



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC APPEAL NO. 44 OF 2019

DANIEL KAMAU MBOGO.....APPELLANT

VERSUS

SAMUEL MUIGAI KAMAU.....RESPONDENT

(Being An appeal from the Judgment and Decree of the Chief Magistrates Court at Thika Hon. M. W. Wanjala, Senior Resident Magistrate issued on 8th February 2019, in Thika CMCC No. 746 of 2006)

BETWEEN

SAMUEL MUIGAI KAMAU.....PLAINTIFF

VERSUS

DANIEL KAMAU MBOGO.....DEFENDANT

JUDGMENT

The Appellant **Daniel Kamau Mbogo**, was the Defendant in **Thika CMCC 746 of 2006**. The Respondent **Samuel Muigai Kamau** was the Plaintiff. By a Re Amended Plaintiff, the Plaintiff (Respondent) brought the suit against the Defendant and sought for orders that;-

a) That the Thika District Land Registrar and the Thika District Land Surveyor do visit the original land parcel Loc 16/ Kimandi/ Wanyaga /832(now parcels number 9222, 923, 924 and 925) and excise 0.03 hectares therefrom and put the same back to the original land parcel Loc 16/Kimandi-Wanyaga/833 (now parcels number as 843, 844, 845, 846 and 847) the current parcels of land should be adjusted as follows;

	<i>FROM</i>	<i>TO</i>
<i>Loc 16/Kimandi 843</i>	<i>0.05 ha</i>	<i>0.56ha</i>
<i>Loc 16/Kimandi 847</i>	<i>0.201ha</i>	<i>0.221ha</i>
<i>Loc 16/Kimandi 922</i>	<i>0.49 ha</i>	<i>0.43ha</i>
<i>Loc 16/Kimandi 924</i>	<i>0.23 ha</i>	<i>0.21ha</i>

b) General Damages for trespass and fraud and mesne profits for the Defendants encroachment on the Plaintiff's land parcel Loc 16/Kimandi/Wanyaga 843 and 847.

c) Costs of the suit and interest on a and b above at Court rate.

In his statement of Claim, the Plaintiff (Respondent) averred that Defendant and himself bought **L.R No.Loc 16/Kimandi-Wanyaga 286**, measuring **2 acres** and they agreed to share it out equally amongst themselves and each was to get **1 acre**. That they purchased the land at **Kshs. 12,500/=** and each one of them contributed **Kshs.6,250**. That the Land Control Board Consent for the subdivision was acquired and the said land parcel was subdivided into two parcels being **L.R 833 and 832**, owned by the Plaintiff (Respondent)and the Defendant(Appellant) respectively. That at the time of the subdivision, the Plaintiff (Respondent) was not present and he trusted that the

Defendant(Appellant) shall apportion the said land equally but the Defendant fraudulently made his land parcel physically bigger on the ground at the Plaintiff's expense.

He particularized fraud as; acquiring a larger portion of the land than the one he was entitled knowing very well that this was at the expense of the Plaintiff's rights as a proprietor of the other acre; having a title deed showing that he owns one acre of land knowing very well that it was bigger **by 0.03 acres or 0.074 acres** and at the expense of the Plaintiff's (Respondent's) portion of land. That the Defendant(Appellant) has since subdivided his portion into various portions namely **Kimandi-Wanyaga 922, 923, 924, 925** and the Plaintiff's(Respondent) portion is now **Kimandi - Wanyaga 843, 844, 845, 846 and 847**. That the Defendant has since the initial subdivision between the parties been using the **0.03 ha** hived off from the Plaintiff's(Respondent's) land and the Plaintiff's(Respondent's) claim General damages and mesne profits.

