



**Kantai (Suing through Julious M.Ole Nalamae) & 2 others v Keriako & 11 others (Environment & Land Case 24 of 2021) [2022] KEELC 14782 (KLR) (14 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14782 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
ENVIRONMENT & LAND CASE 24 OF 2021  
EM WASHE, J  
NOVEMBER 14, 2022**

**BETWEEN**

**KIPAIPAI OLE KANTAI (SUING THROUGH JULIOUS M.OLE  
NALAMAE) ..... 1<sup>ST</sup> PLAINTIFF  
KIPAIPAI OLE KANTAI (SUING THROUGH JULIOUS M. OLE  
NALAMAE ..... 2<sup>ND</sup> PLAINTIFF  
KIPAIPAI OLE KANTAI (SUING THROUGH JULIOUS M.OLE  
NALAMAE ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**LEONARD TERERE KERIAKO ..... 1<sup>ST</sup> DEFENDANT  
LEONARD TERERE KERIAKO ..... 2<sup>ND</sup> DEFENDANT  
LEONARD TERERE KERIAKO ..... 3<sup>RD</sup> DEFENDANT  
PAUL KAMANTIRE KERIAKO ..... 4<sup>TH</sup> DEFENDANT  
PAUL KAMANTIRE KERIAKO ..... 5<sup>TH</sup> DEFENDANT  
PAUL KAMANTIRE KERIAKO ..... 6<sup>TH</sup> DEFENDANT  
OLORASHA NAIRENKEY KORTOM ..... 7<sup>TH</sup> DEFENDANT  
OLORASHA NAIRENKEY KORTOM ..... 8<sup>TH</sup> DEFENDANT  
OLORASHA NAIRENKEY KORTOM ..... 9<sup>TH</sup> DEFENDANT  
BERNARD KERIAKO ..... 10<sup>TH</sup> DEFENDANT  
BERNARD KERIAKO ..... 11<sup>TH</sup> DEFENDANT  
BERNARD KERIAKO ..... 12<sup>TH</sup> DEFENDANT**



## JUDGMENT

### ADDENDUM TO THE JUDGEMENT PRONOUNCED ON 14TH NOVEMBER 2022.

#### A. Introduction.

1. The Honourable Court in the determination of this suit pronounced its judgement on the 14<sup>th</sup> of November 2022.
2. However, during the trial and preparation of the judgement pronounced on the 14<sup>th</sup> of November 2022, the Honourable Court noted that there was a possible overlap between Enanyieny Section and Isampin Section.
3. The net effect of the possible overlap between EnanyienySection and Isampin Section is what had created a confusion of who should occupy the ground keeping in mind that the area which was within the overlap had been titles in both Enanyieny Section as well as Isampin Section.
4. Based on this possible overlap between Enanyieny Section and Isampin Section, this Honourable Court directed that Sub-County Land Registrar, Transmara West, East and South and the Sub-County Land Surveyor Transmara West, East and South to visit the ground and file a Ground Report to confirm if indeed the two Sections known as Enanyieny Section and Isampin Section had indeed overlapped.

#### B. Details Of The Group Report.

5. Based on the Judgement pronounced on the 14<sup>th</sup> of November 2022 and the directions therein, the Sub-County Land Registrar, Transmara West, East and South together with the Sub-County Land Surveyor, Transmara West, East and South, a Ground Report identified as LA/TM/VOL.IV/95/42 was filed before this Honourable Court on the 22<sup>nd</sup> of June 2023.
6. The findings contained in the Joint Report filed on the 22<sup>nd</sup> of June 2023 can be summarised as follows;-
  - i. Indeed, the two Sections were declared separately and distinctly.
  - ii. During the actual Demarcation of the two sections on the ground, the public did not agree with the boundary features that marked the boundary between the two sections.
  - iii. As a result of this boundary dispute, the elders altered the boundaries between the two s sections in line with the boundary features on the ground.
  - iv. However, the two Declarations were not amended and/or rectified by the Land & Settlement Officer to align with the resolutions of the elders.
  - v. Consequently therefore, one Section known as Enanyieny Section sub-divided the entire land on the basis on the Declaration notice while the other Section known as Isampin Section sub-divided the land on the basis of the altered boundary by the elders.
  - vi. The resultant effect was that some properties in Isampin Section overlapped onto Enanyieny Section if the Declared boundaries are to be followed.



- vii. In conclusion, the Joint Report filed on 22<sup>nd</sup> of June 2023 admitted that indeed some titles from Isampin Section had overlapped into Enanyieny Section based on the boundary features contained in the two Declarations.

#### C. Further Determination By The Honourable Court.

7. One of the main issues that was discussed in the judgement pronounced on the 14<sup>th</sup> of November 2022 was the legality of the elders' decision to alter the boundary features between Enanyieny Section and Isampin Section.
8. According to the determination of this Honourable Court pronounced on the 14<sup>th</sup> of November 2022, the elders did not have the mandate and/or legal capacity to alter the boundary features declared by the Land and Settlement Officer.
9. The only way such boundary features could be lawfully altered would have been either through a cancellation of the original Declaration by way of a Gazettement and then thereafter a fresh Declaration done in line with the resolutions by the elders or an Amendment to the Declarations of both the Enanyieny Section and Isampin Section.
10. In this particular dispute, the Declaration of Enanyieny Section done on 13.02.1975 and the one of Isampin Section done on the 31.05.1985 were not amended through a Gazette publication and therefore the boundary features outlined therein remain to be the lawful and recognised boundaries between the two Sections.
11. Having arrived at the above determination, this Honourable Court is of the view that the boundaries features of Enanyieny Section gazetted on the 13.02.1975 are the first ones to be demarcated and any subsequent Declaration should be exclusive and/or outside the boundary features declared on 13.02.1975.

#### **Conclusion.**

12. In conclusion therefore, this Honourable Court hereby makes the following final orders as appertains the Plaint dated 28 of July 2020;-
  - A. A Declaration be and is hereby made stating that the Defendants titles known as L.R.No. Transmara/Isampin/533, L.R.No. Transmara/Isampin/177, L.R.No. Transmara/Isampin/180 and L.R.No. Transmara/Isampin/181 are overlapping on the property known as L.R.No. Transmara/Enanyieny/948.
  - B. The Sub-County Land Registrar, Transmara East, West and South together with the Sub-County Land Surveyor Transmara East, West and South do hereby affix the legitimate boundary of the property known as L.R.No. Transmara/Enanyieny/948 using the boundary features declared on the 13.02.1975.
  - C. The acreage provided on the titles of the properties known as L.R.No. Transmara/Isampin/533, L.R.No. Transmara/Isampin/177, L.R.No. Transmara/Isampin/180 and L.R.No. Transmara/Isampin/181 if any be rectified and aligned with the actual acreage on the ground in line with the boundary features contained in the Declaration of Enanyieny Group Ranch issued on the 13.02.1975.
  - D. The Defendants who are the registered owners of the properties known as L.R.No. Transmara/Isampin/177, L.R.No. Transmara/Isampin/180, L.R.No. Transmara/Isampin/181 and L.R.No. Transmara/Isampin/533 be and are hereby directed to vacate



and/or hand over possession of any portion of land located within L.R.No. Transmara/Enanyieny/948 within 60 days from the date of this Judgement.

E. In the event of a failure to comply with Order D hereinabove, an order of eviction shall automatically issue against the Defendants.

F. The Defendants will bear the costs of this suit.

Dated, Signed & Delivered Virtually In Kilgoris Elc Court On 18<sup>th</sup> October 2023.

