



**Ram Equity Limited v Kinyei (Environment and Land Appeal
E007 of 2024) [2025] KEELC 1032 (KLR) (4 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1032 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND APPEAL E007 OF 2024**

EM WASHE, J

MARCH 4, 2025

BETWEEN

RAM EQUITY LIMITED APPELLANT

AND

SAMUEL RIOPA KINYEI RESPONDENT

*(Being an Appeal from the Judgement & Decree of HON.W.C.
WASWA, SRM dated and delivered on the 29.02.2024 in the
proceedings known as KILGORIS PMCC ELC NO. E044 OF 2023)*

JUDGMENT

1. The Appellant herein being dissatisfied by the Judgement and Decree of HON W C WASWA pronounced on the 29.02.2024 filed a Memorandum of Appeal dated 22.03.2024 (hereinafter referred to as “the present Appeal”) seeking for the following Orders; -
 - a. The Appeal herein be allowed and the Judgement and Decree of the Trial Magistrate dated and delivered on the 29.02.2024 (hereinafter referred to as “the Trial Court Judgement”) be set-aside, quashed and/or varied.
 - b. The Honourable Court be pleased to substitute in lieu of the decision dated 29.02.2024 an Order allowing the Appellant’s suit vide KILGORIS PMCC NO. E044 OF 2023 (hereinafter referred to as “the Trial Court proceedings”)
 - c. Costs of this Appeal and costs incurred in the sub-ordinate Court be borne by the Respondent.
 - d. Such further and/or other reliefs as the Court may deem necessary, just and expedient.
2. The prayers sought in the present Appeal were premised on various grounds contained therein which can be summarised as follows; -



- i. The Appellant pleaded that the Learned Trial Magistrate erred in law and fact by failing to make a finding that the Ground Reports produced by the Land Registrar and the Land Surveyor confirmed that the Respondent was in occupation of the Appellant's property known as LR. No. Transmara/Kerinkani/678 (hereinafter referred to as "the suit property") as contained in the Plaintiff's Exhibit 9 & 10.
 - ii. The Appellant further pleaded that the Learned Trial Magistrate erred in law and fact in dismissing the Appellant's suit while ignoring the evidence produced as Plaintiff's Exhibit 9 & 10 which confirmed that the Respondent occupation on the ground was at variance with the Mutations and/or Registry Index Maps hence encroaching into the suit property.
 - iii. The Appellant was of the view that the Learned Trial Magistrate erred in law and fact by ignoring the evidence adduced through the PLAINTIFF'S EXHIBIT 10 which confirmed that the Respondent had unlawfully and illegally occupied a portion of 4.2 Hectares within the Appellant's suit property.
 - iv. The Appellant stated that the Learned Trial Magistrate erred in fact and law by ignoring and/or failing to hold that DW 2 was not a truthful witness and the allegations that the Appellant had fenced a bigger portion than what had originally been sold to her by the first owner.
 - v. The Appellant's position was that the Learned Trial Magistrate in essence misapprehended the significance, import and tenor of the Mutation forms and Registered Index Maps which demonstrated the true shape, size and location of the suit property.
 - vi. The Appellant further pleaded that the Learned Trial Court failed and/or erred in fact and law to make a finding that the Respondent was illegally and/or unlawfully occupying a portion measuring approximately 4.2 Hectares on the suit property in view of the neighbouring properties known as LR. No. Transmara/Kerinkani/672,673,674,675,676 AND 677 which border the suit property as demonstrated by the Plaintiff's Exhibit 10.
 - vii. The Appellant was of the view that the Learned Trial Court failed to appreciate the Plaintiff's Exhibit 10 which demonstrated that the Respondent's property known as LR. No. Transmara/Kerinkani/278 only shared a common boundary with the properties known as LR. No. Kerinkani/678, 279 and 116 and not the suit property.
 - viii. In essence therefore, the Appellant's pleaded that the Learned Trial Magistrate misdirected himself on the facts, issues and evidence placed before the Trial Court and thereby erred in fact and law by arriving at a decision that was not supported by the evidence adduced before the Trial Court.
3. Upon filing and service of the present Appeal, the Record of Appeal was duly admitted for hearing on the 20.11.2024 and parties given directions to file their submissions.
 4. The Appellants filed their submissions as well as the Respondents.
 5. The Court in this proceeding is exercising its appellate jurisdiction over the Trial Court proceedings which resulted to the Judgement and Decree pronounced on the 29.02.2024.
 6. In the case of *Selle & Another-versus- Associated Motor Boat Co.ltd & Others (1968) EA 123* the Court of Appeal expounded on the jurisdiction of a first appellate Court as follows;-

