



REPUBLIC OF KENYA



**KENYA LAW**  
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**Bore v County Government of Elgeyo Marakwet & 3 others (Environment & Land Case 32 of 2022) [2025] KEELC 4171 (KLR) (26 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4171 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT ITEN**  
**ENVIRONMENT & LAND CASE 32 OF 2022**  
**L WAITHAKA, J**  
**MAY 26, 2025**  
**FORMERLY ELDORET ELC CASE NO.93 OF 2017**

**BETWEEN**

**THOMAS K EGO BORE ..... PLAINTIFF**

**AND**

**COUNTY GOVERNMENT OF ELGEYO MARAKWET ..... 1<sup>ST</sup> DEFENDANT**

**THE COUNTY LAND REGISTRAR, ELGEYO MARAKWET . 2<sup>ND</sup> DEFENDANT**

**THE COUNTY SURVEYOR ELGEYO MARAKWET ..... 3<sup>RD</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. By a plaint dated 3<sup>rd</sup> March 2017, the plaintiff instituted this suit seeking judgment against the defendants, jointly and severally, for: -
  - a. An order holding that the plaintiff is the legal owner of land parcel number Irong/Kapkoi Forest/155 (hereinafter referred to as the suit land);
  - b. A declaratory order holding that the 1<sup>st</sup> defendant's encroachment of the suit land, felling trees, destroying fence and excavating earth thereon is illegal;
  - c. An order of permanent injunction restraining the 1<sup>st</sup> defendant from further encroaching onto, felling trees, destroying fence, excavating earth or in any other way interfering with the plaintiff's rights over the suit land;
  - d. Special and general damages;



- e. Costs and interest.
2. As can be discerned from the averments/contentions in the plaint, the suit is premised on the grounds that the plaintiff is the registered owner of the suit land; that in 2013 or thereabout, there existed a dispute between the plaintiff and owners of parcels of land created under Irong/Kitany Scheme concerning alleged encroachment of a public road that exists between the plaintiff's parcel of land and the parcels created under Irong/Kitany/Scheme and that the dispute was resolved by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who determined that the plaintiff had not encroached on the public access road as alleged.
  3. The plaintiff complains that on 28<sup>th</sup> February 2017, the 1<sup>st</sup> defendant encroached on his parcel of land, destroyed his fence, felled matured trees and excavated earth therefrom.
  4. Explaining that he pleaded with the 1<sup>st</sup> defendant to stop his illegal activities in the suit land, the plaintiff laments that his pleas were ignored by the 1<sup>st</sup> defendant rendering filing of the instant suit necessary.
  5. The plaintiff blames the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants for having failed to advise the 1<sup>st</sup> defendant despite having resolved the dispute that existed concerning alleged encroachment of the road reserve by him.
  6. The 1<sup>st</sup> and the 3<sup>rd</sup> defendants filed a statement of defence, dated 26<sup>th</sup> July 2017 in which they state/ explain that on or about 10<sup>th</sup> October 2013, the residents of Torok Village, through their Member of County Assembly, petitioned the County Executive Committee Member for Physical Planning, Public Works and Roads to open up a public road between Kitany and Kapkoi forest citing encroachment by the neighbouring plot owners who had denied them their right to electricity and access to the public road; that on 16<sup>th</sup> February, 2017 a meeting was convened between the Assistant Chiefs and residents of Kaptarakwa where it was unanimously agreed that there was need to carry out survey on the disputed land parcels; that the 1<sup>st</sup> defendant contracted the services of the 3<sup>rd</sup> defendant to carry out survey work and that the 3<sup>rd</sup> defendant completed the exercise and found that the plaintiff had encroached on the road making it inaccessible.
  7. Arising from the foregoing, the 1<sup>st</sup> and the 3<sup>rd</sup> defendants denies the plaintiff's allegation that the 1<sup>st</sup> defendant encroached on the suit land and interfered with plaintiff's rights.
  8. Contending that the plaint does not disclose any cause of action and that it is vexatious, frivolous and an abuse of the court process, the 1<sup>st</sup> and the 3<sup>rd</sup> defendants urge the court to dismiss the suit.
  9. The 2<sup>nd</sup> and 4<sup>th</sup> defendants filed a statement of defence, dated 10<sup>th</sup> November, 2017 in which they admit that the suit land is registered in the name of the plaintiff. The 2<sup>nd</sup> and the 4<sup>th</sup> defendants also admit that on 3<sup>rd</sup> October, 2013 the 2<sup>nd</sup> defendant visited the suit land to ascertain its boundary in relation to the public road of access that separated Kitany and Kapkoi forest registration sections.
  10. The 2<sup>nd</sup> and the 4<sup>th</sup> defendants acknowledge/ admit that arising from the site visit, they established that the plaintiff had not encroached on the road of access and state that since that time, there had not been any other activity relating to the suit property.
  11. Contending that the suit discloses no cause of action against them, the 2<sup>nd</sup> and 4<sup>th</sup> defendants urge the court to dismiss the suit against them with costs.
  12. The 3<sup>rd</sup> defendant filed a separate statement of defence, dated 20<sup>th</sup> February, 2018 in which he acknowledges that on 3<sup>rd</sup> October 2013, he accompanied the 2<sup>nd</sup> defendant and assisted her in resolving the boundary dispute between the owner of the suit land and the owners of land parcels number Irong/Kitany/138, 145, 147, 164, 165 and 601. He further states that ever since that time, he never participated in any other survey in respect of the parcels.