Emmanuel.m.washe

Judge

In The Presence Of:

Court Assistant: Mr.ngeno

Advocate For The Plaintiff: Mr.kamwaro

Advocate For The Respondent: Mr.o.m.otieno

## JUDGMENT

1. The Plaintiff herein filed a Plaint on the 28<sup>th</sup> of July 2020 against the Defendants seeking for the following Orders therein; -
  - i. That this Honourable Court be pleased to order an eviction of the Defendants from the premises known as L.R.No. Transmara/Enanyieny/948.
  - ii. A permanent injunction restraining the Defendants, their servants, licensees, agents or any other person(s) acting on their behalf from howsoever trespassing, occupying, or harassing or interfering with the ownership, quiet possession and occupation by the Plaintiff of all that parcel of land known as L.R.No. Transmara/Enanyieny/948.
  - iii. A Declaration that the Plaintiff is the rightful owner and entitled to exclusive, quiet and peaceful enjoyment of all that parcel of land known as L.R.No. Transmara/Enanyieny/948.
  - iv. The Trans-mara Sub-County Land Registrar with the assistance of the District Surveyor be directed to verify and caused to be determined and fixed the boundaries of L.R.No. Transmara/Enanyieny/948 and Transmara/Isampin/533, Transmara/Isampin/177, Transmara/Isampin/180 and Transmara/Isampin/181.
  - v. The Defendants herein be directed to abate their nuisance by removing any structures that they may have erected on the encroached portion of the suit property at their own costs.
  - vi. Special damages for trespass and destruction of vegetation.
  - vii. Costs of the suit and further or any other relief deemed just by this Court.
2. In addition to the Plaint herein, the Plaintiff also filed witness statements of Julious M.Ole Nalama dated 28<sup>th</sup> July 2020, David Taiswa Ngeeti dated 28<sup>th</sup> July 2020, Michael Ole Maki dated 28<sup>th</sup> July 2020 as well as a List of Documents dated 28<sup>th</sup> July 2022.
3. The Plaint was duly served upon the Defendants who instructed the firm of Messrs Mireri & Company, Advocates to act on their behalf.
4. The Defendants Counsel then filed a Statement of Defence dated 17<sup>th</sup> August 2020.



5. The Defendants Statement of Defence was also accompanied with a List of Witnesses dated 17<sup>th</sup> August 2020 which including the actual Witness statements therein and a bundle of Documents which was not dated but attached various supporting documents that the Defence intended to use at the trial.
6. On the 5<sup>th</sup> October 2020, the Plaintiff herein filed a Reply to the Statement of Defence dated 28<sup>th</sup> September 2020.
7. The matter was then listed for Pre-trial conference an upon all parties complying, the hearing was fixed for 22/09/2021.
8. In an effort to appreciate the dispute before the Court and the physical status of the various parcels of land mentioned in this suit, the Court directed the Sub-County Land Registrar, Transmara East , West and South together with the Sub-County Land Surveyor Transmara East, West and South to visit the ground and file a Ground Report on the property known as Transmara/Enaenyeny/948 (hereinafter referred to as “the suit property”) and the other property known as Transmara/Isampin/533,Transmara/Isampin/177,Transmara/Isampin/180 and Transmara/Isampin/181 belonging to the Defendants herein.
9. In compliance of the above directions, the Sub-County Land Registrar, Transmara East, West and South together with the Sub-County Land Surveyor, Transmara East, West and South filed two reports dated 22<sup>nd</sup> July 2021 and 12<sup>th</sup> July 2021.
10. The hearing of this Suit commenced on the 22/09/2021 with the evidence of one Julius M.Ole Nalamaeas Plaintiff’s 1<sup>st</sup> Witness.
11. The witness informed the Court that he was a Bishop and lived in a place known as Shankoe within Osupuko area.
12. The witness informed the Court that he was the biological child of the Plaintiff known as Kipaipai Ole Kantai who was now elderly and could not personally attend Court.
13. The witness presented a duly registered Power of Attorney dated 13/9/2017 from the Plaintiff Kipaipai Ole Kantai authorising him to act on his behalf. (Power of Attorney dated 13/9/2017 produced as Plaintiff’s Exhibit No. 1)
14. The witness began his testimony by stating that his father was a member No. 49 of Osupukiai Group Ranch.
15. By virtue of his membership in Osupukiai Group Ranch, the Plaintiff was allocated Plot No. 948 within the Asset owned by the Osupukiai Group Ranch as per the Area List submitted to the Government Land Officials for processing Titles of individual members. (Osupukiai Group Ranch Area List produced as Plaintiff’s Exhibit 2.)
16. Consequently thereafter, the Plaintiff herein was issued with a Title Deed relating to the suit measuring approximately 9.78 Hectares on the 01/08/2017. (Title Deed for the suit property produced as Plaintiff’s Exhibit 3.)
17. According to the witness, the Section known as Enaenyeny was big in size and therefore was sub-divided into Five (5) different Group Ranches for purposes of . (The Enainyeny Section Map with the five (5) different Group Ranches was produced as Plaintiff’s Exhibit 4.)
18. Osupukiai Group Ranch which the Plaintiff was a member in one of these Five (5) Group Ranches within Enaenyeny Section.



19. Osupukiai Group Ranch as one of the five (5) Group Ranches within Enaenyieny Section was given its own Title Deed known Transmara/Enaenyieny/1 on the 12/11/1976. (Copy of Title Deed of Transmara/Enaenyieny/1 dated 12/11/1976 is produced as Plaintiff's Exhibit 5.)
20. The witness also produced the Certificate of Incorporation of Osupukiai Group Ranch issued on the 21/03/2008. (Copy of the Certificate of Incorporation dated 21/03/2008 produced as Plaintiff's Exhibit 6.)
21. The Certificate of Incorporation of Osupukiai Group Ranch also contained names of the duly appointed representatives. (Certificate of Incorporation of the Group representatives dated 26/03/2008 produced as Plaintiff's Exhibit 7.)
22. The witness testified that although the Plaintiff was the registered and legal owner of the suit property, occupation on the ground has not been possible because the Defendants herein have encroached and/or taken over the area which was demarcated for the suit property.
23. The illegal occupation of the suit property by the Defendants who are the owners of various parcels of land from the neighbouring Section known as Isampin Section and in particular L.R. No. known as Transmara/Isampin/40, Transmara/Isampin/177, Transmara/Isampin/180 and Transmara/Isampin/ 181 prompted the Plaintiff to register a boundary dispute with The District Land Registrar, Transmara through a letter dated 03/09/2018. (Letter dated 03/09/2018 from the firm of Abwour & Company, Advocate to the District Land Registrar dated 03/09/2018) produced as Plaintiff's Exhibit 8.)
24. The witness further informed the Court that even before the Plaintiff registered the boundary dispute between the suit property and the properties owned by the Defendants from the neighbouring Isampin Section, he had placed cautions on their Green Cards just to ensure that the same did exchange ownership before the dispute is resolved. (Copies of the Green Cards with the caution relating to the properties known as Transmara/Isampin/40, Transmara/Isampin/177, Transmara/Isampin/180 and Transmara/Isampin/181 produced as Plaintiff Exhibit 9.)
25. The witness stated that Enaenyieny Section was declared an Section pursuant to a Declaration dated 13/02/1975 by the Land Officer, Narok County. (The Declaration Notice dated 13/02/1975 produced as Plaintiff's Exhibit 10.)
26. The witness indicated that the boundary separating the suit property which is Enaenyieny Section and the Defendants properties which are in Isampin Section were two beacons namely E.22 and E.23.
27. Unfortunately, the Defendants properties namely Transmara/Isampin/40 (thereafter sub-divided and registered as Transmara/Isampin/533), Transmara/Isampin/177, Transmara/Isampin/180 and Transmara/Isampin/181 had been demarcated land beyond the two beacons E.22 and E.23 thereby encroaching into the suit property herein.
28. The witness further acknowledged that the Court had directed both the Sub-County Land Registrar, Transmara West, East and South and the Sub-County Land Surveyor Transmara West, East and South to visit the ground and file an appropriate report on the location and physical occupation of both the suit property and the properties occupied by the Defendants.
29. The witness confirmed participating in the said ground visit by recording his statement and also identifying the boundary as provided by the Declaration Notice of 13<sup>th</sup> February 1975.
30. In the witness's opinion, the land demarcated for the suit property had been encroached by the construction of Five (5) semi-permanent houses by the Defendants.