The Suit was contested and the Defendant(Appellant) filed an Amended Defence and Counter Claim dated **5th June 2015** and denied all the allegations made in the Plaint. He also averred that the Plaintiff and Defendant bought **L.R 286** together in **1976**, and the same was subdivided on **21st August 1979**, in the Plaintiff's(Respondent's) presence and he signed the mutation forms as correct. Further that the subdivision was done by the District Surveyor, Murang'a District. He denied that the Plaintiff was absent during the subdivision. That the District Surveyor Murang'a surveyed the subdivided land **L.R 286 into L.R 832 and 833** professionally and made approximate boundaries exactly as required by **section 21(1)** of the **Registered Land Act** and the Plaintiff was satisfied with the subdivision. That if there was any discrepancies in acreage, between the Plaintiff's (Respondent's) portion of former **L.R 833** and the Defendant's(Appellant's) **L.R 832**, then it is minute and excusable.

That they agreed in writing on **5th February 1979**, that on the junction of **Kimandi Garage Road** and **Ndakaini Road** where the Plaintiff (Respondent) already had a house, the Plaintiff (Respondent) would keep a plot of **50 ft and 90 ft** along the Kimandi garage road and the Defendant would have the rest of the frontage. That the width of the Plaintiff's plot was to measure **15m** wide along Kimandi to garage road by **30 m** long. That contrary to the agreement, the Plaintiff (Respondent) extended a width of **60 ft** to garage road and **98 ft** long and extended his plot to area of **10ft wide**. That the Defendant (Appellant)sold **L.R 615** to **Johnson Mbugua Muchoki** in **1992**, but the Land Registrar has refused to give him an official search and he has not been made a party.

That the subdivision of the Plaintiff's **L.R 833 into L,R 843 0.050 HA, L.R 844 0.033HA, L.R 845 O.033HA, L.R 846 0.033HA and L.R 847 0.50HA** total **0.400HA**. Further that the Plaintiff's (Respondent's) totals acreage is **one acre** and he has not lost anything. That the Plaintiff (Respondent) had 6 months from the date of subdivision to claim compensation and his claim is therefore time barred. That the Plaintiff(Respondent) should have lodged a claim under **section 31 of the Survey Act** within 12 months after the survey dated **21st August 1979**, to the Director of Survey, if he was aggrieved and he did not do so and is therefore time barred.

Further that the Plaintiff's cause of action is Statute barred under **Section 7 of the Limitation of Actions Act**. That the Court did not have jurisdiction to hear the matter under **Section 31 of the Land Disputes Tribunal Act**. Further that the Defendant(Appellant) has not interfered with the original boundary and the Plaint does not comply with the Civil Procedure Rules.

In his Counter Claim, the Defendant (Appellant) reiterated the contents of the Defence and sought for orders that;

a) That the Defendant to the Counter Claim Mr. Samuel Muigai Kamau do surrender to the Plaintiff to the Counter Claim and be evicted from 155 square meter on the road frontage of L.R Loc 16/Kimandi/286 forthwith and any building the Defendant to the Counter Claim may have built in that portion of 155 square metres be demolished at the Defendant to the Counter Claims expense.

The matter proceeded by way of viva voce evidence wherein the plaintiff (Respondent) gave evidence for himself and called one more witness. The Defendant (Appellant) also gave evidence for himself and called three more witnesses.

PLAINTIFF'S (RESPONDENT'S) CASE

PW1 Samuel Muigai Kamau adopted his witness statement dated **14th March 2016**, as his evidence in chief. He further produced his list of documents dated **23rd October 2014** as Exhibits 1 to 6. He prayed that the 2 acres of land be divided into an acre each and that **L.R 286** is less than one acre. He denied that his part of the land occupies the frontal part. That they never agreed that the person who gets the frontal part get less. Further, that he was not present when the survey was done, but the Defendant was present. That he noticed that his parcel was less when he set to subdivide it into plots. That a road project was coming up and a Surveyor and the Land Registrar went to the land and established that it was less and a report was prepared.

That the Defendant is married to his sister, and he settled on the land and invited the Defendant. He denied that there was a sale Agreement. He denied any knowledge of the sale agreement dated **5th February 1979**, and that the signature was his. He also denied visiting **Maina Muiruri Advocate**. That the land was 2 acres and they both contributed equally. That each of them was to get an acre and he had constructed a house on the parcel prior to the purchase. That he was present when the surveyor from Murang'a surveyed the parcel on **21st August 1979**, and several other people were also present. That he filed **Misc 28 of 2006**, which was dismissed. That he had titles to parcel Numbers **843, 844, 845,846 and 847**, but did not know if the Defendant had titles to his parcels **Nos. 922,923,924 and 925**. That he did not know the actual size of his land.

