Plaintiff is only entitled to the 6.1 Ha that should correspond to what is on the title and not anymore.

DISPOSITION: -

79. Accordingly the encroaching part of the fence measuring 2.01 Ha comprised in Nandi/kokwet/524, shall now be deemed to form part of Nandi/kokwet/22 as was originally intended.
80. The Plaintiff and/or his servants and or agents shall within 3 months from the date of this judgment move from the 2.01 Ha that has been decreed to be belonging to the Defendants, failure to which they shall be evicted from the area as better detailed in the survey report dated August 11, 2020.
81. The Plaintiff his agents and servants are equally restrained by an order of permanent injunction from trespassing into the 2.01 Ha decreed to the Defendants as forming part of Nandi/kokwet/22, better detailed in the survey report dated August 11, 2020.
82. On general damages, the Defendants are entitled to General Damages on trespass, and the Court awards kshs 200,000 as general damages on trespass noting that the Plaintiff was under a mistake of fact.
83. The counterclaim having been allowed the Defendant shall have costs of the counterclaim as well as the costs of the suit.

JUDGMENT ACCORDINGLY. DATED AT KAPSABET THIS 22ND SEPTEMBER, 2022.



HON. M. N. Mwanyale,

JUDGE

In the presence of;

Ms Kesei for the Defendant

Ms Chebitok holding brief for Mr. Omusundi for the Plaintiff.