31. In conclusion therefore, the witness requested the Court to grant the prayers sought in the Plaint.
32. Upon completion of his evidence in chief, the witness was then cross examined by the Defence Counsel.
33. On cross-examination, the witness informed the Court that his name was Julius. Ole Nalamae.
34. The use of the name Ole Nalamae according to Maasai culture means he was the son of Nalamae.
35. The Plaintiff on the other hand was Ole Kantai.
36. According to the witness, both Ole Nalamae and Ole Kantai was one and the same person.
37. Nevertheless, the witness admitted that there was no Statutory Declaration and/or Affidavit to that effect.
38. Similarly, there was no Identification Card Number of the Donee and the Donor attached to the Power of Attorney produced as Plaintiff's exhibit 1.
39. The witness reiterated that the Defendants had encroached the entire suit property and consequently therefore, the Plaintiff was not on the ground and/or occupation.
40. The witness indicated that the Plaintiff was allocated the suit property way back in the year 1985.
41. The witness admitted that he was not sure when the Defendants entered and/or started encroaching the suit property but approximated the same to have happened about 10 years ago.
42. Nevertheless, to the witness's recollection, Enaenyeny Section was declared in the year 1975 while Isampin Section was declared in the year 1985.
43. The boundary dispute between the Enaenyeny Adjudication Section and Isampin Adjudication Section according to the witness has been a long-standing dispute which elders have tried to mediate.
44. Nevertheless, the witness informed the Court that he was not aware of any meeting done in the year 1985 or privy to any resolutions passed therein.
45. The witness informed the Court that during the visit by the Sub-County Land Registrar, Transmara East, West and South together with the Sub-county Land Surveyor Transmara East, West and South, there were discussions about the elders meeting of 1985.
46. The Ground Report filed by the Sub-County Land Registrar, Transmara East, West and South together with the Sub-County Land Surveyor Transmara East, West and South filed in Court on the 27/07/2021 mentioned the elders meeting of 1985.
47. The witness stated that according to the Ground Report dated 27/07/2021, the boundary separating Enaenyeny Section and Isampin Section was demarcated with trees.
48. However, the boundary demarcated by trees did not conform with the boundary prescribed in the Declaration Notice of Enaenyeny Section for the year 1975.
49. The witness disputed the allegation that the trees demarcating the boundary of Enaenyeny Section and Isampin Section were actually old trees because according to his opinion, the trees were only about Ten (10) years old.
50. The witness indicated that the Defendants have been hostile to the Plaintiff despite numerous meetings in an effort to mediate the dispute.



51. In Re-examination, the witness reiterated that the names Ole Nalamae and Ole Kantai referred to one and the same person.
52. Consequently therefore, the Power of Attorney produced as Plaintiff's Exhibit 1 was from the father.
53. The witness further testified that there has never been an amendment to the Declaration Notice of Enanyieny Section done in the year 1975.
54. The witness confirmed that he did not attend the 1985 meeting and was not privy to the resolutions thereof.
55. Lastly, the witness indicated that as a layman, he did not know the difference between a fixed boundary and/or a general boundary.
56. In re-examination, the witness stated that the name Ole Natamae and Ole Kantai belong to one and the same person.
57. The witness stated that an affidavit to that effect that been prepared and filed in Court.
58. The witness further reiterated that the Power of Attorney was donated by his father Ole Kantai.
59. According to the witness, the father who is the registered owner of the suit property had taken possession but currently, the Defendants are the ones in occupation.
60. The witness indicated that he was not aware of any amendments to the Declaration of 1975 and was not in the peace meeting of 1985.
61. In conclusion, the witness testified that he does not know the difference between fixed and general boundaries.
62. The Plaintiff then called the 1<sup>st</sup> Expert Witness who was Henry Otieno Owuor.
63. The 1<sup>st</sup> Expert Witness was the Sub-County Land Surveyor in charge of Transmara East, West and South.
64. The 1<sup>st</sup> Expert witness confirmed visiting the disputed area in the presence of the Plaintiff and the Defendants.
65. Both the Plaintiff and the Defendants herein presented witnesses who included the chiefs of Shangoi Location and Isampin Location.
66. The aggrieved parties were then given an opportunity to identify the boundaries of their individual parcels of land.
67. The 1<sup>st</sup> Expert witness thereafter did the picking of the different portion occupied by the parties and did a sketch plan of their occupation.
68. During this exercise, the elders from both Sections testified as to the boundaries of Enanyieny Section and Isampin Group Ranch.
69. During this ground visit, the 1<sup>st</sup> Expert witness was informed by the elders that the boundary between Enanyieny Section and Isampin Group Ranch has always caused conflicts between these two Sections since 1985.
70. Consequently therefore, the elders informed the 1<sup>st</sup> Expert Witness that during a peace meeting in the year 1985, a new boundary was defined and adopted by the parties in an effort to find a lasting peace between the two Sections.



71. The 1<sup>st</sup> Expert witness thereafter proceeded to present his Ground Report dated 27<sup>th</sup> July 2021 which outlined the following findings; -
- a. There a visible boundary separating Enanyieny Section and Isampin Section placed by the elders in the year 1985.
  - b. The boundary placed by the elders in 1985 did not conform with the Declaration boundaries given in 1975 relating to Enanyieny Section.
  - c. The Defendants in this suit occupied the area demarcated for suit property entirely.
  - d. The Records show that the map to be used is to scale of 1: 50,000 contained in Map Sheet 130/3, 130/4,144/2.
  - e. Using this map, the boundary between Enanyieny Section and Isampin Section can be identified.
  - f. The beacons of interest separating Enanyieny Section and Isampin Section was beacon E22 and E23.
  - g. Although the Demarcation is a general one, the beacons of interests usually gives guidance in establishing the boundary.
  - h. Similarly, in this present case, beacons E22 and E 23 mark the end of Enanyieny Section and Isampin Section as provided in their respective Declarations.
    - i. According to the ground identification by the parties, the Defendants who were in Isampin SECTION have passed the boundary as marked by beacons E22 and E 23 into Enanyieny Section.
  - j. However, if you use the new boundary placed by the Elders in the year 1985, then the Defendants are within Isampin Section.
  - k. All the parcels of land in dispute that been titled using the two sections.
72. Once the Group Report dated 12<sup>th</sup> July 2021 was presented to the Court, Counsel for both parties were not satisfied with the Contents of the said Ground Report as it had not captured the physical location of all the suit properties on the ground.
73. The 1<sup>st</sup> Expert witness was therefore stood down and directed to prepare a ground report clearly showing the physical location of the suit properties as they appear on the ground.
74. On the 21/03/2022, the 1<sup>st</sup> Expert witness confirmed filing of the additional report dated 16/03/2022 which had been compiled together with the Sub-County Land Registrar, Transmara East, West and South which was acknowledged by Counsel for all the parties in this suit.
75. On the 16/05/2022, the Court proceeded with the case by calling the 2<sup>nd</sup> Expert witness known as Stephen Waithaka Githinji.
76. The 2<sup>nd</sup> Expert witness was the Sub-County Land Registrar of Transmara East, West and South.
77. The 2<sup>nd</sup> Expert witness informed the Court that some of his duties included issuance of Title Deeds in accordance to the law.
78. The 2<sup>nd</sup> Expert witness confirmed that Transmara/Enanyieny/948 indeed had a Title Deed and the necessary Green Card.