“A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the



appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.”

7. The jurisdiction of this Court sitting as the first Appellant Court having being defined in the above decision, the Court will now proceed to relook and re-evaluate the facts and evidence placed before the Trial Court with a view of arriving at its own independent decision on whether or not to allow the Appeal.
8. To begin this exercise, the Court has perused the Complaint dated 12.07.2023 which was filed by the Appellant before the Trial Court.
9. In the Complaint dated 12.07.2023 filed by the Appellant before the Trial Court, the Appellant sought for the following Orders; -
 - A. A declaration that the Plaintiff is the registered and/or lawful owner of the property known as LR. No. Transmara/Kerinkani/678 measuring approximately 21 Hectares or thereabout.
 - B. A declaration that the portion of LR. No. Transmara/Kerinkani/678 measuring approximately 4.2 Hectares or thereabout which is being claimed by the Defendant (Respondent) herein is part of what comprises LR. No. Transmara/Kerinkani/678.
 - C. An Order of eviction against the Defendant, his agents and/or servants from the property known as LR. No. Transmara/Kerinkani/678.
 - D. A permanent injunction restraining the Defendant either by himself, agents, servants and/or anyone claiming under the Defendant from entering upon, re-entering, trespassing onto, cultivating, building on, grazing on, interfering with and/or in any other manner dealing with the suit property that is LR. No. Transmara/Kerinkani/678 and/or any portion thereof.
 - E. General damages for Trespass.
 - F. Interest on (v) hereof at Court rates.
 - G. Costs of this suit be borne by the Defendant.
 - H. Such further and/or other reliefs as the Honourable Court may deem fit and expedient so to grant.
10. The Appellant’s Complaint dated 12.07.2023 was duly served on the Respondent who opposed it by filing a Statement of Defence dated 18.09.2023.
11. After the Respondent filed his Statement of Defence dated 18.09.2023, the matter was certified ready for hearing on the 04.12.2023.

Appellant’s Case Before Trial Court

12. The Appellant’s case before the Trial Court began on the 04.12.2023 with the testimony of one Mr. Ashwin Ramji Gudka who was marked as PW 1.
13. PW 1 introduced himself as a Director of the Plaintiff and therefore authorized to attend court and testify on its behalf.
14. PW 1 confirmed to the Trial Court that he had prepared a witness statement dated 12.07.2023 of which he adopted the same as his evidence in chief.