It was his further testimony that when the survey was done, he had not arrived as he was on the night shift and travelled that morning only to arrive when the survey was already done. That he did not know the nature of the documents that he signed. That there is a big difference in the size of the parcels of the land on the ground as the Defendant has more land.

PW 2 Jeremiah Kihonge Kiama adopted his witness statement dated **9th February 2016**, and testified that the Plaintiff is his elder

brother and the Defendant is the brother to his brother's wife. That the two parties bought the land which was two acres and agreed that each would get an acre after partition. That he was not present when the survey was done on **21st August 1979**, and did not represent the Plaintiff during the survey. Further that he was present when the survey was done on **17th August 2006**, as the survey had come to align the boundaries. That he found that the Defendant had encroached on the Plaintiff's land by 2 to 3 meters from the road to the river.

He further testified that he was not aware if **Mr. Kihiu** was the Surveyor or the Land Registrar. That the Plaintiff and Defendant were present during the survey of **2006**. That **Kamiti Joel Mbogo** and **Kamau Marenye** were not present on that day. That he did not see the Plaintiff sign any papers after the survey. That according to the report, **Mr. Kihiu** was the Land Registrar and it was signed by a **Mr. Stephen Gatheru** for the District Surveyor, Thika. That he could recognize his brother signature. He confirmed that it was his in the mutation form.

DEFENCE CASE (APPELLANT'S)

DW1 Daniel Kamau Mbogo adopted his witness statement dated **13th August 2018**, as his testimony. That the Plaintiff is his brother in law. He produced his list of documents as Exhibits 2 to 11. He marked Document 1 DMF1. That they made the agreement with the Plaintiff and they both signed. That the Plaintiff was present during the survey on **21st August 1979**. That the Plaintiff's brother **Joel Mbogo** and **Solomon Kamaiti** were also present. That the Surveyor aligned the boundary and asked them whether they were both satisfied and they agreed. Further, that they signed the mutation forms and the Plaintiff later refused to sign the partition forms. That he filed case **No. 52 of 1980**. They had both collected their titles and they were living peacefully until the Plaintiff filed a suit and was given an ex parte order to partition the parcel again, but the same was set aside. That the Plaintiff then filed the instant suit seeking orders to resurvey.

That they went to an Advocate to do an agreement where each one of them would get a plot at the corner that measured **50 ft by 98 ft** and for the rest of the land to be shared equally, and they gave the agreement to the Surveyor. That the Plaintiff was present when the survey was done pursuant to the Court orders and he was not present as he had not participated in the proceedings. Further that the Plaintiff later moved to the LDT which gave ruling on **17th February 2009**, and he appealed against the same.

That contrary to their agreement, the Plaintiff got **60 ft** on the frontage facing the road side instead of **50 ft**. That the Plaintiff has constructed on the plot. That the **Gatanga Land Disputes Tribunal** made a decision in favour of the Plaintiff and ordered that the land be re aligned. That the Appeals Committee confirmed the **Gatanga LDT** decision and on appeal, the **Nyeri High Court** did not overturn the decision. That the decision that was made in **Misc 28 of 2006**, was set aside upon his Application. That the Plaintiff understood what the survey was and did not complain. That one can bring another surveyor if in doubt. That a surveyor came up pursuant to the Court order in **Misc 28 of 2006** and the Land Registrar was not present, but several people were present. That he did not participate in the 2nd survey done pursuant to the Court order.

That the report in Court is joint report by the District Land Surveyor and Land Registrar. That he signed the mutation forms and he did not have a problem with it. That he has one acre of land and they both paid **Kshs. 100/=** to the lawyer for the agreement. That the agreement was prepared by **Mr. Pujas** clerk and they paid **Kshs. 200 to Maina Muiruri** who signed it. That the agreement does not indicate who prepared it. That each of them was supposed to have **50 ft** frontage to the road and he got **60ft** facing the road. That he was against the land being surveyed afresh as they have sold part of the land.