79. The 2<sup>nd</sup> Expert witness admitted that the property Transmara/Enanyieny/948 was created out of a sub-division of Transmara/Enanyieny/1 owned by Osupukiai Group Ranch.
80. According to the 2<sup>nd</sup> Expert witness, the demarcated area of Transmara/Enanyieny/1 was described by the Land Officer who published the Section Declaration.
81. Once an area is declared an Section, the members of the Group Ranch prepare an Area List and a Member's register.
82. The Area List is usually prepared by the Government District Surveyor or a private licensed Surveyor and the Group Ranch Demarcation Committee.
83. The Group Ranch Demarcation Committee ideally are the owners of the Area List.
84. In essence therefore, the 2<sup>nd</sup> Expert witness confirmed that the suit property was created on the basis of the Area List supplied by the Private licensed Surveyor and the Group Ranch Demarcation Committee which was produced as Plaintiff's Exhibit No. 2.
85. The Area List captured the Plaintiff as the beneficiary of 9.79 Hectares which was allocated as Parcel No. 948.
86. This information contained in the Area list is what is also captured in the Title Deed.
87. Consequently therefore, the 2<sup>nd</sup> Expert witness confirmed that the current title deed held by the Plaintiff was issued on the basis of the information presented on the Area List forwarded by the Private Licensed Surveyor and the Group Ranch Demarcation Committee.
88. After filing of this suit, the 2<sup>nd</sup> Expert witness in compliance with the directions of this Court visited the ground and filed their first report dated 9<sup>th</sup> March 2022.
89. According to the 2<sup>nd</sup> Expert witness, the boundary between Enanyieny Section and Isampin Section seems to be a River known as Inkieiani whose origin or source is disputed.
90. Unfortunately, there was no beacon on the ground to identify which is the correct origin or source of the said River Inkieiani.
91. Consequently therefore, if the Court is to use the source and/or origin relied by the Plaintiff, then a lot of allocations within Isampin Section will be affected.
92. However, the 2<sup>nd</sup> Expert witness did not provide the list or total number of allocations within Isampin Section would be affected by applying the Plaintiff's origin or source of RIVER Inkieiani.
93. On the other hand, if the 2<sup>nd</sup> Expert witness used the source and/or origin relied by the Defendant, then a number of allocations in Enanyieny Section would similarly be affected including the suit property.
94. The suit property was lawfully provided for in the Private Licensed Surveyor's map tasked by Osupukiai Group Ranch to draw the sub-division of Transmara/Enanyieny/1.
95. According to the evidence of the 2<sup>nd</sup> Expert witness, the Plaintiff is identifying the suit property using a point in River Inkieiani which has not been properly marked and another point on the hill which is also not marked.
96. The 2<sup>nd</sup> Expert witness's opinion is that the Demarcation points provided by the Declaration Notice of 1975 should have been marked by the Government.



97. The 2<sup>nd</sup> Expert witness further testified that during Demarcation of an Section, each beneficiary is shown the boundary of their parcels by the officer, the Licensed Surveyor and the and/or Demarcation Committee of the Section.
98. According to the office of the Land Registrar, Transmara, the suit property was a sub-division of Transmara/Enanyieny/1 and not an process under Cap 284.
99. The boundaries of the suit property was therefore defined in the Mutation of the property known as Transmara/Enanyieny/1 which is contained in the Surveyor's Report second Report dated 16<sup>th</sup> March 2022.
100. In reference to the Surveyor's Report dated 16<sup>th</sup> March 2022, the 2<sup>nd</sup> Expert witness confirmed that the property Transmara/Enanyieny/1 produced sub-divisions No. 716-950.
101. In essence therefore, the suit property is within the sub-divisions created in the Mutation of Transmara/Enanyieny/1.
102. However, the 2<sup>nd</sup> Expert witness informed the Court that in the year 2009, there was a site visit to verify how the sub-divisions of Transmara/Enanyieny/1 were physically occupying the ground.
103. During this ground visit of 2009, the suit was identified by the EnanyienyDemarcation Section Committeeand it was in line with the map provided by the Licensed Surveyor's report.
104. According to the Enanyieny Demarcation Section Committee, the suit property should be abating the property known as Transmara/Enanyieny/944.
105. The sequence of the sub-divisions on the Surveyor's map should be Enanyieny/944,945,946 and 947.
106. The property known as Enanyieny/944 should extend beyond the road on the map.
107. In other words, the suit property should be across the road.
108. However, the 2<sup>nd</sup> Expert witness informed the Court that if the Map done by the Licensed Surveyor and the Group Ranch Demarcation Committee would be applied, the suit property does not exist on the ground.
109. The Map presented before the Court by the 1<sup>st</sup> Expert witness was what is within the National Government's Survey Office and form part of Government Records.
110. The Map produced in Court contain the Registered Index Maps of the sub-divisions done after the year 2017.
111. According to the Registered Index Map for the sub-division of the property known as Transmara/Enanyieny/1, the Plaintiff's property known as Transmara/Enanyieny/948 is provided for.
112. However, on the ground, the suit property can not be identified on the ground.
113. According to the 2<sup>nd</sup> Expert witness, the possible location where the suit property can be placed has other titles belonging to the Defendants herein.
114. The Ground Report dated 9<sup>th</sup> March 2022 filed by the 2<sup>nd</sup> Expert witness identifies Transmara/Isampin/533,177,180 and 181 belonging to the Defendants herein as those properties that are within the demarcated land of the suit property.
115. All the Defendants properties are deemed to be in Isampin Section.



116. During the Ground visit, the Expert witnesses also got information from members of Osupukiai Group Ranch which deals with Enanyieny Section.
117. The Expert witnesses also referred to the two Declarations of Enanyieny Section and Isampin Section which provided the boundaries of the two Sections.
118. According to the Declarations, the Enanyieny Declaration was done first before the Isampin Declaration.
119. In practical sense, the Isampin Declaration should have followed the boundaries provided in the Enanyieny Declaration to avoid any overlap into each other.
120. In reference to the Plaintiff's Exhibit No. 4, the 2<sup>nd</sup> Expert witness identified the map produced as the Registered Index Map of the different Group Ranches that constitute the Enanyieny AREA.
121. According to the 2<sup>nd</sup> Expert witness, the Beacons marked as E22 and E23 were simply boundary marks and not beacons as referred by the Plaintiff.
122. Usually, these boundary marks are placed by the Department.
123. In the 2<sup>nd</sup> Expert witness's opinion, even if the Court used the boundary marks, the identification of the boundary between the two sections can not be ascertained as the marks do not have co-ordinates to be deemed beacons.
124. In essence therefore, the boundary marks only work if they are still on the ground and/or have not been tempered with.
125. In reference to the Land Registrar's Ground Report dated 9<sup>th</sup> March 2022, the 2<sup>nd</sup> Expert Witness testified that it was difficult to identify the boundary of the suit property.
126. According to the testimonies of 8 members out of the 10 members of Enanyieny Demarcation Committee, they do not recognise suit property as drawn on the Registered Index Map while 2 members recognise and accept the suit property as drawn in the Registered Index Map.
127. Nevertheless, the general boundary acceptable to both Enanyieny Committee and Isampin Committee is the one that runs along the properties known as Transmara/Enanyieny/944,945,946 and 947 which does not include 948.
128. However, this general boundary used by the two Committees does not conform with the boundaries provided by the Declarations of the two Sections.
129. During the ground visit, the Expert witnesses did not have the benefit of contacting the private Licensed Surveyor who prepared the Registered Index Map of the property Transmara/Enanyieny/1.
130. In reference to the Ground Visit Report dated 12/07/2021, the 2<sup>nd</sup> Expert witness confirmed that an observation had been made to the effect that some parcels within Isampin Section had encroached into Enanyieny Section.
131. However, land owners from Enanyieny Section and Isampin Section claim that the other has encroached on their areas.
132. Similarly, in the Ground Visit Report dated 12/07/2021, the 2<sup>nd</sup> Expert witness observed that the boundary agreed upon by the elders of the two Sections were marked with over grown blue gum trees.
133. However, this tree boundary was not in line with the boundaries provided for in the Declarations for the two sections.



