



**Kanchuel v Kanchuel & another (Environment and Land Case
463 of 2017) [2025] KEELC 5289 (KLR) (14 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5289 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND CASE 463 OF 2017**

MN KULLOW, J

JULY 14, 2025

BETWEEN

JOHN ORETU OLE KANCHUEL PLAINTIFF

AND

PHILIP LEMISO KANCHUEL 1ST DEFENDANT

WILSON MEITEKINI KANCHUEL 2ND DEFENDANT

JUDGMENT

A. Plaintiff's Claim

1. By a plaint dated 17th November 2010 the Plaintiff sued the 1st and 2nd Defendants seeking the following reliefs;
 - a. Declaration that the Plaintiff is the Bona- fide and registered owner of LR No. Trans-Mara/Olalui/12.
 - b. An Order of Eviction do issue against the Defendants by themselves agents and/or servants in respect of LR No. Trans-Mara/Olalui/12.
 - c. Permanent Injunction restraining the Defendants either by themselves, agents, servants and/or anyone claiming under the Defendants, from re-entering, trespassing onto, building, cultivating, grazing, interfering with and/or in any other manner, whatsoever dealing with the suit land, that is LR No. Trans-Mara/Olalui/12.
 - d. General Damages for Trespass
 - e. Costs of this suit be borne by the Defendants.
 - f. Such further and/or other relief as the Honourable Court may deem fit and Expedient to grant.



2. The Plaintiff averred that he is the registered proprietor of LR No. Trans-Mara/Olalui/12 (the suit property) having obtained title following the dissolution and subdivision of Olalui Group Ranch. He stated that the Defendants, being relatives, were also allocated separate parcels within the former group ranch, namely LR Nos. Trans-Mara/Olalui/113 and 114 respectively.
3. The Plaintiff alleged that the Defendants unlawfully entered and occupied a portion of the suit property, thereby interfering with his proprietary rights. He relied on a survey report dated 27th October 2009 and a sketch map to substantiate his claim.
4. The Plaintiff further asserted that he sought assistance from the Land Registry and the District Surveyor, but the Defendants refused to vacate the disputed portion, prompting him to institute this suit.
5. It was the Plaintiff's case that despite demand and issuance of a notice of intention to sue the Defendants had failed to make good his claim thus rendering the suit necessary.

B. Defendants' Response and Counterclaim

6. The Defendants filed a joint defence and counterclaim dated 30th November 2010. They denied trespassing on the Plaintiff's land and asserted that they have always occupied LR Nos. Trans-Mara/Olalui/113 and 114.
7. They contended that any dispute arose from the failure of proper ground survey and that boundaries in Olalui adjudication section remain unfixed. They further claimed that they have been in occupation of the disputed land for over four decades, long before the issuance of titles.
8. In the alternative, they claimed that if the disputed portion falls within LR No. 12, then the Plaintiff holds it in trust for them. They argued that family land was historically held communally, and their occupation should be respected.
9. They challenged the validity of the Plaintiff's survey report, arguing that it was conducted without notice to them and lacked legal sanction from the Land Registrar.

C. Trial of The Suit

10. The trial commenced with the Plaintiff testifying on his own behalf. He produced a title deed issued in his name for LR No. Trans-Mara/Olalui/12 and relied heavily on a survey report dated 27th October 2009 and a sketch map to show that the Defendants had trespassed onto his land. He stated that he had called upon the District Surveyor and the Land Registrar to assist in resolving the dispute. However, under cross-examination, the Plaintiff conceded that the survey was aerial and had not been conducted on the ground. He also acknowledged that the Defendants were not involved in the survey exercise.
11. The Plaintiff called two additional witnesses: the District Land Surveyor (PW2) and the Land Registrar (PW3). PW2 testified that although a sketch map and report were prepared, the disputed area was not physically visited, and no ground demarcation was done. PW2 further stated that the Olalui section, being formerly a group ranch, had multiple pending boundary disputes and lacked final boundary confirmation.
12. PW3, the Land Registrar, corroborated that his office had not issued instructions for the specific survey relied on by the Plaintiff and that no official ground verification had been sanctioned. He testified that for such disputes, the proper recourse is a boundary determination under Section 18 of the *Land Registration Act*, to be conducted jointly by the parties, the Land Registrar, and the Survey Department.