DW2 Kamiti Magana Solomon adopted his witness statement dated **4th September 2014**, and filed on **3rd December 2014**. That on **21st August 1979**, the Defendant told him to accompany him and witness how their parcel of land was to be subdivided. That the Plaintiff and his brother **Jeremiah Kihonge Kamau** were present and the survey was conducted and trees planted as they had been told by the surveyor. That he was witnessing for the Defendant together with **Joel Mbogo Kibe**. That the plot is in a trading center and there were other onlookers. That they were called by the Surveyor to sign that they were satisfied with the process and they appended their signatures.

That he witnessed the Surveyor subdividing the land, but he did not know how to undertake survey. That the signing meant that they were agreeable to how the survey had been done and for a problem to arise, it depended on how the survey was done.

DW3 Joel Kibe Mbogo adopted his witness statement dated **4th September 2014**. That the parcel of Land is **286**. That on **21st August 1979**, as he was headed to the shop and he met the Defendant who told him that they were in the process of subdividing their land with the Plaintiff and were awaiting the Surveyor to divide the land into two portions and requested him to witness. That **Daniel Kamau Mbogo**, **Samuel Muigai Kamau** and his brother **Jeremiah Kihonge** were present. That subdivision was done and at the boundary, some rafters were planted by the parties as well as **Jeremiah Kihonge**. That they later signed to confirm that the survey had been done and none complained and did not appear to have any problem. That they were following what the surveyor was telling them. That he saw the sign but he was not near and he did not know what they were signing.

DW4 Benson Kamau Marenye adopted his witness statement on **30th April 2015**. That on **11th April 2015**, **Daniel Kamau** asked him to assist him in measuring their land with the Plaintiff and told him that the Plaintiff had taken more land than he was supposed to. That they measured together using a tape measure and he found that the place that **Samuel** had constructed was **60 ft** and they did the same at night and they were alone. That their dispute was that one person got a bigger portion of the parcel of land than what they had agreed.

That they measured the parcel at night and they used a torch and they each confirmed that it was **60 ft**. That Samuel was not called during the exercise. The beacons were the houses they had constructed and they did not have a map. That Daniel told him where to start the measurements and where to end.

After the *viva voce* evidence, the parties filed their written submissions and on **8th February 2019**, the trial Court entered Judgment in favour of the Plaintiff(Respondent) and stated as follows;

“The said report buttresses the Plaintiffs claim that his portion of land (parcel number 833) is smaller than what it was stated

to be. Relying on that report by the surveyor dated the 12th October 2006 and without any other report to the contrary, the Court has no option but to believe what the Plaintiff asserted in his *Plaint*. I consequently enter Judgment for the Plaintiff in terms of prayer (a)(i) of the re amended *plaint* filed in Court on the 7th July 2015.

The Counter Claim by the Defendant was similarly not proved to the required standards and is hereby disallowed with no orders as to costs. The defendant did not produce the agreement that was marked as DMF1 or any other evidence to prove that the parties herein had agreed to share out the parcel otherwise than in equal measure. He has all along been silent and contended with how the parcels were partitioned and his Counter Claim appears to be an afterthought meant to Counter the Plaintiff's claim. I do not also think that the Plaintiffs claim was barred by the provisions of Section 148(2) of the Registered Lands Act (repealed) or Section 31 of the Survey Act as stated by the Defendant.