134. According to the 2<sup>nd</sup> Expert witness, the Land Officer of Enanyieny or Isampin Sections has not made any amendments to the Declarations so that they conform with the tree boundary placed by the elders from the two sections.
135. The 2<sup>nd</sup> Expert Witness reiterated that the land demarcated for the suit property is currently being occupied by the Defendants in this suit.
136. In conclusion of his evidence in chief, the 2<sup>nd</sup> Expert Witness reiterated that both the Ground Report of 12/07/2021 and 16/03/2022 were relevant in this suit although the minutes of the elders meeting held in the year 1985 were not availed.
137. In cross-examination, the 2<sup>nd</sup> Expert witness indicated that the Registered Index Map of the property known as Transmara/Enanyieny/1 was prepared by a private licensed surveyor by the name of B.M.Okumu.
138. The 2<sup>nd</sup> Expert witness stated that the suit property did not have any demarcated land on the ground.
139. The 2<sup>nd</sup> Expert witness reiterated that the boundary which existed on the ground was the one demarcated by the grown trees which were placed by the elders of both Enanyieny and Isampin sections.
140. Lastly, the 2<sup>nd</sup> Expert witness informed the Court that the sizes of the parcels emanating from Isampin Section were not equivalent with those of Enanyieny Section.
141. There was no Re-examination of the 2<sup>nd</sup> Expert witness and he was accordingly discharged from the witness box.
142. The next witness was another Expert Witness by the name of Morris Robert Otieno.
143. The 3<sup>rd</sup> Expert witness was the Land officer, Transmara East, West and South.
144. The 3<sup>rd</sup> Expert witness confirmed filing a report dated 16/03/2022 pursuant to an Order of the Court.
145. The Report dated 16/03/2022 dealt with two sections namely Enanyieny Section and Isampin Section.
146. According to the records from the Land Section, Enanyieny Section was declared a Section on the 13/02/1975.
147. During the of the Enanyieny Section, the area was sub-divided into Five (5) portions which were registered in various individual Group Ranches which had been registered.
148. Osupukiai Group Ranch was one of the Five (5) Group Ranches and it was allocated the property known as Transmara/Enanyieny/1.
149. The size of the Five (5) different portions were captured in the Photographic Index Diagrams also known as Aerial Topographs.
150. The Photographic Index Diagrams are usually produced by the Department of Survey and contain the total acreage which should be shared within the beneficiaries of the Group Ranches.
151. The 3<sup>rd</sup> Expert witness confirmed that Osupukiai Group Ranch was given the property known as Transmara/Enanyieny/1 with the approximate acreage indicated on the Title issued.
152. On the other hand, Isampin Section was simply an Section undertaken by the Government and did not belong to any Group Ranch.



153. The total area for under the Isampin Section was also contained in the Photographic Index Diagram which contained the necessary boundaries.
154. The 3<sup>rd</sup> Expert witness stated that once a Group Ranch was incorporated, it manages its own actions and once sub-division is concluded, a resolution for dissolution is passed and the Group Ranch assets transferred to the individual beneficiaries.
155. Under the Land (Group Representatives) Act, Cap 287, the supervisory powers over Group Ranches rests with the office of the Land Officer.
156. Usually, the Resolution to dissolve a Group Ranch is usually passed by 60 % of the registered members and 60 % of the members present in that meeting.
157. The members who attend the meeting are usually ticked against the members register of the Group Ranch.
158. The beneficiaries in the Group Ranch are usually duly registered members of the Group Ranch found in the Register.
159. To facilitate the sub-division of the Group Ranch asset, the members usually appoint a private licensed Surveyor who then prepares the mutations and gives registerable numbers of the sub-divisions.
160. The private Licensed Surveyor is usually guided with the Demarcation Committee and supervised by the Land Officer.
161. During the creation of the individual mutations emanating from the sub-division, the beneficiaries are usually shown their boundaries by the Licensed Surveyor and the Demarcation Committee.
162. Once the entire Section has been demarcated, the private licensed Surveyor then prepares the Area List which is then forwarded to the relevant Land Registrar who will close the Original Green Card under sub-division and create new Green Cards for the resultant sub-divisions.
163. This entire exercise is usually undertaken under the supervision of the Land Officer who is required to endorse the Area List as being in order.
164. The 3<sup>rd</sup> Expert witness informed the Court that Transmara/Enanyieny/1 had an approximate area of 832 Hectares.
165. The sub-division of Transmara/Enanyieny/1 produced Parcels No. 716 to 950.
166. In essence therefore, the suit property is within the sub-divisions which ended with Parcel 950.
167. Referring to the Area List produced by Osupukiai Group Ranch, the 3<sup>rd</sup> Expert witness could not verify the authenticity as the same did not bear a stamp from the Land Officer.
168. According to the 3<sup>rd</sup> Expert Witness, every Group Ranch is supposed to prepare its Area List and submit the same to the Land Officer who will verify the following information to be correct; -
  - i. The number of the Group Ranch Asset that is being sub-divided.
  - ii. The List of the beneficiaries to the sub-division of the Group Ranch Asset.
  - iii. The membership numbers of the proposed beneficiaries of the Group Ranch Asset.
  - iv. The acreage allocated to each beneficiary in the sub-division of the Group Ranch Asset.



169. Once the Land Officer is satisfied with the correctness of the above information, the entire Area List is then forwarded to the Land Registrar for issuance of the appropriate titles.
170. Unfortunately, the 3<sup>rd</sup> Expert witness informed the Court that he is a stranger to the entire Area List presented in Court by Osupukiai Group Ranch as the same did not emanate from Land Office in Transmara and therefore, the contents of the Area List were unknown to him.
171. The 3<sup>rd</sup> Expert witness further stated that he was not familiar with the Chairman of Osupukiai Group Ranch at the time the Demarcation and dissolution of Transmara/Enanyieny/1 was being undertaken unless he referred back to previous records in their office.
172. The 3<sup>rd</sup> Expert witness's testimony was that there was no communication from the Demarcation Committee of Osupukiai Group Ranch on the issue of the Area List and the issuance of the individual titles to the beneficiaries were done by the Land Registrar directly.
173. In other words, the Land Office in Transmara has no record of the Demarcation, mutation or Area List appertaining to Osupukiai Group Ranch.
174. The 3<sup>rd</sup> Expert witness reiterated that every Declaration of an Section is done through a Gazette Notice which contains the geographical external boundaries of the entire area.
175. In reference to Point No. 1 of the Report dated 16/03/2022, the 3<sup>rd</sup> Expert witness was referring to a dispute which was reported sometime back between the parents of the litigants.
176. During this dispute, the local elders of both Enanyieny Section and Isampin Section discussed the dispute and resolved the same by planting trees on the boundaries of these properties in dispute.
177. However, the boundary placed by the elders from Enanyieny Section and Isampin Section was not to alter the sectional boundary contained in the Declarations.
178. During the ground visit, the 3<sup>rd</sup> Expert witness reiterated that the suit property is indeed provided for in the Area List of Osupukiai Group Ranch but there is no physical piece of land on the ground for occupation.
179. The 3<sup>rd</sup> Expert witness confirmed that during the creation of the Five (5) portions within Enanyieny area, there were disputes between different portions.
180. Referring to the tree boundary established by the elders of both Enanyieny Section and Isampin Section, the 3<sup>rd</sup> Expert witness view was that such alteration should have been contained in an Amendment to both the Declarations of Enanyieny Section and ISMAPIN Section to give it a legal effect.
181. This would also require an amendment of the Photographic Index Diagram of both Sections and subsequently, the acreage in the title of Transmara/Enanyieny/1 and Isampin Section.
182. Referring to Point A, the 3<sup>rd</sup> Expert witness indicated that he had not come across any minutes and resolutions relating to the elders meeting held in the year 1985.
183. Consequently, in the absence of the relevant amendments to the Declarations of 1975 and 1985 relating to Enanyieny Section and Isampin Section respectively, then the original boundaries are still valid and unchallenged.
184. The 3<sup>rd</sup> Expert witness informed that the Court that he was able to interview a number of the elders who attended the elders meeting of 1985 but did not provide their names in his report dated 16/03/2022.