13. The plaintiff filed a reply to defence, dated 29th September, 2017 reiterating the averments in his pleadings and adding that the boundary dispute arose in the year 2005 or thereabout reaching its peak in the year 2013 when the 2<sup>nd</sup> defendant made its findings vide a ruling delivered on 3<sup>rd</sup> October 2013.
14. It is noteworthy that the position taken by the 3<sup>rd</sup> defendant in his statement of defence, dated 20th February, 2018 is not only a departure from the averments contained in the joint statement of defence dated 26th July, 2017 but also a contradiction of the averment contained therein suggesting that he was contracted by the 1<sup>st</sup> defendant to survey the parcels of land in dispute and that upon carrying out the survey, he established/found that the plaintiff had encroached on the public access road.

### **Evidence and analysis**

15. When the case came up for hearing, the plaintiff led evidence that confirms that he is the registered owner of the suit property (Certificate of title-Pexbt1); that there existed a boundary dispute between him and the owners of land parcels numbers Irong/Kitany/138, 145, 147, 164, 165 and 601 concerning alleged encroachment of the public access road which forms the subject matter of this suit (boundary dispute proceedings-Pexbt 3) and that he was found not to have encroached on the access road.
16. It is acknowledged or admitted that the boundary dispute resolution exercise that was conducted in 2013 did not establish that the plaintiff had encroached on the access road.
17. Whereas the 1<sup>st</sup> defendant, in his statement of defence, alleges that in 2017 or thereabout, it contracted the 3<sup>rd</sup> defendant who conducted a survey and established that the plaintiff had encroached on the road of access, that allegation was denied and/or contradicted by the 3<sup>rd</sup> defendant in its statement of defence dated 20<sup>th</sup> February, 2018. During hearing, the 3<sup>rd</sup> defendant led evidence that contradicts his pleaded case to the effect that after the survey he conducted in 2013, he never conducted any other survey. Besides being a departure of his pleaded case that he never visited the suit land and surveyed it in 2017, the evidence by the 1<sup>st</sup> defendant to the effect that upon survey of the suit lands in 2017, he established that the plaintiff had encroached on the road is not supported by the totality of the evidence adduced in this case.
18. Being the one who desires judgment based on the allegation that the plaintiff had encroached on the public road of access, it was imperative on the 1<sup>st</sup> defendant to prove its pleaded case to the required standard. Evidence led by the defendants' witnesses is not only at variance with the pleadings, but also contradictory in that D.W.4 confirms that the survey exercise they conducted did not reveal that the plaintiff had encroached on the public access road. To the contrary, the survey exercise established that on account of the expansion of the road exercise carried out by the 1<sup>st</sup> defendant pursuant to alleged public participation, the 1<sup>st</sup> defendant encroached on the plaintiff's parcel of land by about a quarter an acre.
19. The 3<sup>rd</sup> defendant's denial of the 1<sup>st</sup> defendant's allegation that he was contracted to do survey on the suit land in 2017 and that he did the survey and established that the plaintiff had encroached on the public access road was laid bare by the evidence adduced during hearing of the case, which confirmed that indeed no such survey was done in 2017 as alleged in the 1<sup>st</sup> defendant's statement of defence.
20. It is a cardinal rule concerning pleadings and evidence that parties are bound by their pleadings and that any evidence led which is in contravention of the pleadings is inadmissible or counts for nothing.