13. The Defendants testified in their own defence and stated that they were in occupation of LR Nos. 113 and 114, respectively, and had never encroached on LR No. 12. They emphasized their long-standing occupation and use of the land, having established homes and conducted farming for over 40 years.
14. They also denied any knowledge or participation in the survey conducted by the Plaintiff and asserted that the Plaintiff's report was self-serving and unverified. They maintained that if there was any overlap, it was a result of mapping errors during the adjudication and allocation stages.
15. On the counterclaim, the Defendants argued that their familial relationship with the Plaintiff and historical shared occupation of the land necessitated recognition of a trust over the disputed portion. However, no documents or testimonies were tendered to demonstrate that the Plaintiff held the land in trust or that any such agreement or representation existed.

D. Issues for Determination

16. The court has considered the pleadings, the evidence and documents on record in this matter. The court is of the opinion that the following are the key issues which arise for determination herein;
 - a. Whether the Plaintiff is the registered and lawful proprietor of LR No. Trans-Mara/Olalui/12
 - b. Whether the Defendants have unlawfully encroached upon the suit land
 - c. Whether the Plaintiff holds any portion of the suit land in trust for the Defendants
 - d. Whether the Plaintiff is entitled to the reliefs sought
 - e. Whether the Defendants' counterclaim has merit

E. Analysis and Determination

Whether the Plaintiff is the registered and lawful proprietor of LR No. Trans-Mara/Olalui/12

17. The Plaintiff produced a certified copy of the title deed issued on 10th May 1995 showing him as the registered proprietor of LR No. Trans-Mara/Olalui/12.
18. Section 26(1) of the *Land Registration Act* provides that a certificate of title shall be taken by the court as conclusive evidence of proprietorship unless it is shown that the registration was obtained through fraud or misrepresentation.
19. The Defendants did not challenge the authenticity of the title nor allege that it was obtained unlawfully. In *Henry Muthee Kathurima v Commissioner of Lands & Another* [2015] eKLR, the Court of Appeal affirmed that the title deed is prima facie evidence of ownership and shall not be questioned unless procured through illegality.
20. The Court therefore finds that the Plaintiff is the lawful registered proprietor of LR No. Trans-Mara/Olalui/12.

Whether the Defendants have unlawfully encroached upon the suit land

21. The Plaintiff alleged that the Defendants had trespassed onto a portion of LR No. 12, relying on a survey report dated 27th October 2009 and a corresponding sketch map. He argued that the report confirmed that part of the Defendants' occupation extended into his land.



22. However, evidence from the District Surveyor (PW2) and the Land Registrar (PW3) revealed that the survey was not conducted on the ground, did not involve the Defendants, and was not sanctioned by the Land Registry.
23. Under Section 18(2) of the *Land Registration Act*, the law expressly provides that the
“court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with that section.”
24. Further, Section 19 mandates the Land Registrar, upon any question arising as to the position of a boundary, to determine and fix the boundary on the ground after giving all interested parties an opportunity to be heard.
25. If indeed the Plaintiff’s allegation concerns encroachment or trespass arising from a boundary dispute, the proper forum for resolution is not the court but the Land Registrar, who has the statutory mandate to determine such issues administratively. The jurisdiction of this Court can only be invoked after that process has been undertaken and the boundaries conclusively fixed.
26. In the present case, it is not disputed that the Olalui adjudication section has a history of unresolved boundary demarcations, and there is no evidence that the boundaries of LR Nos. 12, 113, and 114 were physically fixed on the ground. As such, the Plaintiff has failed to establish any encroachment to the required standard of proof. His claim remains speculative until verified through a lawful boundary identification exercise under the *Land Registration Act*.

Whether the Plaintiff holds any portion of the suit land in trust for the Defendants

27. The Defendants, in their counterclaim, alleged that if the disputed portion of land is ultimately determined to fall within LR No. 12, then the Plaintiff must be deemed to hold that portion in trust for them. Their claim is based on historical occupation, familial ties, and the communal nature of the Olalui Group Ranch.
28. According to Black’s Law Dictionary, 9th Edition, a trust is defined as:
“The right enforceable solely in equity, the beneficial enjoyment to which another holds a legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”
29. A customary trust is recognized in law and constitutes a valid claim to land. Under Section 28(b) of the *Land Registration Act*, 2012, customary trusts are categorized as overriding interests, meaning they bind the registered proprietor even if not reflected in the title. The provision states:
“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—(b) trusts including customary trusts.”
30. Furthermore, Section 25(1)(b) of the same Act provides that the rights of a registered proprietor are subject to such overriding interests. Therefore, registration of land in a person’s name does not extinguish valid claims under customary trust, provided they are proved.