15. PW 1 informed the Trial Court that the Appellant's claim against the Respondent was a portion of 4.2 Hectares.
16. PW 1 testified that according to a Surveyor's Report to be presented before the Trial Court, it was discovered that the Defendant was in occupation and/or use of about 4.2 Hectares which are within the suit property.
17. PW 1 then produced the Plaintiff's Exhibit 1- 10 in support of his testimony before the Trial Court.
18. At the end of producing the above-mentioned Exhibits, PW 1 sought the Trial Court to declare that the portion measuring approximately 4.2 Hectares currently occupied by the Respondent was within the suit property and should be returned to him forthwith.
19. At the end of this examination in chief, PW 1 was cross-examined by the Defence Counsel.
20. On cross-examination, PW 1 informed the Court that initially, the suit property was purchased by his son from one Philip Ole Ntwala.
21. However, PW 1 did not have the Agreement For Sale between the person known as Philip Ole Ntwala and his son.
22. After the acquisition of the suit property by PW 1's son, he purchased the same from the son.
23. PW 1 informed the Trial Court that all entries of ownership are contained in the Green Card of the suit property which had been duly produced before Court.
24. PW 1 stated that according to his knowledge, the sons were registered as owners of the suit property in the year 2014.
25. Later on, a Surveyor was directed to confirm the extent and acreage of the suit property.
26. The main reason the Surveyor was directed to establish the boundaries and extent of the suit property was to enable the Appellant fence the same.
27. As the fencing exercising was on going, it was discovered that the portion purchased by the Appellant was less than what was recorded in the Title Deed.
28. It is on the basis of this discovery that a Boundary Dispute was registered by the Appellant before the Land Registrar in the year 2018.
29. PW 1 admitted that since the dispute on the boundaries arose with the Respondent, he had not contacted the original vendor Philip Ole Ntwala to demand for the 4.2 Hectares that was missing.
30. PW 1 stated that the portion of 4.3 Hectares which is in dispute had not been fenced and no one was using the same.
31. PW 1 insisted that at the time of purchasing the suit property, the Original Owner Philip Ole Ntwala availed the correct Title Deed and the relevant maps in support of the size of land therein.
32. PW 1 therefore insisted that he was claiming what is a portion of the suit property measuring 4.2 Hectares which was unlawfully being occupied and/or used by the Respondent herein.
33. At the end of this cross-examination, PW 1 was re-examined by his Counsel.
34. PW 1 reiterated that he obtained all the maps from the offices of the Land Registrar and Surveyor.



35. PW 1 clarified that when the suit property was purchased in the year 2014, the Appellant started slowly fencing it and that is why he did not discover the anomaly until much later.
36. PW 1 admitted that in the year 2014 is when the suit property was purchased, the Appellant did not engage a surveyor to confirm the actual acreage but according to the Title Deed, the size was 21 Hectares.
37. At the end of this re-examination, PW 1 was discharged from the witness stand.
38. The Appellant's second witness before the Trial Court was one MR. JACOB OBOI who was marked as PW 2.
39. PW 2 informed the Trial Court that he had prepared, signed and filed a witness statement dated 12.07.2023 of which he adopted as his evidence in chief.
40. According to PW 2, the original seller pointed out to the Appellant all the boundary markings of the suit property.
41. However, this exercise was undertaken without a Surveyor being present and the Appellant only used the Mutation Map that was available.
42. PW 2 concluded his evidence in chief by stating that later in the year 2018, it was discovered that a portion of 4.2 Hectares was missing from the suit property and in fact there was no access into the same.
43. On cross-examination, PW 2 stated that he did not have the Agreement For Sale of the suit property before the Trial Court.
44. PW 2 further admitted that during the initial ground visit, the Appellant did not engage a surveyor.
45. PW 2 informed the Trial Court that at the moment, there was no access road into the suit property on the ground.
46. PW 2 confirmed that after the discovery that some land was missing, the Appellant did not make any demands to the original seller to demand for the same.
47. PW 2 nevertheless was of the view that the portion of 4.2 Hectares that was missing is being occupied by the Respondent.
48. PW 2 averred that the 4.2 Hectares had in fact been fenced off by the Respondent herein.
49. As a result of this unlawful occupation and use of the 4.2 Hectares by the Respondent, the fencing of the suit property was not completed.
50. Nevertheless, PW 2 confirmed to the Trial Court that the physical boundaries on the disputed portion are visible.
51. PW 2 stated that the original plot before sub-division and creation of the resultant plots including the suit property was known as Plot No. 121.
52. PW 2 concluded his cross-examination by indicating that the Appellant purchased the suit property after the sub-division and titling had been completed.
53. On re-examination, PW 2 reiterated that Plot No. 278 and Plot No. 678 share a boundary.
54. PW 2 again stated that the suit property did not have any access road on the ground.