185. The 3<sup>rd</sup> Expert witness opinion that Osupukiai Demarcation Committee did not follow the boundaries given in the Declaration of Isampin Section.
186. Looking at the titles issued to the Defendants, the same were issued under Isampin Section.
187. Similarly, during the visit, the 3<sup>rd</sup> Expert witness's opinion was that the Defendants were using land which is within Enanyieny Section if the Declaration of 1975 is applied.
188. In concluding his evidence in chief, the 3<sup>rd</sup> Expert witness stated that there was no physical feature on the ground that is in line with the Declaration boundary contained in the Declaration of 1975.
189. In cross examination, the 3<sup>rd</sup> Expert witness informed the Court that the Plaintiff was able to identify the boundaries of the suit property as pointed out to him by the Demarcation Committee.
190. During this exercise, the Plaintiff identified a number of trees on one side but the other points did not have any markings and also did not state when he was shown the said boundaries.
191. Despite being shown the boundaries, the Plaintiff also did not take possession of the land.
192. According to the 3<sup>rd</sup> Expert witness, the exercise of sub-dividing the Group Ranch Asset began in the year 2009.
193. During the exercise of sub-division, beacons or natural markings are required to be placed on the ground.
194. However, the Plaintiff in this matter did not show all the necessary markings to demarcate the boundaries of the  
Suit property.
195. The 3<sup>rd</sup> Expert witness informed the Court that titles from Isampin Section were first issued in the year 2010 while those of Enanyieny Section was first issued in 2017 including the Plaintiff's title to the suit property.
196. The witness testified that in Sections, it's the occupant that identifies the portion which he or she occupies.
197. During the meeting of 26/01/2021, members of the Demarcation Committee of Enanyieny Section were present and Committee members of Isampin were also present.
198. According to the testimony of the Chair and Secretary of the Demarcation Committee from Enanyieny Section, the suit property was located beyond the boundary placed by the Elders in the year 1985.
199. This meant that suit property was within the area titled to the Defendants within Isampin Section.
200. However, according 3<sup>rd</sup> Expert Witness, other members of the Demarcation Committee of Enanyieny Section were of the view that the suit property was placed somewhere else and not where it was identified by the Chair and the Secretary.
201. The 3<sup>rd</sup> Expert Witness stated that due to this confusion on the boundaries between the two sections, there is a possibility that some members of the public could be holding titles which are outside their 's sections.
202. The Committee handling Isampin Section admitted that they did not follow the boundaries provided in the Declarations but instead used the ones placed by the elders as this would affect the general occupation on the ground.



203. Nevertheless, the 3<sup>rd</sup> Expert Witness concluded his evidence by stating that the tree boundary placed by the elders is being respected and has not been interfered by their the Enanyieny or Isampin residents.
204. The witness was thereafter discharged from the witness stand.
205. The next witness on the stand was Henry Otieno Owuorwho had already stated testifying as 1<sup>st</sup> Expert witness and was stood down on the 04/10/2021.
206. The witness reiterated that some of his functions is to assist the Land Registrar in solving boundary disputes, check and approve mutations provided by private licensed Surveyors and the implementation on the ground.
207. The witness further stated that he conducted a Ground Visit of the disputed properties known as Transmara/Enanyieny/948 belonging to the Plaintiff and Transmara/Isampin/533,180, 181 and 177 on the 12/07/2021 and filed a Report dated 12/07/2021.
208. Thereafter, the witness did a second Ground visit on the 26/01/2022 and filed another report dated 16/03/2022.
209. Both Ground Reports were confirmed to be in the Court's record.
210. According to the Ground Report dated 12/07/2021, the 1<sup>st</sup> Expert Witness testimony was that on the ground, there is a boundary Demarcation separating the Enanyieny Section and Isampin Section which was placed by the Elders in the year 1985.
211. Nevertheless, this boundary placed on the ground does not conform with prescribed boundaries provided for in the two Declaration issued in 1975 and 1985 relating to Enanyieny Section and Isampin Section respectively.
212. The 1<sup>st</sup> Expert Witness's position was that in any Declaration of an Section, the geographical boundary of such an Section are usually provided in Gazettement of the Declaration.
213. Consequently therefore, the 1<sup>st</sup> Expert Witness was of the opinion that if the Declarations of Enanyieny Section and Isampin Section issued in the year 1975 and 1985 respectively were not amended, then the geographical boundaries contained there are still valid, binding and operational up to date.
214. Referring to the Ground Report of 12/07/2021, the boundary marks identified as E 22 and E 23 were presumed to mark the end of Enanyieny Section and Isampin Section.
215. According to the 1<sup>st</sup> Expert Witness, these boundary markings known as E22 and E 23 were placed by the Land Officers back then.
216. The 1<sup>st</sup> Expert Witness informed the Court that if you use the geographical boundaries provided in the Declaration of Enanyieny Section dated 1975 and the boundary marks E22 and E22, then the properties known as Transmara/Isampin/533, 177, 180 and 181 belonging to the Defendants will have encroached partly on the suit property.
217. The 1<sup>st</sup> Expert Witness was however not able to give accurate information as to how many acres of the suit property had been occupied by the Defendant's properties.
218. The witness confirmed that all the disputed properties can be traced on the ground using the maps and mutations currently found at the Land Survey offices.
219. In the Land Survey maps, the suit property measures approximately 9.25 Hectares.



220. The 1<sup>st</sup> Expert Witness informed the Court that Sheet 4 in the Report dated 12/07/2021 contains the entire sub-division of Enanyieny Section.
221. Sheet 4 confirms that suit property is within the sub-division and can be picked by the Surveyor.
222. The 1<sup>st</sup> Expert Witness however noted that the outer boundary of the suit property was not in conformity with the Enanyieny Section but the boundary established by the elders of both Isupukiai Group Ranch and Isampin Section.
223. In other words, if the Court applies the boundary placed by the elders in the year 1985, then the entire 9.25 Hectares comprising of the suit property be established on the ground.
224. The 1<sup>st</sup> Expert Witness testified that during a sub-division, the Mutation or the Registered Index Map must be approved by the Department of Survey.
225. According to the Mutation form of the property known as Transmara/Enanyieny/1 which was approved by the Department of Survey, the resultant parcels were 716-950.
226. In essence therefore, Parcel No. 948 is legal and within the sub-divisions created from the property known as Transmara/Enanyieny/1.
227. During any sub-division, the 1<sup>st</sup> Expert Witness confirmed that all beneficiaries are usually shown their physical boundaries as defined in the maps.
228. Unfortunately, in this particular case, the 1<sup>st</sup> Expert Witness stated that he did not call the Surveyor who did the sub-division to point out the boundaries of the suit property on the ground.
229. Nevertheless, the witness confirmed that the Plaintiff in this suit had a legitimate expectation that the suit property existed within the sub-divisions created from the property known as Transmara/Enanyieny/1.
230. As a result of the Ground Visit and picking of the various parcels contained in this suit, the following results were obtained; -  
Transmara/Isampin/177- Acreage On Title- 5.5 HA-Acreage On Ground- 7 HA.  
Transmara/Isampin/533-Acreage On Title4.66-Acreage On Ground-3.07HA.
231. The 1<sup>st</sup> Expert Witness confirmed that Point 1 and Point 2 of the reports dated 16/03/2022 and 12/07/2021 were similar.
232. However, Point 3 in the first report dated 12/07/2021 was not captured in the second report of 16/03/2022.
233. Consequently therefore, the report dated 16/03/2022 was at variance with the Report dated 12/07/2021.
234. This variation was because when the 1<sup>st</sup> Expert Witness visited the Ground for the second time, he noticed that the Committee of Isampin Section was using the boundary placed by the elders in 1985 and not the geographical features provided in the Declaration.
235. This was the main reason the second ground visit resulted to different observations although the 1<sup>st</sup> Expert Witness did not include this explanation in the second report dated 16/.3/2022.
236. Similarly, the 1<sup>st</sup> Expert Witness also admitted omitting the comment that there was an encroachment on the suit property by the Defendants.