The Appellant was aggrieved by the above determination of the trial Court and Decree thereon and he has sought to challenge the said Judgment through the Memorandum of Appeal filed on 3rd July 2019 . The Appellant sought for orders that;

1. That this appeal be allowed.
2. That the Judgment delivered by Hon. M.W Wanjala Senior Resident Magistrate on 8th February 2019, be set aside and be substituted therewith with an order dismissing the suit and allowing the Appellant's Counterclaim dated 10th June 2015.
3. That the costs of this Appeal and the lower Court suit be borne by the Respondent .
4. That any other or further relief as the Honourable Court may deem fit and just to grant in the circumstances of this Appeal

The grounds in support of the Appeal are:-

1. The Learned Magistrate erred in allowing the Plaintiffs suit in failing to appreciate and to hold that the suit in so far as the Plaintiff sought to recover land , allegedly owned by the Defendant is barred by Limitation by dint of Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya.
2. The Learned Magistrate erred in allowing the Plaintiff suit in failing to appreciate and hold that in so far as the Plaintiff's claim is based on an alleged trespass over his land by the Defendant this Court lacked Jurisdiction to entertain it by dint of Section 3 of the Lands Disputes Tribunal Act a position that the same Court had held in its ruling delivered on 15th April 2008 holding the Preliminary Objection on the very same grounds.
3. That the Learned Magistrate erred in allowing the Plaintiff suit in failing to appreciate and hold that the suit in so far as the Plaintiffs sought correction of errors on the survey carried out in 1979 between his land parcel Kimandi /Wanyaga /833 and the Defendants parcel No. Kimandi /Wanyaga/832 then the same is barred by Limitation by dint of Section 31 Survey Act, Cap 2999 Las of Kenya and Section 148 of the Registered Lands Act , Cap 300 Laws of Kenya.
4. The Learned Magistrate erred in allowing the Plaintiffs suit in failing to appreciate and hold that in so far as the Plaintiff sought to challenge or appeal the decision of the registrar to accept and act on mutations and survey works carried out in 1979 between his parcel and that of the Defendant then the Court lacks jurisdiction to entertain it by dint of Section 150 of the Registered Land Act Cap 300 Laws of Kenya.
5. The Learned Magistrate erred in allowing the Plaintiff's suit when she had correctly found and appreciated the fact that the Plaintiff was aware of and satisfied with the survey carried out in 1979 between his parcel of land and that of the Defendant yet she proceeded to use the survey of 1979 without any proper and legal basis.
6. The Learned Magistrate erred in allowing the Plaintiff suit in considering and relying on the surveyors report of 12th September 2006 carried out pursuant to orders made in Thika Chief Magistrates Court Misc Appl 28 of 2006 when the orders had been set aside and the cause withdrawn on 12th September 2006 and hence the report had been rendered null and void and of no effect.
7. The Learned Magistrate erred in allowing the Plaintiff's suit in considering and relying on the surveyors report of 12th September 2006 carried out pursuant to the orders made in Thika Chief Magistrates Court Misc Appl 28 of 2006 even after observing that the said surveyor had not been called as a witness and hence his evidence had nit ben tested.
8. The Learned Magistrate erred in allowing the Plaintiff's suit thus leading to absurd result where the Plaintiff ended having a larger parcel of land at the expense of the Defendant when the two portions ought to be of equal size.
9. The Learned Magistrate erred in dismissing the Defendant's counter claim by holding and finding that there was no sufficient evidence to prove it when there was ample evidence on record.

The Appeal was canvassed by way of written submissions. The Appellant through the Law Firm of Gacheru Ngángá & Company Advocates filed his written submissions dated 21st September 2020, and submitted that the suit was barred by the Limitations of time and the Court lacks jurisdiction. It was further submitted that the law provided timelines on how Appeals were to be lodged, heard and determined and the Respondent ignored the process. That the Respondent was provided with many remedies and he did not explore them.

That the lower Court dismissed the issue of jurisdiction without giving reasons.

It was further submitted that the implications of the proceedings and orders made in **Misc Appl. No. 28 of 2008**, is that there was stay of these orders until when the Application was withdrawn. That the effect of the withdrawal of the Application was an admission that the Application was wrongly filed and was to render any orders made in favour of the Applicant null and void. That having been withdrawn on the Respondent's own admission, the Court did not have powers to entertain the Application. That the purported resurvey was done without involvement of the Appellant. It was therefore submitted that the Applicant has made a case that the Appeal is merited.