55. PW 2 informed the Trial Court that the Respondent had fenced the portion measuring approximately 4.2 Hectares.
56. At the end of this re-examination, PW 2 was discharged from the witness stand.
57. The Appellant's Counsel then sought for summons to the Land Registrar, Transmara and the Land Surveyor Transmara to come and produce the Ground Reports produced as Plaintiff's Exhibit 9 & 10 respectively.
58. The Defence hearing commenced with the testimony of the Defendant Samwel Riopa Kinyei who was marked as DW 1.
59. The Defendant informed the Trial Court that he had prepared a witness statement dated 20.09.2023 of which he adopted as his evidence in chief.
60. The Defendant stated that the property known as LR. No. Transmara/Kerinkani/278 registered in his name borders the Plaintiff's suit property.
61. The Defendant testified that he had purchased the property known as LR. No. Transmara/Kerinkani/278 from one Philip Ole Mope.
62. However, before purchasing the property known as LR. No. Transmara/Kerinkani/278, the Defendant had another portion of land which he amalgamated with the said property.
63. The Defendant further stated that later on, the Plaintiff purchased the suit property and at the time of taking possession, the Defendant was already in occupation of the disputed portion measuring 4.2 Hectares.
64. The Defendant confirmed to the Trial Court that he is the one that fenced off the disputed 4.2 Hectares in dispute and the Vendor who sold him the land did not have any issue with the occupation of the said portion.
65. The Defendant nevertheless pointed out that according to the Mutations presented by the Plaintiff, there is an access road through the disputed portion of land to the suit property but the said access road is not there on the ground.
66. Consequently, the Defendant informed the Trial Court that the access road being claimed by the Plaintiff through the Mutations does not pass through his property known as LR. No. Transmara/Kerinkani/278.
67. The Defendant informed the Trial Court that he had purchased a portion of 19 acres from the person known as Philip Ole Mope but in toto the portion measures about 50 acres.
68. At the end of the evidence in chief, the Defendant produced the following documents as his Exhibits in support of his case; -
DW 1 Exhibit 1- Copy of a Title Deed for the property known as LR. No. Transmara/Kerinkani/278.
DW 1 Exhibit 2- Copy of an official Search of LR. No. Transmara/Kerinkani/278.
69. On cross-examination, the Defendant reiterated that he fenced the portion of land that he purchased long time ago using barbed wire.
70. According to the Defendant, the property known as LR. No. Transmara/Kerinkani/278 was fenced way back in 2001.



71. The Defendant reiterated that the property known as LR. No. Transmara/Kerinkani/278 was purchased from one Philip Ole Mope but could not produce the Agreement For Sale.
72. The Defendant admitted that indeed, the District Land Surveyor and the District Land Registrar came on the ground to resolve the boundary dispute.
73. However, the Defendant denied that there was an access road to the suit property through his property known as LR. No. Transmara/Kerinkani/278.
74. The Defendant informed the Trial Court that before he purchased the property known as LR. No. Transmara/Kerinkani/278, he used a Surveyor known as Langat to identify the land and another Surveyor known as Korir.
75. In concluding the cross-examination, the Defendant stated that he is in occupation of the disputed portion measuring 4.2 Hectares which is his lawful portion of land and the Plaintiff should claim any portion missing from his title from the person who sold him the suit property.
76. On re-examination, the Defendant stated that the Land Registrar's Report shows that the Plaintiff has fenced the entire suit property and the Defendant had also fenced the same land.
77. The Defendant further testified that from the Land Registrar's Report, the Plaintiff's claim is for a portion of land and not a boundary dispute.
78. Consequently, the Land Surveyor's Report does not clearly indicate where the Defendant's property is located.
79. At the end of this re-examination, the Defendant was discharged from the witness stand thereof.
80. The second Defence witness was one Philip Ole Twala who was marked as DW 2.
81. DW 2 also informed the Trial Court that he had prepared a witness statement dated 18.09.2023 and adopted the same as his evidence in chief.
82. DW 2 confirmed that indeed, he was the one that sold the property known as LR. No. Transmara/Kerinkani/278 to the Defendant herein.
83. However, at the time of selling the property known as LR. No. Transmara/Kerinkani/278 to the Defendant, the adjudication process was still ongoing.
84. DW 2 testified that he only sold a portion of his land to the Defendant who then amalgamated the same as one portion of land which he then took possession and fenced.
85. DW 2 averred that the Defendant's boundary is well demarcated by trees that have been planted therein.
86. DW 2 therefore stated to the Trial Court that he did not have any dispute with the Defendant herein.
87. Similarly, DW 2 admitted that he sold another portion of land to the Plaintiff herein which was also fenced by the Plaintiff.
88. Since selling a portion of his land to the Plaintiff, DW 2 had never received any demand letter or any dispute about the portion of land owned by the Plaintiff.
89. According to DW 2, the Plaintiff's suit property does not reach the road.
90. Consequently, DW 2 was of the considered view that the Map dated 14.04.2014 presented by the Plaintiff does not reflect the ground occupation.