237. On cross-examination, the 1<sup>st</sup> Expert Witness stated that the second ground visit was necessitated by the fact that some issues had not been tackled in the first ground visit.
238. However, for purposes of this suit, the Court should rely on the second Report dated 16/03/2022.
239. The 1<sup>st</sup> Expert Witness reiterated that the boundary placed by the elders in the year 1985 did not conform with the Declaration of 1975 relating to Enanyieny Section.
240. On the ground, there are no physical features demarcating the boundaries contained in the Declaration of 1975.
241. According to the 1<sup>st</sup> Expert Witness, the only physical features found on the ground are those placed by the elders in the year 1985.
242. Incidentally, the physical boundary placed by the elders in the year 1985 is being observed by the locals up to date.
243. However, there has been no action by the offices of the Land Officer and/or the Department of Survey to amend the two Declarations to align with the ground boundaries although it is possible to do so.
244. The 1<sup>st</sup> Expert Witness testified that if the Court applied the boundary placed by the elders in 1985, then the suit property does not have any corresponding land within Enanyieny Adjudication Section.
245. As to the properties within Isampin Section, the ground status was as follows; -  
Isampin/533-Acreage On Ground-3.07 HA-Acreage On Title-4.66 HA.  
Isampin/180-Acreage On Ground-6.21 HA-Acreage On Title-8.5 HA  
Isampin/181-Acreage On Ground-6.27 HA- Acreage On Title-8.10 HA.
246. The 1<sup>st</sup> Expert Witness further stated that during the ground visits, there was variance among the officials of Osupukiai Group Ranch on the physical location of the suit property.
247. According to the majority of Osupukiai Group Ranch Demarcation Committee members, the suit property was between the road and the river.
248. Then the boundary between Transmara/Enanyieny/944 and Transmara/Enanyieny/948 was the road.
249. The portion that was identified as the suit property by the elders is not occupied by the Defendants herein.
250. The 1<sup>st</sup> Expert Witness testified that on the ground, the occupation was not based on the Declarations but the boundaries fixed by the elders in 1985.
251. According to the ground visit, the suit property has some Demarcation features on the upper part which also touch on the properties Enanyieny/944,945,946 & 947.
252. However, on the lower boundary of the suit property, the boundary shown was only placed by the officials of Osupukiai Group Ranch and not elders from the two sections.
253. Consequently, if the boundaries provided in the Declarations are applied strictly, then a lot of people will be affected.
254. The 1<sup>st</sup> Expert Witness informed the Court that Isampin Section was adjudicated first before the Demarcation and sub-division of Enanyieny Section.



255. The recommendation suggested by the 1<sup>st</sup> Expert Witness was that the Land Registrar needs to take steps and resolve the dispute.
256. In concluding his evidence, the 1<sup>st</sup> Expert Witness lamented to the Court that the use of general boundaries in Demarcation of parcels of land usually causes conflicts amongst the occupants.
257. The above 1<sup>st</sup> Expert Witness was the last witness called and the Court directed that parties do file their submissions.
258. The Plaintiff filed his submissions on the 15<sup>th</sup> September 2022 and the Defendants filed their on the 21<sup>st</sup> September 2022.

### **Analysis & Determination**

259. Looking at the pleadings filed herein, the oral evidence adduced, the documentary evidence produced and the submissions filed by the parties herein, the Court has identified the following issues which need to be discussed and the appropriate findings arrived. Issue no. 1- where was the plaintiff's property known as Transmara/Enanyieny/948 created from? Issue no. 2- was there a conflict or overlap of the boundaries provided in the Declaration OF Enanyieny Section & Isampin Section issued in the year 1975 & 1985 respectively? Issue no. 3- was the boundary established by the elders in 1985 demarcating Enanyieny Section and Isampin Section lawful? Issue no. 4- is the plaintiff entitled to the reliefs sought in the plaint?
260. Having identified the critical issues for determinations, the Court will now proceed to deal with the same hereinbelow.

### **Issue No. 1- Where Was The Plaintiff's Property Known As Transmara/Enanyieny/948 CREATED FROM?**

261. The Plaintiff herein instituted this suit on the basis of the title Transmara/Enanyieny/948.
262. According to the evidence of the Expert witnesses who testified, it was clear that Transmara/Enanyieny/948 was a sub-division of Transmara/Enanyieny/1.
263. It is not in dispute that the Mutation and/or Registered Index Map of Transmara/Enanyieny/1 dated 1/08/2017 created sub-divisions No. 716- 950.
264. Consequently therefore, the sub-division No. 948 was legally created from Transmara/Enanyieny/1 and duly issued with a title deed known as Transmara/Enanyieny/948 currently registered in the name of the Plaintiff.

### **Issue No. 2- Was there a conflict or overlap of the boundaries provided in the Declarations Of Enanyieny Section & Isampin Section issued in the year 1975 & 1985 respectively?**

265. The Plaintiff having been registered as the legal owner of Transmara/Enanyieny/948, the pleadings indicate that he has not been able to physically occupy the land demarcated for it.
266. The Plaintiff's pleadings indicate that the suit property has been occupied by the Defendants herein.
267. The Defendants state in their pleadings that the land they occupy emanates from the titles known as Transmara/Isampin/533, 177,180 and 181.
268. The Defendants indicate that the titles known as Transmara/Isampin/533, 177,180 and 181 were a creation from Isampin Section.



269. According to the evidence of the Expert witnesses and in particular the 3<sup>rd</sup> Expert witness, there are two SECTIONS namely Enanyieny Section and Isampin Section.
270. The Plaintiff in his evidence in chief produced in Court the Declaration Notice of Enanyieny Section dated 13/02/1975 as the Plaintiff's Exhibit 10.
271. The Plaintiff also testified and acknowledged that Isampin Section was declared in the year 1985.
272. In the Ground Report filed by the 3<sup>rd</sup> Expert Witness, one Maurice R. Otieno. the Land & Settlement Officer-Transmara East, West and South, the Declaration of Isampin Section was issued on the 31<sup>st</sup> of May 1985.
273. Clearly therefore, the parties in this suit were adjudicated land in these two sections which were created by different Sections and there should be no conflict on the ground.
274. Unfortunately, in this suit, this is not the position as the Plaintiff claims that the land titled to the Defendants is within the suit property.
275. The first question that the Court seeks to ascertain is whether there was a conflict and/or overlap in the two Declarations appertaining to Enanyieny Section & Isampin Section dated 13/02/1975 and 31/05/1985.
276. One of the key components of any Declaration of an Section under the Land Act, Cap 284 is the description of the outer boundary of the Section.
277. According to the Declaration of Enanyieny Section dated 13/02/1975, the outer boundary of the Section was described as follows; -

“Commencing at the source of Olchoro/Onyoki stream the boundary runs on northly direction until it touches Kisii/Narok District boundary thence turns eastly direction following the district boundary until it touches Kisii/Kilgoris road on top of Langata Engima hill thence the boundary turns southwards following the top of Lempongit hills following olosirua cliffs then it turns westerly direction following the top of the ridge ridge until Ilbanoi stream following the stream until it joins with Olbalbal stream following the stream on the same direction until it joins with Olchoro/Onyoikie thence turns no northerly directions until its source of the point of its commencement.”

278. The second Declaration regarding Isampin Section dated 31/05/1985, described the outer boundary as follows; -

“Commencing from the source of Ngaipaiyani Stream, the boundary follows the same stream up to Langata saeni river. The boundary then follows Langata saeni river southwards and continues through Endolndol swamp up to Kobia boundary. Thence the boundary runs along the Kobia boundary eastwards until it reaches the top of oldorisho hill. From there it turns northwards and follows the boundary between Messrs Ole Kuso and Ole Nchoe and goes up to Kapinor stream. The boundary then follows Kapinor stream eastwards for about 300 yards after which it turns northwards and follows Kuliliyai valley up to Olasirauni escarpment eastwards until it reaches Oloingori point. From there the boundary goes to the source of Ngaipeiyeri stream, which is the commencing point.



279. The Court has taken time to peruse the boundary description of the two Sections namely Enanyieny Section and Isampin Section as contained in the Declarations dated 13/02/1975 and 31/05/1985 respectively.
280. In the Court's considered opinion, the boundary description provided in the Declarations of Enanyieny Section and Isampin Section dated 13/02/1975 and 31/05/1985 respectively do not have any conflict and/or overlap in terms of the outer boundaries of these two sections.
281. The Expert witnesses who testified during the hearing of this matter did not point any possible conflict and/or overlap created by the two Declarations of Enanyieny Section and Isampin Section dated 13/02/1975 and 31/05/1985 respectively.
282. Referring to the 1<sup>st</sup> Expert witness's Ground Report dated 12/07/2021, the entire Section known as Enanyieny Section was contained in Sheets 130/3, 130/4 and 144/2.
283. Sheets 130/3, 130/4 and 144/2 gives a drawing of the entire Section known as Enanyieny Section including various boundary markings E1 to about E 300.
284. Looking at Sheet 130/3, 130/4 and 144/2, there is no portion and/or area in the map contained therein that is in conflict and/or overlaps with Isampin Section.
285. In conclusion therefore, the Court's finding is that there is no conflict and overlap in the descriptions of the outer boundaries between Enanyieny Section and Isampin Section.

