Kibe & another v Lemeiruko & another; Gakumo (Interested Party) ((Suing As The Legal Representative Of The Estate Danson Gakumo Kihoro)) (Environment & Land Case 802 of 2024 & 63 of 2019 (Consolidated)) [2025] KEELC 600 (KLR) (11 February 2025) (Judgment)

Neutral citation: [2025] KEELC 600 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ENVIRONMENT & LAND CASE 802 OF 2024 & 63 OF 2019 (CONSOLIDATED)

MN GICHERU, J

FEBRUARY 11, 2025

BETWEEN

PHILOMENA WANJIRU KIBE ..... PLAINTIFF

AND

SAMMY KELOI OLE LEMEIRUKO ..... 1ST DEFENDANT

LANDS REGISTRAR KAJIADO ..... 2ND DEFENDANT

AND

MARGARET WANJIKU GAKUMO ..... INTERESTED PARTY

(SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE DANSON GAKUMO KIHORO)

AS CONSOLIDATED WITH

ENVIRONMENT & LAND CASE 63 OF 2019

BETWEEN

HAVANA COURT LIMITED ..... PLAINTIFF

AND

SAMMY KELOI OLE LEMEIRUKO ..... DEFENDANT

JUDGMENT

1. The Plaintiffs seeks the following reliefs against the Defendants.

a. A declaration that the Plaintiff is the legal owner of L.R. Kajiado/Kitengela/16845 and 16848 and is entitled to ownership and exclusive use, occupation and vacant possession of the property to the exclusion of the 1st Defendant or anyone claiming under him.

b. A permanent injunction restraining the 1st Defendant whether by himself, his servants and/or agents or otherwise howsoever from denying the Plaintiff access to the land, entering onto, construction on, possession of or dealing with the suit parcels pending the hearing of this suit.

c. An order do issue against the 2nd Defendant whether by himself, his agents, servants, employees or persons acting under him directing him to visit the site of the suit parcels and replace the beacons interfered with.

d. Damages.

e. Costs and interest.

f. Such further or other relief as this court may deem fit to grant.

This is as per the Plaint dated 10th July 2017.

2. The Plaintiffs' case is as follows. She is the registered owner of the suit parcels which abut each other. She purchased the suit parcels from Danson Gakumo Kihoro in the year 2007. At the time of the purchase, there was no boundary dispute between the suit land and the neighbouring parcels. Since May 2017, the 1st Defendant has refused the Plaintiff entry to the suit land on the grounds that the land was irregularly and illegally acquired from the estate of the 1st Defendant's father. Every time the Plaintiff fences her land and plants trees thereon, the 1st Defendant and his servants destroy the fence and uproot the trees. This has happened on various occasions. The 1st Defendant has also uprooted the beacons that mark the boundaries of the two land parcels. The Plaintiff has all the title documents for the suit parcels which she obtained procedurally and she prays that the Court allows the prayers in the plaint as drawn.

3. The case for the Plaintiff in ELC No. 63 of 2019 is very similar to that of the Plaintiff in this case. It prays for more or less similar orders as the Plaintiff herein.

The facts of its case are that it is the registered owner of L.R Nos. Kajiado/Kitengela/16831, 16832, 16850, 16851, 16856 and 16857. The Plaintiff purchased the six suit parcels from the late Gakumo Kihoro on 12-2-2009.

4. In support of their case, the two Plaintiffs filed the following evidence.

i. Witness Statements by Philomena Wanjiru Kibe dated 10-7-2017 and Samuel Gitwekere dated 12-7-2019.

ii. Copies of title deeds for L.R. Nos. 16845,16831, 16832,16850, 16851, 16856 and 16857.

iii. Copies of certificates of official search for L.R. Nos.16831, 16832,16850, 16851, 16856, 16857 and 16845.

iv. Copy of certificate of incorporation of the Plaintiff in ELC 63 of 2019 dated 27/8/2007.

v. Copy of Sale agreement dated 3/4/2009 between Barclays Bank of Kenya Limited and Philomena Wanjiru Kibe for L.R No. Kajiado/Kitengela/16849.

vi. Copy of letter by Chief Land Registrar dated 29-11-2013.

vii. Copy of Statutory declaration by Gakumo Kihoro which is undated.

viii. Copy of deed of Indemnity dated 3/7/2008 signed by Gakumo Kihoro.

ix. 2 Letters between Kontos Advocates and Land Registrar Kajiado.

x. 7 Copies of certificates of official search showing the registered owners of L.R. Kajiado/Kitengela/16845, 16831, 16832,16850, 16851, 16856 and 16857.

xi. 7 copies of transfer forms for L.R. Nos. 16847, 16831, 16832,16850, 16857, 16851, and 16856.

xii. Stamp duty declaration, assessment and pay-in slip dated 12-2-09 for L.R. Nos. 16831, 16832,16850, 16851, 16856 and 16857 and an additional one dated 3/4/2009.

xiii. 6 copies of partial discharge of charge for L.R. Nos.16831, 16832,16857, 16851, 16850, and 16856.

xiv. Copy of mutation form for L.R. No. Kajido/Kitengela/7655 registered on 26/11/2002.

xv. Sketch maps.

xvi. Other relevant documents.