91. DW 2 informed the Trial Court that he was not present when the Land Registrar and Land Surveyor visited the ground.
92. Nevertheless, DW 2 denied the allegations that the Defendant had taken a portion of the Plaintiff's suit property.
93. In closing his evidence in chief, DW 2 was of the opinion that the disputed portion of land belongs to the Defendant and not the Plaintiff.
94. On cross-examination, DW 2 confirmed that he sold 19 acres to the Defendant and 37 acres to the Plaintiff.
95. DW 2 denied selling 21 Hectares to the Plaintiff herein and insisted that he duly pointed out the 37 acres sold to the Plaintiff physically on the ground.
96. DW 2 testified that he had also shown the Defendant his portion of 19 acres which the Defendant also fenced.
97. DW 2 informed the Trial Court that the Plaintiff's portion of land did not reach the road but had an access road through Plot No. 76 and 121.
98. DW 2 however admitted that he did not have any sketch map and/or mutation of his original land as he was selling the same to the Plaintiff and the Defendant.
99. DW 2 also admitted that he did not have any other map contrary to the one presented by the Plaintiff dated 14.04.2014.
100. DW 2 denied executing a Transfer to the Plaintiff but simply stated that he gave him a title deed.
101. DW 2 therefore insisted that he sold the Plaintiff 37 acres which the Plaintiff has never complained that he has received less land.
102. On re-examination, DW 2 stated that both the Plaintiff and the Defendant known where their boundaries are located.
103. According to DW 2, both parties are in full occupation and use of their portions of land and the Plaintiff has never made a complaint to him.
104. DW 2 denied that he was told by the Plaintiff that his suit property would stretch to the main road.
105. DW 2 closed his evidence by stating that he did not take part in the drawing of the Map presented by the Plaintiff.
106. At the end of this re-examination, DW 2 was discharged from the witness box by the Trial Court.
107. The third witness was Lateipa Mpatiai Ole Ngete who was marked as DW 3.
108. DW 3 informed the Trial Court that he had prepared and filed a witness statement dated 18.09.2023 which he adopted as his evidence in chief.
109. DW 3 stated that the Defendant had demarcated his property by planting trees around it and fencing the same.
110. DW 3 confirmed that the Defendant had purchased a portion of 19 acres from DW 2 and they had never had issues regarding the same.