31. That said, the existence of a customary trust is not presumed. It is a matter of fact and evidence, not inference. In *Mbothu & Others v Waitimu & 11 Others* (1980) KLR 171, the Court of Appeal emphasized:
- “The law never implies, the Court never presumes a trust but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”
32. Likewise, in *Salesio M’Itonga v M’Ithara & 3 Others* (2015) eKLR, the Court held:
- “It is trite law that trust is a question of fact and has to be proved by evidence.”
33. In the present case, the Defendants have not presented any concrete evidence documentary or oral to support the existence of a trust. There are no minutes from the group ranch, declarations, or agreements indicating that the Plaintiff holds any part of the suit land on their behalf. A familial relationship and long-standing occupation, while relevant, are not in themselves sufficient to establish a trust in the absence of clear, consistent, and credible evidence.
34. Accordingly, the Court finds that the Defendants have failed to discharge the burden of proving that the Plaintiff holds any portion of LR No. 12 in trust for them. There is no legal or factual basis for the Court to make such a finding.

Whether the Plaintiff is entitled to the reliefs sought

35. The Plaintiff seeks various remedies: a declaration of ownership, an order of eviction, a permanent injunction, and general damages for trespass. As the registered proprietor of LR No. 12, the Plaintiff is entitled to a declaration confirming his ownership under Section 26(1) of the *Land Registration Act*, which provides that a certificate of title is prima facie evidence of proprietorship.
36. However, the Plaintiff’s additional claims for eviction, injunction, and damages are founded on the allegation that the Defendants have unlawfully occupied or trespassed onto a portion of the suit land. As already discussed, this allegation is rooted in a dispute over the precise boundary between LR Nos. 12, 113, and 114.
37. Pursuant to Section 18(2) of the *Land Registration Act*, the Court has no jurisdiction to entertain any action or proceeding concerning a boundary dispute unless the same has first been determined by the Land Registrar. Section 19 further provides that the Land Registrar is responsible for physically fixing and certifying boundaries, after hearing affected parties.
38. Given that the boundary has not yet been determined on the ground, and that the Plaintiff has failed to demonstrate a clear act of trespass or unlawful occupation independent of the boundary uncertainty, the Court finds that the claims for eviction, injunctive relief, and general damages for trespass are premature.
39. Although trespass is actionable per se, a plaintiff must first establish that the defendant has interfered with a clearly defined proprietary boundary. In the absence of such a determination by the Land Registrar, there is no legal basis for awarding general damages or granting injunctive or eviction orders.
40. Accordingly, the Plaintiff is only entitled to a declaration of ownership as the registered proprietor of LR No. 12. The other prayers for relief are declined at this stage, without prejudice to the Plaintiff’s



right to pursue appropriate remedies after the boundary is conclusively determined in accordance with the [Land Registration Act](#).

Whether the Defendants' counterclaim has merit

- 41. The counterclaim is wholly premised on the allegation that the Plaintiff holds the suit property, or part thereof, in trust for the Defendants. As discussed above, the law requires that a trust be specifically pleaded and proved. There was no proof of any express or implied trust arising from family arrangements, customary rights, or group ranch documentation.
- 42. The counterclaim is thus unsubstantiated in both fact and law and must fail.

E. Final Orders

- 43. Having carefully considered the pleadings, evidence, and applicable law, the Court arrives at the following conclusions:
 - a. A declaration is hereby issued that the Plaintiff, John Oretu Ole Kanchuel, is the registered and lawful proprietor of land parcel LR No. Trans-Mara/Olalui/12, pursuant to Section 26(1) of the [Land Registration Act](#).
 - b. The Plaintiff's prayers for eviction, permanent injunction, and general damages for trespass are declined at this stage for want of conclusive proof of unlawful encroachment. These claims are premature and contingent upon an official determination of boundaries in accordance with Section 18 of the [Land Registration Act](#).
 - c. The Defendants' counterclaim seeking a declaration that the Plaintiff holds a portion of LR No. 12 in trust for them is unproven and is hereby dismissed in its entirety.
 - d. In the interest of justice and in accordance with the recommendation of the Land Registrar (PW3), the Court hereby directs that the Land Registrar and County Surveyor for Trans-Mara shall jointly undertake a boundary determination exercise in respect of LR Nos. Trans-Mara/Olalui/12, 113, and 114 within ninety (90) days from the date of this judgment. The exercise shall be conducted with prior written notice to all parties, and in accordance with Sections 18 and 19 of the [Land Registration Act](#).
 - e. Liberty is granted to any aggrieved party to re-approach the Court upon completion of the boundary determination, should the dispute persist.
 - f. In view of the mixed success in the claims and counterclaims, and given the familial nature of the dispute, each party shall bear their own costs.

It is so decided!

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON 14TH DAY OF JULY, 2025.

MOHAMMED N. KULLOW

JUDGE

Judgment delivered in the presence of: -

..... for the Plaintiff

..... for the Defendants

Philomena W. Court Assistant