5. In his written statement of defence dated 12-3-2021 filed in ELC Case No. 63 of 2019 the 1st Defendant replies as follows. Firstly, the Plaintiffs' claim is generally denied. Secondly, the 1st Defendant says that the pleadings by the Plaintiffs should be struck out because the verifying affidavit was sworn two(2) days before the Plaint was dated and signed; failure by the Plaintiff's director to attach proof of directorship in form of CR 12 and failure to annex the resolution of the Company authorizing the institution of his suit. Thirdly, it is the Defendant's contention that the suit parcels do not exist on the ground as they were obtained illegally, wrongfully and irregularly. Finally, there was a previous suit which was Magistrate's Court Tribunal case No. 24 of 2006 between the 1st Defendant and Kidira Gakumo Kihara and Lepish Ole Looloila. In the tribunal case Kidira Kagumo Kihara was a party. He failed to appear before the tribunal even though he had been served. The Complaint against him was that he had encroached on the Defendant's father's land No. Kajiado/Kitengela/75 which abutted his L.R. No. Kajiado/Kitengela/18. The tribunal's verdict was that the District Surveyor was to visit the land and rework on the acreage to ensure that L.R. No. 75 retained its original size of 150.5 Ha. Fifthly, this decision of the tribunal was never appealed against or reviewed and it was adopted by the Court as its Judgement in Tribunal Case No. 24 of 2006 and a Decree issued on 3-10-2019. Neither has any appeal been preferred against the District Surveyor's report dated 17-3-2014. Sixthly Kidira Gakumo Kihara charged L.R No. 18 to Barclays Bank Ltd and then failed to service the loan. Without the Defendants' knowledge ,the bank encroached onto the Defendants' father's land and subdivided it into 47 Plots for sale to third parties. Seventhly, the Plaintiffs and the Interested Party have not come out clearly to explain whether it is the Barclays Bank or the Interested Party's husband who sold the suit land to the Plaintiffs. There is contradiction between the two parties as to who the seller of the suit land really was. Eighthly, the Plaintiff in this was unable to point out her land during the boundary determination exercise on 9-8-2018.

   Finally, the Interested Party has not tendered any evidence to prove that the suit land was owned by Danson Gakumo Kihoro and the Plaintiffs have not proved that they exercised due diligence before purporting to buy the suit land.

   For the above and other reasons, the 1st Defendant called for the dismissal of the two suits by the two Plaintiffs.

6. In support of his case, the 1st Defendant filed the following evidence.

i. His witness statement dated 12-3-2021.

ii. Copy of National Identity Card.

iii. Copy of grant in Succession Cause No. 1450/1991 at Nairobi.

iv. Copy of official search for L.R. No. Kajiado/Kitengela/75 dated 2/11/1987.

v. Copy of ruling by Kajiado and Disputes Tribunal dated 21/9/06.

vi. Copy of Mutation form for LR. No. 75 registered on 17-10-1988.

vii. Copy of Decree in Kajiado Tribunal Case No. 24 of 2006.

viii. Copy of report by Earth Matrix Ltd, a Private Surveyor dated 19-10-2016.

ix. Copy of District Surveyors Report dated 17-3-2014.

x. Copy of the 1st Defendant's further witness statement dated 25-9-2023.

xi. Copy of letter dated 16-10-03 registering a complaint.

xii. Copy of record from the court and tribunal.

xiii. Copy of title deed for LR. No. 16846 in the name David Onyango Malago and title No. 16847 also in his name.

xiv. Other relevant documents.

7. The Interested Party, Margaret Wanjiku Gakumo filed an affidavit dated 9-12-2022 in which states as follows.

Firstly, she is legal representative of the estate of Danson Gakumo Kihoro who is now deceased having died on 18-6-2010. Secondly, the suit properties belonged to Danson Gakumo Kihoro who sold them to the Plaintiffs in the two suits herein. Thirdly, the deceased Danson Gakumo Kihoro was not a party in CMCC Kajiado Tribunal Case No. 24 of 2006 against one Kidira Gakumo Kihara who is a stranger to the estate of the deceased. Fourthly, since the decree in CMCC 24 of 2006 is dated 2nd October 2019 and the deceased died on 18-6-2010, then the 1st Defendant was litigating against a dead party. Fifthly, since the suit property was sold by the deceased when there was no boundary dispute, then the registered owners of the parcels should have been parties to the tribunal case. Sixthly, the dispute affects other purchasers who are not parties in this suit.