**Issue no. 3- was the boundary established by the elders in 1985 demarcating Enanyieny Section and Isampin Section lawful?**

286. The Court having decided what the Declarations of Enanyieny Section and Isampin Section issued on the 13/02/1975 and 31/05/1985 respectively are not in any way conflicting and/or overlapping, then why are the parties herein claiming the same portion of land yet their titles are issued from two distinct sections?
287. According to the different Ground Reports filed by the Expert Witnesses who testified in this matter, there is the common recognition of a boundary dispute between the boundary of Enanyieny Section and Isampin Section which dates back to around 1985.
288. According to the Expert Witnesses testimonies, the boundary dispute between Enanyieny Section and Isampin Section was mediated by the elders from Enanyieny Section and Isampin Section and a resolution was arrived.
289. The Resolution was implemented by the planting various blue gum trees to demarcated the boundary between Enanyieny Section and Isampin Section.
290. Unfortunately, the Expert witnesses further testimonies are that the boundary demarcated by the elders by way of the blue gum trees between Enanyieny Section and Isampin Section did not conform with the description of the boundaries provided in the Declarations dated 13/02/1975 and 31/05/1985 respectively.
291. The net-effect of altering the boundary provided in the Declaration of Enanyieny Section and Isampin Section by the elders in 1985 altered the amount of land available for in the two s Section.
292. From the Ground Reports filed by the Expert witnesses, it is clear that the suit property would be partly encroached and/or completely encroached if the boundary Demarcation done by the elders is upheld.



293. On the other hand, if the boundary descriptions of the two sections are implemented in line with the Declarations of 13/02/1975 and 31/05/1985 respectively, then a number of plots created within Isampin Section would be adversely affected.
294. The Court having established this conflict to be between the boundaries provided in the Declarations of Enanyieny Section and Isampin Section dated 13/02/1975 and 31/05/1985 respectively and the ground Demarcations placed by the elders in the year 1985, then which one is the legal and correct boundary?
295. Section 5 (1) of the Land Section, Cap 284 states as follows; -  
The Officer shall by notice either; -
- a. Establish sections within the area.
  - b. Establish the whole Section as an Section.
296. Section 5 (2) of the Land Section, Cap 284 further provides as follows; -
- “A separate notice shall be published in respect of each Section, and in each such notice the officer; -
- a. Shall define as clearly as possible the area of the Section;
  - b. Shall declare that interests in land within the Section will be ascertained and recorded in accordance with this Act;
297. The plain reading of Section 5 (1) and (2) of the Land Act, Cap 284 provides in mandatory terms that the mandate and/or legal authority of establishing an Section and the possible area of is bestowed on the Land Officer.
298. The Court has again perused the Land Act, Cap 284 and failed to identify any provision that mandates any other person other than the Land Officer to set boundaries of an Section.
299. The manner in which a Declaration for an Section is communicated to the public is by way of a Gazette Notice published by the Land Officer in charge of that Section.
300. The boundary descriptions contained in of the Declaration of an Section which is Gazetted can not be altered by a resolution of elders without a fresh Declaration being published and Gazetted by the Land Officer.
301. Although this Court acknowledges that there could have been a dispute or disagreement on the ground as appertains the boundary between Enanyieny Section and Isampin Section however, the actions of the elders to change and/or alter the published and/or Gazetted boundaries of either Enanyieny Section and/or Isampin Section without involving the Land Officer who published the Declaration Notices was not procedural and/or legal.
302. Consequently, the implementation of this illegal resolution by the elders in 1985 by placing blue gum trees to demarcate the boundary between Enanyieny Section and Isampin Section without publication and Gazettement of a new Declaration by the Land Officer was unlawful.

**Issue no. 4- is the plaintiff entitled to the reliefs sought in the plaint?**

303. Prayer No. 1 of the Plaint herein seeks for issuance of an Eviction Order against the Defendants from the suit property.



304. Prayer No. 2 further seeks for the issuance of an injunction restraining the Defendants, their servants, licensees, agents or any other person(s) acting on their behalf from howsoever trespassing, occupying, or harassing or interfering with the ownership, quiet possession and occupation by the suit property.
305. From the evidence adduced in Court and the Ground Reports filed by the Expert witnesses herein, the described boundaries contained in the Declarations of Enanyieny Section and Isampin Section dated 13/02/1975 and 31/05/1985 respectively were tempered with and/or alter unlawfully.
306. Consequently, the Court is of the considered view that the Land Officer, Transmara East, West and South should undertake an exercise of re-establishing the Gazetted Area as envisaged under Section 5 (2) of the Land Act, Cap 284 before the outcome of Prayer 1 and Prayer 2 can be determined.
307. On prayer No. 3 of the Complaint, the Court is satisfied that the Plaintiff holds and is the bona fide owner of the property known as Transmara/Enanyieny/948 and should enjoy its quiet occupation and possession thereof.
308. As to Prayers No. 4 of the Complaint, the Court is of the view that each of the parties in this suit have lawful issued Title Deeds which are protected under Section 24, 25 and 26 of the Land Registration Act, No. 3 of 2012.
309. The Court is therefore obligated to protect the rights contained in the individual title deeds issued to both the Plaintiff and the Defendants until that time a proper reason for any interference is ascertained by the Court.
310. In other words, the Court is of the view that this Prayer can only be determined once the boundaries between Enanyieny Section and Isampin Section are re-established in line with the Declarations issued on the dated 13/02/1975 and 31/05/1985 respectively.
311. As regards Prayer No. 5 & 6 of the Complaint, the Court will also give its determinations on these prayers once the re-establishment of the boundaries have been carried out.
312. As to the issue of Costs sought in Prayer No. 7 of the Complaint, the Court is of the view that the dispute herein is one occasioned by the acts of other parties including Government Officials.
313. Consequently therefore, the resolution of this suit will be for the beneficial of the general public in the determination of their rights and/or availability of the land within their respective Sections.
314. Each party shall therefore bear its own costs of this suit.

## **Conclusion**

315. In conclusion therefore, the Court makes the following Orders as appertains the Complaint dated 28<sup>th</sup> July 2020: -
  - A. The Land Officer, Transmara East, West and South together with the Sub-County Land Surveyor, Transmara East, West and South be and are hereby directed to undertake an exercise of demarcating the entire Section known as Enanyieny Section as provided for in the Declaration of Enanyieny Section contained in the publication and/or Gazette Notice of 13/02/1975 and in line with Survey Sheets 130/3, 130/4 and 144/2 using the Boundary Marks provided therein within Sixty (60) days from the date of this judgement.
  - B. The Sub-County Land Officer, Transmara East, West and South together with the Sub-County Land Surveyor are further directed to prepare and present a Ground Report to the



Court confirming the placement of the boundary marks relating to Enanyieny Section in line with the Declaration dated 13/02/1975 and Survey Sheets 130/3, 130/4 and 144/2.

- C. The Sub-County Land Registrar, Transmara East, West and South and the Sub-County Land Surveyor, Transmara East, West and South be and are hereby directed within Thirty (30) Days upon receipt by the Court of the Ground Demarcation Report by the Sub-County Land Officer to visit the Plaintiff's property known as Transmara/Enanyieny/948 and verify, establish and confirm whether or not the same is encroached any of the Defendants properties known as Transmara/Isampin/533, 177, 180 and 181 and if so, to what extend has the encroachment affected the Plaintiff's property known as Transmara/Enanyieny/948 and file an appropriate Ground Report to this Court thereof.
- D. The matter will shall be mentioned within Ninety (90) Days for further orders Prayers No. 1, 2,4 & 5 of the Plaint.
- E. Each party shall bear its own costs of this suit.

**DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 14<sup>TH</sup> NOVEMBER 2022.**

**EMMANUEL.M.WASHE**

**JUDGE**

In The Presence Of:

Court Assistant: Mempe/ngeno

Advocate For The Plaintiff: Kamwaro

Advocate For The Defendant: Mireri

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