The Respondent through the **Law Firm of Wachira Ndungu & Company Advocates** filed his written submissions on **23rd October 2020**, and submitted that the Plaintiff discovered the fraud on **1st August 2001** and filed the suit on **14th September 2006**, and the suit is not time barred. That the Appellant confirmed that the Thika Land Disputes Tribunal ruled in favour of the Appellant and ordered the boundaries to be realigned and the Appeals tribunal confirmed the same.

Further that **Section 31 of the Surveys Act** bars the Director of Survey or a Government Surveyor from sending a Notice to the licensed Surveyor after expiry of **12 months**. It was further submitted that **Section 148 of the Registered Land Act** refers to a claim by a proprietor against the government for indemnity and thus it is not relevant to this matter. That the case does not fall within the provisions of **Section 150 of the Registered Land Act (repealed)** as the same deals with decisions of Registrar and Appeals.

It was further submitted that the proceedings of the **Misc 28 of 2006** were produced without contest and the trial Court was in order to rely on the report dated **12th September 2006**. The Court was urged to dismiss the instant Appeal.

Having carefully considered the Memorandum of Appeal, the evidence adduced in the subordinate Court and the written submissions, the Court finds that the issues for determination are ;

1. Whether the Subordinate Court had Jurisdiction to hear and determine the matter.

2. Whether the Appeal is merited.

1. Whether the Subordinate Court had Jurisdiction to hear and determine the matter

The Appeal is based on various grounds amongst them the issues that the trial Court did not have jurisdiction to hear and determine the matter as the matter was time barred.

The issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same. Jurisdiction is everything and without it a Court has no option but to down its tools.

The Court will first determine whether the suit is time barred and or the trial Court had jurisdiction to determine the matter.

It is the Appellant's contention that the trial Court had no jurisdiction to determine the matter as the suit was time barred by dint of the provisions of **Section 7** of the Limitations of Actions Act as the suit sought to recover land. That since the cause of action arose on **21st August 1999**, then **12 years** have since lapsed.

Section 7 of the Limitation of Actions Act provides:

"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

Further **Section 26 of the Limitation of Actions Act** provides as follows;

Where, in the case of an action for which a period of limitation is prescribed, either—

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

And in the case of **Justus Tureti Obara ...Vs...Peter Koipeitai [2014] eKLR** the Court held that;

"I am in agreement with the Plaintiff's submission that the Plaintiff's claim is for the recovery of the suit property from the Defendant and as such the limitation period for such a claim is 12 years as provided for in section 7 of the Limitation of Actions Act, Cap. 22, Laws of Kenya. I would wish to point out further that the Plaintiff's case although for recovery of land is based on fraud. The proviso to section 26 (a) of the Limitation of Actions Act, Cap. 22, Laws of Kenya provides that where an action is based on the fraud of the Defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the Plaintiff herein discovered the fraud alleged

against the Defendant is a matter to be ascertained at the trial.”

From the above provisions of law and the decided cases, it is not in doubt that for purposes of Limitation, when an action is based on fraud or, mistake, time does not begin to run until the fraud is discovered. The Respondent's suit was based on fraud. Further the Respondent averred that he did not discover that the survey was wrong until **9th August 2001**, when he sought to subdivide the land. It therefore follows that time began to run in the year **2001**. The Court therefore finds and holds that from **2001 to 2006**, when the suit was filed, **12 years** had not lapsed and therefore the suit was not time barred as per the **Section 7 of the Limitations of Actions Act**.

Further that the suit was time barred as per **Section 31 of the Survey Act**. The said provision of Law provides;

31. Correction of errors (1) The Director, or a Government surveyor authorized in writing by the Director in that behalf, may at any time undertake such field and office checks on the survey work of a licensed surveyor as he thinks fit.

(2) The Director, or a Government surveyor duly authorized to authenticate a plan under section 32 of this Act may, by notice in writing, instruct any licensed surveyor to correct at his own expense within a time specified in such notice any error made by him in the survey represented by the plan submitted for authentication: Provided that such notice shall not be sent more than twelve months after the date on which the plan was sent to the Director under section 30.