111. DW 3 testified before the Trial Court that he resides just about 2 kilometres from the Plaintiff's property.
 112. According to DW 3, there has never been a dispute between the Plaintiff and the Defendant over any portion of land.
 113. Consequently, DW 3 was of the view that the allegation by the Plaintiff that the Defendant is using 10 acres within the suit property was not true.
 114. DW 3 concluded his evidence in chief by stating that if there was any dispute on the portions sold to the Defendant and the Plaintiff, the same should be brought to the attention of the Seller.
 115. On cross-examination, DW 3 stated that he was not present when the Plaintiff purchased his portion of land and therefore could not authoritatively identify the site that the suit property was located.
 116. Nevertheless, the DW 3 insisted that the Plaintiff's suit property does not reach the main road.
 117. DW 3 confirmed that he was present when the Defendant purchased a portion of 19 acres from DW 2 because the Vendor was his neighbour.
 118. DW 3 further averred that he was present when the Land Registrar and the Land Surveyor visited the ground and could not recall that the Defendant accepted to give any access road the Plaintiff's suit property.
 119. On re-examination, DW 3 reiterated that both the Plaintiff's and Defendant's properties were well demarcated on the ground.
 120. At the end of this re-examination, DW 3 was discharged from the witness box by the Trial Court and the Defence closed their case.
 121. The Trial Court then proceeded to direct the parties to file their final submissions.
 122. The Appellant filed their final submissions dated 26.02.2024 while the Respondent filed his final submissions dated 14.02.2024.
 123. This Court has perused the pleadings by the parties, the testimonies of the witnesses, the documentary evidence produced in Court and the submissions filed therein and identifies the issues for determination as follows; -
 - Issue No. 1- What is the acreage provided for relating to the suit property owned by the plaintiff?
 - Issue No. 2- Is the acreage of the suit property provided for under the mutations and/or maps provided by the land registrar & land surveyor?
 - Issue No. 3- Is the defendant in occupation of the 4.2 hectares within the suit property lawful or not?
 - Issue No. 4- Is the plaintiff entitled to the prayers sought in the plaint or not?
 - Issue No. 5- Is the present appeal merited?
 - Issue No.6- Who bears the costs of the present appeal?
 124. The above issues having been duly identified for determination, the same will now be discussed as follows; -
- Issue No. 1- What is the acreage provided for relating to the suit property owned by the plaintiff?**
125. The first issue for determination is the amount of acreage that the suit property is supposed to have.



126. According to the Plaintiff, the suit property herein measures about 21 Hectares as contained in the Certificate of Title issued on the 25.02.2022 and produced as Plaintiff's Exhibit 4.
127. To verify this acreage, the Plaintiff further produced the certified Green Card of the suit property as Plaintiff's Exhibit 5.
128. The Defendant herein did not dispute the acreage of the suit property in his pleadings and/or testimony.
129. However, DW 2 who was the Vendor who sold the suit property to the Plaintiff disputed the acreage that the Plaintiff claimed to have purchased.
130. DW 2 testified that the Acreage which the Plaintiff purchased was 37 acres (13.7 Hectares) only and not 21 Hectares as alleged.
131. This Court has in fact carefully perused the Title Deed issued on the 25.02.022 which was produced as Plaintiff's Exhibit 4 and the Plaintiff's Exhibit 5 which is the Green Card of the suit property.
132. The acreage of the suit property on both the Title Deed and the Green Card provides for 21 Hectares.
133. The Green Card further confirms that DW 2 who was the Vendor to two persons known as Bhavin A. Gudka and Akash K. Gudka who in turn transferred the same to the Plaintiff sold a total of 21 Hectares as a whole and not a sub-divided portion measuring 37 acres.
134. The ownership of DW 2 was recorded on the 20.08.2014 and thereafter, the entire suit property was transferred to Bhavin A. Gudka and Akash K. Gudka on the 21.08.2014 and lastly recorded to the Plaintiff's name on 25.02.2022 once again as the entire property.
135. Consequently, the allegation by DW 2 that the Plaintiff's only purchased 37 acres and not 21 Hectares is not true and there is no evidence to that effect.
136. In essence therefore, this Court hereby makes a finding that the actual acreage of the suit property owned by the Plaintiff is 21 Hectares as provided in the Title Deed and Green Card thereof.

Issue No. 2- Is the acreage of the suit property provided for under the mutations and/or maps provided by the land registrar & land surveyor?