In that regard, see the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) e KLR where it was stated: -

“In absence of pleadings, evidence if any, produced by parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. pleadings ensure that each side is fully alive to the questions that are likely to be raised and may have opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings...”

21. The totality of the evidence produced in this case shows that, it is the 1<sup>st</sup> defendant, who in purported implementation of a resolution made by the local administration in conjunction with the residents of the area where the suit land is situated, decided to expand the road of access from the 6-meter road indicated in the Registry Index Map (RIM) resulting in encroachment into the plaintiff's parcel of land without his consent. In that regard, see the testimony of Philip Kipchumba (D.W.3) which is to the effect that the size of the access road as per the Registry Index Map is 6 meters but after survey, with concurrence of the Community, they expanded it from 6 meters to 9 meters.
22. Whilst the expansion was said to have been sanctioned by the community, D.W.3 was unable to produce any evidence capable of proving that fact. In any event, the community cannot sanction what would appear to be a violation of the rights of a registered proprietor of land.
23. According to Robert Kurgat (D.W.4), a Land Surveyor in Elgeyo Marakwet County, when they visited the ground in 2023, the encroachment that exists currently was as a result of the expansion of the road from 6 meters to 9 meters carried out by the 1<sup>st</sup> defendant following public participation concerning the need to expand the roads.
24. D.W.4 informed the court that as a result of the road expansion exercise, the plaintiff lost about ¼ of an acre of his land.
25. D.W.4 further confirmed that when they visited the suit land in 2013 to settle the dispute between the plaintiff and his neighbours, they found that the plaintiff had not encroached on the access road.
26. Whereas the 1<sup>st</sup> defendant might have been acting in public interest, its conduct is clearly a violation of the protection accorded private land rights under Article 40 of *the Constitution* of Kenya as read with Section 26 of the *Land Registration Act*, 2012.

### **Determination**

27. The upshot of the foregoing is that the plaintiff's case has merit. Consequently, I allow it in terms of prayer (a), (b), (c) and (e).
28. With regard to the prayer for special damages, I decline to issue it on the ground that no particulars of loss were pleaded and strictly proved as by law required.
29. As regards the prayer for general damages, having determined that the 1<sup>st</sup> defendant illegally encroached on the plaintiff's land and breached the plaintiff's right to property guaranteed under Article 40 and Section 26 of the *Land Registration Act* 2012 and further being aware that trespass of land is actionable per se, I award the plaintiff general damages for trespass to his land amounting to Kshs. 250,000/-.



30. The upshot of the foregoing is that the plaintiff's suit has merit and is allowed to the extent contemplated in this judgment.

31. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT ITEN THIS 26<sup>TH</sup> DAY OF MAY, 2025**

**L. N. WAITHAKA**

**JUDGE**

Judgment delivered virtually in the presence of:-

N/A for the plaintiff

Ms. Chelimo holding brief for Mr. Yego for the 1<sup>st</sup> defendant

Ms. Cheruiyot for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants

Court Assistant: Christine