8. Annexed to the Interested Party's affidavit and the following documents.

i. Transfer of land instruments for L.R. No. 16845 and 16846 to the Plaintiff named Philomena Wanjiru Kibe.

ii. Transfer of Land instruments for L.R. No. 16831-2, 16850-1 and 16856-7 to Havana Court Limited.

iii. Copy of decree in Kajiado Tribunal Case No. 24 of 2006 dated 3-10-2019.

iv. Copy of certificate of death for Gakumo Kihoro dated 30-7-2020.

v. Copy of certificate of confirmation of grant in Succession Cause No. 1583/2011 Nairobi dated 11-7-2016.

9. The second Defendant did not file any pleadings in the suit. However, there is a report dated 12-8-2018 by the District Land Registrar Kajiado in which he says that he was not able to gain access to the land and determine the boundaries because the family of Patrick Ole Marugula denied him and his team access on the ground of trespass. There is on record a second report dated 15-9-2020 which says as follows at the conclusion.

> "I have analysed all the evidence tendered. The sketch map developed by the Surveyor during the hearing depicting the physical features and existing beacons. I have also analysed the sketch map as per the land dispute tribunal verdict. Therefore, based on all evidence tendered on the site, it is now our considered opinion that the sketch map developed by the surveyor be adopted and recommended for implementation. If agreeable to both parties, a date can be fixed for the implementation but that is only subject to the direction of the court".

10. At the trial on various dates including 3-10-2022 and 18-9-2024 the Plaintiffs, the first Defendant and the Interested party testified on oath. Each of the parties adopted the witness statements and documents as their evidence. They were then cross-examined at length by the opposing party. The outcome of the trial is that each of the parties stuck to its guns and did not waver in restating their case as per the evidence on record. Each party only hardened in its position as per the pleadings.

11. Counsel for the parties, filed written submissions which are all on record. The Plaintiffs counsel filed on 14-12-2022 and filed again last year. Counsel for the first Defendant filed his which are dated 22-10-2024 while those of the Interested Party are dated 20-11-2024. The issues raised by the 1st Defendant's Counsel are as follows.

    a. Whether the Plaintiff's documents contained in the Supplementary list of documents dated 30-8-2024 are admissible.

    b. Whether the Plaintiffs have proved their cases taking into account the District Land Registrar's report dated 17th March 2014, 9th August 2018 and 15th September 2020 and report dated 19th October 2016 by Earth Matrix.

    c. Whether the Plaintiffs in the consolidated suits have established a prima facie case.

    On the other hand, the Plaintiff's Counsel identified the following issues for determination.

    a. Whether there was proper sale agreement/s between the Interested Party through the Barclays Bank and the Plaintiffs.

    b. Whether the 1st Defendant was privy to the sale agreements.

    c. Whether he should interfere with the said agreements and prevent the Plaintiff's from taking possession of the plots.

    d. Whether the title deeds issued by the Land Registrar to the Plaintiffs for the suit plots were properly issued and/or should be revoked.

    e. Whether the plots brought from the bank by the Plaintiffs having been subdivisions of Kitengela/7655 belonged to the 1st Defendant.

    f. Who should meet the costs of the suit.

    Finally, counsel for the Interested Party did not identify the issues clearly. However, a look at his submission will show that two issues arise from what is on record.

i. Fate of Proceedings against a non-existent person.

ii. Proceedings against a deceased person being void and of no legal effect.

12. I have carefully considered the evidence adduced in this case by all the parties including the witness statements, documents and affidavit by the Interested Party. I have also considered the oral evidence adduced at the trial. Further to this, I have considered the written submissions filed by the Learned Counsel for the parties and the law cited therein.

Ideally, the Plaintiff's counsel should have replied to the issues raised by the Defendants Counsel as envisaged by Order 18 Rule 2 (2) Civil Procedure Rules. The rules provides.

> " Unless the Court otherwise orders;-
>
> 1. On the day fixed for hearing of the suit, or any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.
>
> 2. The other party shall then state his case and produce his evidence, and may then address the court generally on his case. The party beginning may then reply."

The Plaintiff ought to have replied to the issues raised by the Defendant's Counsel going by the above rule. Be that as it may, I will make a decision on each and every issue raised by the Learned Counsel for the parties.