137. The second issue for determination is where the acreage provided in the suit property is actually supported by any mutations and/or maps from the Ministry of Lands or not.
138. The Plaintiff herein pleaded and testified that the acreage of 21 Hectares in the Title Deed and Green Card is actually supported by the Map produced before the Trial Court through the Ground Reports produced as Plaintiff's Exhibits 9 & 10.
139. The Plaintiffs' witnesses testified that indeed, currently the available acreage on the suit property is 16 Hectares and the balance of 4.2 Hectares is actually in occupation and use of the Defendant herein.
140. The disputed portion of 4.2 Hectares seems to have been fenced by both the Plaintiff and Defendant in an effort to retain the same.
141. The Defendant on the other hand pleaded and testified that the disputed portion of land is within the property known as LR. No. Transmara/Kerinkani/278.



142. The Defendant's further testimony was that he has been in occupation and use of the disputed portion measuring 4.2 Hectares from way back when he purchased a portion of 19 acres from DW 2 and fenced the same.
143. The Defendant's view was that the Maps and/or Mutations held by the offices of the Land Registrar and the Land Surveyor were not reflective of the ground occupation of the property known as LR. No. Transmara/Kerinkani/278.
144. The Defendant pointed out that for example, the Maps and/or Mutations held by the offices of the Land Registrar and the Land Surveyor indicated that there was an access road through LR. No. Transmara/Kerinkani/278 which in fact does not exist on the ground and the Defendant has never given consent of such an access to the Plaintiff.
145. Consequently, the Defendant was of the view that the said Maps and/or Mutations held by the Land Registrar and the Land Surveyor can not be applied and/or used to alter the boundaries and/or locations of the suit property and the Defendant's property known as LR. No. Transmara/Kerinkani/278.
146. The dispute regarding this 4.2 Hectares was then referred to the Land Registrar and the Land Surveyor who indeed visited both LR. No. Transmara/Kerinkani/678 and 278.
147. The Land Registrar filed his Ground Report dated 04.11.2018 which was produced as Plaintiff's Exhibit 9.
148. In the Land Registrar's Ground Report dated 04.11.2018, it was confirmed that the Plaintiff had actually fenced the entire suit property including where it borders LR. No. Transmara/Kerinkani/278, 279 and 116.
149. Nevertheless, the acreage that was covered in the fencing was less than the 21 Hectares which was at variance with the Maps and Mutations that create the suit property.
150. However, if the disputed portion of 4.2 Hectares which had been occupied by the Defendant is added to the fenced portion, then the total portion of the suit property would be 20.37 Hectares.
151. The second Ground Report by the Land Surveyor dated 08.11.2008 which was produced as Plaintiff's Exhibit 10 also provided similar facts.
152. According to the Government Land Surveyor, the acreage fenced by the Plaintiff was 16.17 Hectares but if you added the disputed portion of 4.2 Hectares as per Maps and Mutations, then the same would amount to 21.0 Hectares.
153. Based on these two facts, the Land Registrar's Report dated 04.11.2018 made a conclusion that the dispute between the Plaintiff and the Defendant was not about boundary but ownership of the 4.2 Hectares currently being occupied by the Defendant.
154. This Court's interpretation of the above conclusion by the Land Registrar and the Land Surveyor is that the Plaintiff's fencing did not align with the Maps and/or Mutations held in their offices.
155. The observations and findings by the Land Registrar and the Land Surveyor were that the portion of 4.2 Hectares which had been fenced by the Defendant was in fact to be part of the suit property in line with the Maps and Mutations held by the Land Registrar and Land Surveyor.



156. By making this observation, the Land Registrar made the conclusion that there was no boundary dispute between the suit property registered in the name of the Plaintiff and LR. No. Transmara/Kerinkani/278 owned by the Defendant.
157. The Defendant's justification is that he has been in occupation and use of the disputed 4.2 Hectares for a long period of time cannot override the provisions of Section 18 of the [Land Registration Act](#), No. 3 of 2012 which states as follows; -
- “(1) Except where, in accordance with Section 20, it is noted in the Register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation of the parcel.”
158. If indeed the Defendant upon taking possession of the disputed 4.2 Hectares planted trees and even fenced the same, then it is his duty to make an application for the Maps and Mutations held by the Land Registrar and the Land Surveyor demarcating his property known as LR. No. Transmara/Kerinkani/278 to be reviewed and the boundary lines altered to facilitate the preparation of new editions of the cadastral maps in line with Section 16 of the [Land Registration Act](#), No. 3 of 2012.
159. However, before such an exercise is done, then the existing Maps, Mutations and/or Cadastral Maps relating to the suit property must be adhered to and the acreage of 21 Hectares contained therein preserved for the use and benefit of the Plaintiff.