From the reading of the said provision of law, the Court finds that the

same relates to the Director or a Government Surveyor authenticating a plan and or correcting of errors committed by a surveyor and does not in any way limit the time within which party can claim an error occurred.

The Appellant has also contended that the Court did not have jurisdiction by dint of **Section 3 of the Land Disputes Tribunal Act**. The said section provides:-

(1) Subject to this Act all cases of a civil nature involving a dispute as to;

(a) the division of or the determination of boundaries to land including land hold in common:

(b) a claim to occupy or work land; or

(c) trespass to land. shall be heard and determined by a Tribunal established under section 4.

Does the instant suit therefore falls within the said boundaries?

From the **Re Amended Plaintiff**, the Court notes that the Respondent was seeking orders from Court to have the Land Registrar and District Land Surveyor visit the land and put it back. The Court further notes that it is acknowledged that **Gatanga Land Disputes Tribunal** had already determined the matter and held that the same should be aligned and therefore what the Respondent was seeking was for the Land Registrar and District Surveyor to come in and align the same.

The Appellant had also contended that the suit is barred by the provisions of **Section 148 of the Registered Land Act(Repealed)**. The Court concurs with the submissions by the Respondent that the provisions of **Section 148** of the said Act deals with indemnity by a proprietor as against the government which is not the cause of action in the instant suit nor is the suit about decisions of the Land Registrar as provided by **Section 150** of the repealed Act.

From the foregoing, the Court finds and holds that the trial Court did have jurisdiction to hear and determine the matter .

2. Whether the Appeal is merited

Having held that the trial Court had jurisdiction, the Court must then determine whether the trial Court came to correct or wrong conclusion. It is the Appellant's contention that the trial Court erred in relying on the report dated **12th September 2006**. The dispute as to whether or not the boundaries were to be adjusted had been litigated upon and the same determined by the **Land Disputes Tribunal** which on **17th February 2009** made a decision and stated as follows;

“Deputy Land Registrar and the District Surveyor visited the stated land and parcel originally parcel Loc.16 Kimandi Wanyanga 832 and 833 which were supposed to be equal do a survey to adjust the boundaries for equal sharing (original 1 acre each).”

From the said decision, it is not in doubt that the issue as to whether or not there was a discrepancy had been settled. In the Court's considered view, in his **Re-amended** Plaintiff, what the Respondent was seeking therefore was how to align the said measurements.

The next question then would have been how would the Court then make a finding of how the measurements would be adjusted. The court concurs with the Appellant that the survey presented by the Plaintiff had been impugned by the Court when the said proceedings were set aside. However the trial Court was faced with a situation where it had to make a decision. The Respondent had presented a proposal on how the said adjustment could have been done. Was the said report binding to the Court? I certainly do not think so and that is why the Court stated that having been faced with no option but only the report that has been produced in evidence by the Respondent

The Appellant did not present an alternative form in which the adjustment of the boundaries could be done and the Court finds that it was not wrong of the trial Court to seek to rely on the said report which in the Court's considered view was but a mere proposal that only guided the Court.

Consequently the Court finds that the trial Court did **not err** and therefore, this Appeal is **not merited** as the Court used its discretion to come to a determination which had to be made and since the evidence was not contested, it was the best way.

Having now carefully re-evaluated and re-assessed the available evidence, before the trial court, the Memorandum of Appeal together with the written submissions, the Court finds that the trial Magistrate arrived at a proper determination and this Court finds no reason to upset the said determination.

The upshot of the foregoing is that the Appellant's Appeal is found **not merited** and consequently the said **Appeal is disallowed entirely** and the Judgment and Decree of the trial court is upheld with costs to the Respondent.

It is so ordered.

Dated, signed and Delivered at Thika this 25th day of March 2021

L. GACHERU

JUDGE

25/3/2021

Court Assistant - Dominic

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgement** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Gacheru for the Appellant

Mr. S. N. Nganga for the Respondent

L. GACHERU

JUDGE

25/3/2021