13. On the first issue raised by the 1st Defendant, I find that the documents filed on 3/9/2024 are, strictly speaking, not admissible because they were filed after the Plaintiffs had closed their case much earlier on 3/10/2022. The said documents should have been filed before the trial but not after the testimony of the Plaintiffs. Some of the documents especially the transfer forms for the suit parcels have been produced by the Interested party as her exhibits annexed to the affidavit of 9/12/2022. Other documents like the court order dated 13/11/2019 form part of the court record. The certificates of official search had been filed on 15/7/2019 when ELC 63 of 2019 was filed and again on 10/7/2017 when ELC 802/2017 was filed. The same applies to the copies of title deeds. In short some of the documents though not admissible perse, are otherwise already properly filed. Had the Plaintiffs' pleadings been well paginated and labelled, the filing of the supplementary list would probably not have been necessary.

14. As for the second of the 1st Defendant's issues, I have this to say. It is very clear from these proceedings that the proceedings in Tribunal Case No. 24/2006 at Kajiado SRM Court and also at the Land Disputes Tribunal did not concern Gakumo Kihoro, the husband of the Interested Party. They concerned a person called Kidira Gakumo Kihara. It has been proved that some of the orders especially the one dated 2/10/2019 was issued when the said Gakumo Kihoro was dead. It is very unfair to refer to the said orders to have been binding on him or his heirs. So far, I have not seen a report from the District Land Registrar conclusively determining the boundary between the first Defendant's father land and that of the husband of the Interested Party. That to me is the problem in this dispute. Had the dispute been resolved as ordered by this court on 19/12/2017, the suit would have been resolved in good time. It is more than Seven(7) years since the order was made by this Court. The reason why

this order has not been implemented is to be found in the report of the report of the District Land Registrar dated 12/9/2018 where he states in part.

> " (3) The family of late Patrick Ole Maragula denied us access citing trespass on their parcel hence if we proceeded with our work the ground would have turned violent."

In his witness statement dated 25-9-2023, the 1st Defendant has this to say.

> " My name is Sammy Keloi Ole Lemeiruko. I am the administrator of the estate of Patrick Lemeiruko Ole Marangura(deceased)..."

In short, it is the 1st Defendant's family that used violent when the Land Registrar visited the locus in quo. Why use violence? Why resist a lawful exercise?

It is my finding that the 1st Defendant has acted with great impunity and his impunity is responsible for the delay in quick conclusion of this dispute.

15. On the final of the 1st Defendant's issues, I find, as the Judge who handled this dispute from the onset found out, that this case is all about a boundary dispute and it is therefore the preserve of the Land Registrar as per Section 18(2) of the *Land Registration Act*. The dispute would have been resolved by now had the 1st Defendant been cooperative.

16. A look at the Plaintiffs' issues for determination shows that none of them concerns the boundary between the parcels belonging to the family of the Interested Party and the family of the 1st Defendant but rather on how the Plaintiffs acquired their land from the bank or the husband of the Interested Party. The 1st Defendant in his written statement of defence dated 12th March 2021 is saying at Paragraph *4* hereof that the Plaintiffs' land does not exist on the ground. Existence or non-existence of land on the ground is a surveying and registration issue. This issue falls outside the jurisdiction of the Court.

17. What then is the way forward?

It would be very easy to dismiss the suit but this will not be fair especially because the Court did not do so in 2017. As I have said earlier, this process would have been complete had there been cooperation. I have however seen a report dated 15-9-2020 which to me lacks details of the actual findings of the District Surveyor. The matter is therefore still in the hands of the Land Registrar. Under Regulation 40 of the Land Registration(General) Regulations, 2017 especially Sub regulation(6), it is not envisaged that a boundary dispute would be filed in this court except in its appellate jurisdiction. The sub regulation reads as follows.

> (6) Any party aggrieved by the decision of the Registrar made under Paragraph *(5)* may within thirty days of the date of notification, appeal the decision to the Court."

In order that these proceedings may comply with the law and bring finality to the dispute I order as follows.

i. The District Land Registrar to conclude the exercise in the report dated 15-9-2020 as per the report.

ii. Any party dissatisfied with the decision of the Land Registrar may file an Appeal as envisaged by Regulation 40(6) of the 2017 Regulations.

iii. The 1st Defendant to pay the costs of the suit to the Plaintiffs and the Interested Party because of resisting the lawful implementation of the Court order dated 19th December 2017 for more than Seven(7) years.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 11TH DAY OF FEBRUARY, 2025.

M.N. GICHERU

JUDGE.

11/02/2025

Delivered online in the presence of; -

Court Assistant – Mwangi Njonjo

Plaintiffs' Counsel – Absent

1st Defendants' Counsel – Mr. Kipkirui Advocate

Interested Party – Mr Kimani Advocate