Issue No. 3- Is the defendant in occupation of the 4.2 hectares within the suit property lawful or not?

160. In this issue, this Court having made a finding that the Maps, Mutations and/or the Cadastral Maps relating to the suit property provide for an acreage of 21.0 Hectares, it is clear that the occupation and use of the 4.2 Hectares by the Defendant is unlawful and illegal and contravenes the Appellant's ownership rights under Section 24 of the [Land Registration Act](#), No. 3 of 2012.

Issue No. 4- Is the plaintiff entitled to the prayers sought in the plaint or not?

161. Based on the determination of Issues N0.1, 2 and 3, this Court is of the considered view and finding that the Appellant herein was entitled to Prayers 1, 2,3 and 4 of the Plaint dated 12.07.2023.
162. Similarly, the Appellant was entitled to Costs before the Trial Court.

Issue No. 5- Is the present appeal merited?

163. Indeed, the Appeal herein is merited as the Trial Court erred in failing to consider the acreage provided by the Mutations and/or Cadastral Maps relating to LR. No. Transmara/Kerinkani/678 as well as the Ground Reports represented by both the Land Registrar and the Land Surveyor dated 04.11.2018 and 08.11.2008 thereby arriving at an erroneous determination that the disputed 4.2 Hectares occupied by the Defendant were in fact part of LR. No. Transmara/Kerinkani/278.
164. The Trial Court further failed to apply the provisions of Section 18 of the [Land Registration Act](#), No. 3 of 2012 which expressly provide for the manner in which the acreage of any registered portion of land should be ascertained and located by the Land Registrar and Land Surveyor on the ground.

Issue No.6- Who bears the costs of the present appeal?

165. On the issue of costs, the Appellant herein has been successful in the Appeal and the Respondent will bear the costs of the said Appeal.



Conclusion

166. In conclusion thereof, this Court hereby makes the following Orders in determination of the present Appeal;-

- A. The Memorandum of Appeal dated 22.03.2024 is merited.
- B. The judgement & decree of Hon.W.C Waswa issued on the 29.02.2024 be and is hereby reviewed & set-aside.
- C. The plaint dated 12.07.2023 is hereby allowed in the following manner; -
 - I. A declaration be and is hereby made that the plaintiff herein is the lawful registered owner of the property known as LR. No. Transmara/Kerinkani/678 measuring approximately 21 acres thereof.
 - II. The portion measuring approximately 4.2 hectares being claimed and occupied by the defendant is part of the plaintiff's property known as LR. No. Transmara/Kerinkani/678.
 - III. The defendant be & is hereby ordered to yield vacant possession and/or occupation of the disputed 4.2 hectares within LR. No. Transmara/Kerinkani/678 to the plaintiff herein within 60 days from the date of this judgement failure to which an order of eviction will automatically issue upon expiry of the 60 days period and the deputy registrar, kilgoris elc is directed to issue the same thereafter.
 - IV. A permanent injunction be and is hereby issued against the defendant from entering upon, re-entering, trespassing onto, cultivating, building on, grazing on, interfering with and/or in any other manner dealing with the suit property known as LR. No. Transmara/Kerinkani/678 and/or any portion thereof.
 - V. The respondent will bear the costs of this appeal as well as the costs of the litigation before the trial court.

DATED, SIGNED & DELIVERED VIRTUALLY AT ELDORET ELC ON DAY THIS 4TH OF MARCH 2025.

EMMANUEL.M. WASHE

JUDGE

In the presence of:

Court Assistant: Brian

Advocates for the Appellant: Mr. G. Otieno holding brief Ms. Ochwal

Advocates for the Respondent: Mr. Shira

